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A TREATISE

ON THE LAW OF

MUNICIPAL CORPORATIONS

BY

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MUNICIPAL CORPORATIONS.

CHAPTER VI (Cont'd).

PUBLIC REVENUES; THEIR COLLECTION AND DISBURSEMENT.

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IV. The Disbursement of Public Revenues.

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III. License Fees and Poll Taxes.

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§ 398. Power to impose.

The state may either, as an exercise of the power of taxation [611] or of its police power,[612] impose a license fee upon those carrying on or engaging in certain specified trades, occupations or profes-

[611] Goldthwaite v. City of Montgomery, 50 Ala. 486; Osborne v. City of Mobile, 44 Ala. 493; Ogden City v. Crossman, 17 Utah, 66; Cache County v. Jensen, 21 Utah, 207; Erie R. Co. v. State, 31 N. J. Law, 531, 86 Am. Dec. 226; Cousins v. State, 50 Ala. 113, 20 Am. Rep. 290, 21 Am. & Eng. Enc. Law, p. 776, and cases cited; State v. Hammond Package Co., 110 La. 180, 34 So. 368.

"The idea that the state lends its countenance to any particular traf-

sions, the payment of which and the securing of the license will be necessary to the right to engage in such trade, occupa-

fic by taxing it seems to rest upon a very transparent fallacy. It certainly overlooks or disregards some ideas that must always underlie taxation. Taxes are not favors; they are burdens. They are necessary, it is true, to the existence of government; but they are not the less burdens, and are only submitted to because of the necessity. It is deemed advisable to make careful provision to preclude these burdens becoming needlessly oppressive; but it is conceded by all the authorities that under some circumstances they may be carried to an extent that will be ruinous to individuals. It would be a remarkable proposition, under such circumstances, that a thing is sanctioned and countenanced by the government, when this burden, which may prove disastrous, is imposed upon it, while on the other hand it is frowned upon and condemned when the burden is withheld. It is safe to predict that if such were the legal doctrine, any citizen would prefer to be visited with the untaxed frowns of government rather than with testimonials of approval, which are represented by the demands of the tax-gatherer.

"It may be supposed that some idea of special protection is involved when a business is taxed; taxation and protection being reciprocal. If the tax upon any particular thing was the consideration for the thing given to the owner in respect to it, this might be so; but the maxim of reciprocity in taxation has no such meaning. No government ever undertakes to tax all it protects. If the government were to levy only poll taxes, it would not be on the idea that it was to protect only the persons of its citizens, leaving their property open to rapine and plunder. In this state our taxes are derived mainly from real estate; but it has never been suggested that real estate was entitled to special consideration in consequence. In Great Britain, real estate pays a relatively insignificant portion of the taxes, although in the social and political state it is more important than any other property. As a general fact the United States has not taxed real property, and though during the recent rebellion it taxed most kinds of business for war purposes, the number of subjects taxed has been several times reduced by legislation since, and may reasonably be expected to be further reduced hereafter. But the business taxed is no more protected than the business not taxed; and the fisheries which are favored by bounties are as much protected as either. All this is only an apportionment of taxation by the selection of subjects which, under all the circumstances, it is deemed wise and politic to subject to the burden. Whether a person in respect to his property or his occupation falls within the category of taxables, or not, is immaterial as affecting his claim to protection from the government. It is enough for him that the government has selected for itself its own subjects for taxation, and prescribed its own rules. It is his liability to taxation at the will of the government that entitled him to protection, and not the circumstance of his being act-

tion or profession.[613] This power of the state is an inherent one as both taxation and the exercise of the police power are sovereign attributes and also capable of delegation by the state to

ually taxed; and the taxation of a thing may be, and often is, when police purposes are had in view, a means of expressing disapproval instead of approbation of what is taxed.

"Taxes upon business are usually collected in the form of license fees; and this may possibly have led to the idea that seems to have prevailed in some quarters, that a tax implied a license. But there is no necessary connection whatever between them. A business may be licensed and yet not taxed, or it may be taxed and yet not licensed. And so far is the tax from being necessarily a license, that provision is frequently made by law for the taxation of a business that is carried on under a license existing independent of the tax."

[612] In re Guerrero, 69 Cal. 88. If the state constitution permit, the license fee may be imposed for both purposes. Taliaferro v. Moffett, 54 Ga. 150; Price v. People, 193 Ill. 114, 55 L. R. A. 588; City of Goshen v. Kern, 63 Ind. 468; State v. Montgomery, 92 Me. 433; State v. Wagener, 69 Minn. 206, 38 L. R. A. 677.

State v. Klectzen, 8 N. D. 286, 78 N. W. 984. "In our judgment the act under consideration, in so far as it may be called a tax law, is an occupation tax law, framed to derive revenue from the occupation of peddling, and hence the same is not restricted by the constitutional requirement of valuation and of uniformity. It is our opinion that this law was enacted to effect a two-fold purpose: It seems to be designed both as a revenue measure, and as a means of regulating the occupation of peddling; and in this double aspect the statute is referable both to the police power inherent in the state and the authority to impose taxes. It is true that many cases may be found holding that subordinate political bodies which have no original and inherent power of taxation are without authority to tax an occupation under a charter delegating the right to regulate only; but with the sovereign state, which possesses plenary power, unless expressly restricted by organic law, both to tax and to regulate, there is no such limitation of authority. Hence it is that laws are sometimes passed to accomplish the double purpose of regulation and revenue. A license measure may include a taxing measure or it may not. If its chief purpose is to clearly regulate

[613] State v. City of Columbia, 6 S. C. (6 Rich.) 1. Notwithstanding such persons have already obtained licenses from the state to prosecute their respective callings. Osborne v. City of Mobile, 44 Ala. 493; Welch v. Hotchkiss, 39 Conn. 140; Wright v. City of Atlanta, 54 Ga. 645; Wiggins v. City of Chicago, 68 Ill. 372; Kniper v. City of Louisville, 70 Ky. (7 Bush) 599; Hodgson v. City of New Orleans, 21 La. Ann. 301; Licks v. State, 42 Miss. 316; Durach's Appeal, 62 Pa. 491; Oil City v. Oil City Trust Co., 151 Pa. 454. See, also, Cousins v. State, 50 Ala. 113, 20 Am. Rep. 290.

subordinate agencies.[614] It is the duty of the government to protect the lives, the health and good morals of those within its jurisdiction, and that this may be more effectively done it may be deemed advisable or even necessary to control the manner or

and nothing else, it then falls within the police power. In such cases the exaction must not be any greater than is necessary to effect the primary object in view, viz., regulation. This rule is well established; but the matter of regulation may embrace more than a mere license fee and include expenses which are incidental and indirect as well as those clearly growing out of the business license." Mays v. City of Cincinnati, 1 Ohio St. 268; Iler v. Ross, 64 Neb. 710, 90 N. W. 869, 57 L. R. A. 895; Borough of Belmar v. Barkalow, 67 N. J. Law, 504, 52 Atl. 157.

Cooley, Taxation (2d Ed.) p. 592. Judge Cooley is of the opinion that license fees may be imposed (1) for regulation, (2) for revenue, (3) to give monopolies, and (4) for prohibition. "The fourth purpose is entirely admissible in the case of pursuits or indulgencies which in their general effect are believed to be more harmful than beneficial to society, and which, consequently the public interest requires should be put an end to. A case of this nature is that of heavy fees imposed on the keepers of implements of gaming. When, however, prohibition is the object, the end may generally be more directly accomplished by legislation which in its terms is prohibitory, than by the circuitous method of imposing a burden difficult or impossible to be borne; and the direct method is consequently the one usually adopted. But it is often found that the prohibition of an occupation which excites or gratifies the vices or passions of large numbers of people is met by a resistance so steady and powerful as to render the law wholly ineffectual, when a heavy tax might lessen the evils and possibly in the end make the occupation unprofitable."

[614] City of Mobile v. Yuille, 3 Ala. 137; Carroll v. City of Tuskaloosa, 12 Ala. 173; Intendant & Council of Greensboro' v. Mullins, 13 Ala. 341; Bates v. City of Mobile, 46 Ala. 158. The power can only be exercised within the limits of the corporation to whom it is delegated. Ex parte City Council of Montgomery, 64 Ala. 463; Nashville, C. & St. L. R. Co. v. City of Attalla, 118 Ala. 362; El Dorado County v. Meiss, 100 Cal. 268; Inyo County v. Erro, 119 Cal. 119; Kiowa County Com'rs v. Dunn, 21 Colo. 185. See Norwich Gaslight Co. v. Norwich City Gas Co., 25 Conn. 19; Welch v. Hotchkiss, 39 Conn. 140; Canova v. Williams, 41 Fla. 509, 27 So. 30; Perdue v. Ellis, 18 Ga. 586; Wright v. City of Atlanta, 54 Ga. 645. The power may exist in both the state and the municipality to license the same business or occupation.

Johnston v. City of Macon, 62 Ga. 645; Bennett v. People, 30 Ill. 389; Wiggins v. City of Chicago, 68 Ill. 372. The power to impose a license fee possessed by the state is not exclusive. A municipal corporation if authorized by the legislature may also license the same occupation. City of Lawrenceburg v. Wuest, 16 Ind. 337; City of Huntington v. Cheesbro, 57 Ind. 74; City of Leaven-

place in which a certain occupation, business or profession may be carried on,[615] and also the number or qualifications of those who may desire to engage in such business or profession.[616] The state may, therefore, to the better exercise of its police power,

worth v. Booth, 15 Kan. 627; Blanks v. Bastrop, 18 La. Ann. 534; Iberia Parish v. Chiapella, 30 La. Ann. 1143. A retail merchant in the absence of an exemption may be compelled to pay license fees to the state or parish as a subordinate public corporation.

Town of Mandeville v. Baudot, 49 La. Ann. 236; Ash v. People, 11 Mich. 347; Licks v. State, 42 Miss. 316; State v. Maguire, 52 Mo. 420; State v. Williams, 160 Mo. 333, 54 L. R. A. 950; City of York v. Chicago, B. & Q. R. Co., 56 Neb. 572; Ex parte Siebenhauer, 14 Nev. 365. A municipality having the power to impose a license fee may do so though the state imposes one for carrying on the same business. Harrington v. Trustees of Rochester, 10 Wend. (N. Y.) 547. But compare Day v. Green, 58 Mass. (4 Cush.) 433; and City of Portland v. O'Neill, 1 Or. 218.

Winston Com'rs v. Taylor, 99 N. C. 210, 6 S. W. 114; Edenton Com'rs v. Capeheart, 71 N. C. 156; State v. Green, 126 N. C. 1032. A delegated agency can only exercise the power within the limits of its jurisdiction. Baker v. City of Cincinnati, 11 Ohio St. 534; City Council of Charleston v. Ahrens, 4 Strob. (S. C.) 241; Hirshfield v. City of Dallas, 29 Tex. App. 242; Ogden City v. Crossman, 17 Utah, 66; Village of St. Johnsbury v. Thompson, 59 Vt. 300; Fleetwood v. Read, 21 Wash. 547, 47 L. R. A. 205, 77 Am. St. Rep. 681.

[615] Barthet v. City of New Orleans, 24 Fed. 563; In re Hang Kie, 69 Cal. 149. But see Board of Council of Harrodsburg v. Renfro, 22 Ky. L. R. 806, 58 S. W. 795, as holding that a city ordinance fixing a larger fee for selling liquor on a certain street is invalid as discriminating against this business conducted on that street and to that extent special legislation.

Com. v. Dow, 51 Mass. (10 Metc.) 382. It is within the power of a town under Mass. Rev. St. c. 58, § 10, to license the keeping of dogs. See, also, Fox v. Mohawk & H. R. Humane Soc., 20 Misc. 461, 46 N. Y. Supp. 232.

Hill v. City Council of Abbeville, 59 S. C. 396, 38 S. E. 11; Hayes v. City of Appleton, 24 Wis. 542. An ordinance interfering with freedom of trade will be held invalid. The principle applies to one prohibiting a licensed auctioneer from selling at auction after sunset.

[616] City of Titusville v. Brennan, 143 Pa. 642, 14 L. R. A. 100; State v. Benzenberg, 101 Wis. 172, 76 N. W. 345. "Such a law as the one before us can only be justified on the ground that it is a reasonable exercise of the police power. * * * Under modern systems of house building and disposal of sewage, the dangers to the health of the entire public arising from defective plumbing are so great and at the same time so insidious that were the state unable to provide for the proper regulation and supervision of the plumber in his work, so as to minimize the danger to the public health from the escape of sewer gas the state would certainly be unable to

exact a license fee from such as it may designate. In the application of this principle there is, however, a substantial distinction between a useful trade or honorable profession and an occupation, amusement or business, which may be regarded to a varying extent as injurious to the morals or the health of the people.[617] In respect to the latter, the power of the state is far reaching and less subject to restraint.[618] A distinction should

protect the public life and health in a most important particular. This power may be exercised by the legislature by demanding practical knowledge of his business on the part of the plumber or it may be done by requiring inspection and supervision of his work by experts or by both means combined; and when such regulations are brought before the courts, the question simply is whether they are really appropriate and reasonable measures for the promotion of the public health and safety and hence are a valid exercise of the police power, or whether they go further than this and unreasonably invade the right of the citizen to pursue a lawful business under the guise of a police regulation. Applying these principles to the present law we are unable to say that it makes an unreasonable requirement when it provides that a master or journeyman plumber shall be examined as to his practical knowledge of plumbing, house drainage and plumbing ventilation. Such an examination would not necessarily nor properly include anything except just what it says, namely, a practical knowledge of plumbing and the necessary and proper ventilation thereof, and house drainage. All this knowledge surely ought to be possessed by every practical plumber, and it may all be acquired in the school of actual experience, while assisting a practical plumber at his work. It requires no university education nor study of abstract science and we cannot anticipate that any examining board would go further than the act requires and insist upon more than this practical knowledge acquired in the school of experience. So construed, the act seems to us in this regard entirely reasonable, * * * nor do we see that it is unreasonable to require this knowledge of a journeyman plumber as well as of a master or employing plumber. Certainly, a journeyman plumber should be a practical plumber and know the practical rules of his business as well as his employer. Laws somewhat similar in their provisions have been sustained upon this point in several states." Citing Singer v. State, 72 Md. 464, 8 L. R. A. 551; People v. Warden of City Prison, 144 N. Y. 529, 27 L. R. A. 718; State v. Gardner, 58 Ohio St. 599, 51 N. E. 136, 41 L. R. A. 689.

[617] Howland v. City of Chicago, 108 Ill. 496; Banta v. City of Chicago, 172 Ill. 204, 40 L. R. A. 611; Walcott v. People, 17 Mich. 68; Guerin v. Borough of Asbury Park, 57 N. J. Law, 292, 30 Atl. 472.

[618] Town of Mena v. Smith, 64 Ark. 363; Humes v. City of Ft. Smith, 93 Fed. 857; Kitson v. City of Ann Arbor, 26 Mich. 325; People v. Jarvis, 19 App. Div. 466, 632, 46 N. Y. Supp. 596; Cache County v. Jensen, 21

also be made in the exercise of this right by the state or its delegated agencies between the basis of its exercise in individual cases. The general principle holds that a state cannot, under the guise of an exercise of the police power, exercise the power of taxation;[619] and the converse is also true.[620] The application of this basic difference will be found in the succeeding sections and also the cases cited in the notes. Where a license fee is imposed as a part of the exercise of the police power in amount and application it must be limited by the purpose for which it is imposed, namely, the control and regulation of the trade or calling for the purpose of protecting society.[621]

Utah, 207. A license fee imposed upon a commendable and necessary business or occupation is void when in effect its amount is prohibitory of such business or occupation. "The license in cases where the business is unlawful and detrimental to public morals, may be, and frequently is, imposed as a prohibitory measure. A charge of a license fee, however, against a business or occupation commendable and necessary for the public good, which, in effect, is prohibitory of the carrying on or pursuing of such business or occupation, is void as an unlawful exercise of power. This is especially so when such a license fee is imposed by a municipality or board which has no inherent power to issue a license and to require the payment of a license fee. 13 Am. & Eng. Enc. Law (1st Ed.) p. 532."

[619] Van Hook v. City of Selma, 70 Ala. 361; Ex parte Pfirrmann, 134 Cal. 143, 66 Pac. 205; State v. Glavin, 67 Conn. 29; Davis v. City of Macon, 64 Ga. 128; Price v. People, 193 Ill. 114, 55 L. R. A. 588; Trustees of Falmouth v. Watson, 68 Ky. (5 Bush) 660; City of St. Louis v. Boatmen's Ins. & Trust Co., 47 Mo. 150; Pitts v. City of Vicksburg, 72 Miss. 181; North Hudson County R. Co. v. City of Hoboken, 41 N. J. Law, 71; People v. Jarvis, 19 App. Div. 466, 632, 46 N. Y. Supp. 596; State v. Bean, 91 N. C. 554; State v. Bevins, 70 Vt. 574, 41 Atl. 655.

[620] Johnston v. City of Macon, 62 Ga. 645.

[621] See cases cited under note 83, § 405; Borough of Sayre v. Phillips, 148 Pa. 482, 24 Atl. 76, 16 L. R. A. 49. "By the organization of a city or borough within its borders, the state imparts to its creature, the municipality, the powers necessary to the performance of its functions and to the protection of its citizens in their persons and property. The police power is one of these. Ordinances of cities and boroughs passed in the legitimate exercise of this power are therefore valid. An ordinance prohibiting the business of peddling within the municipal limits without a license from the proper municipal officer would seem to be as clearly justified by the police power as a statute prohibiting the same business throughout the commonwealth. But it is very clear that a police regulation must be directed against the business or practice that is harmful, not against one or some

Purpose for which license fee or tax is imposed. It is unnecessary to add, although it is done by way of caution, that, assuming the existence of the authority to impose a license fee or tax, valid in other respects, yet such can only be imposed for proper public purposes. The same rules and principles apply in this respect as apply to the imposition of taxes or the levy of special assessments.[622]

§ 399. As based upon power of taxation.

The state may, without any regard to the exercise of the police power, but as a means of raising revenue, impose license fees upon such trades, occupations or professions as it may elect, in the absence of constitutional restraint.[623] When a fee is imposed for

of the persons who may be engaged in it. The laws of the state are so framed. They are directed against the business of peddling. The ordinances of cities and boroughs must, in order to be supported, as an exercise of the police power residing in the municipality, be directed in like manner at the business. If a statute or a municipal ordinance is in reality directed only against certain persons who are engaged in a given business or against certain commodities in such manner as to discriminate between the persons who are engaged in the same trade or pursuit, in aid of some at the expense of others, such statute or ordinance is not a police but a trade regulation and it has no right to shelter itself behind the police power of the state or the municipality."

[622] Stoutenburgh v. Hennick, 129 U. S. 141; Horton v. Mobile School Com'rs, 43 Ala. 598; City of St. Louis v. Shields, 62 Mo. 247. See §§ 305 et seq., and 340 et seq., post.

[623] License Tax Cases, 72 U. S. (5 Wall.) 462; Liverpool Ins. Co. v. Massachusetts, 77 U. S. (10 Wall.) 566; Ward v. Maryland, 79 U. S. (12 Wall.) 418; Kentz v. City of Mobile, 120 Ala. 623; State v. Fleming, 112 Ala. 179; People v. Naglee, 1 Cal. 232; City of Santa Barbara v. Stearns, 51 Cal. 499; Los Angeles County v. Eikenberry, 131 Cal. 461, 63 Pac. 766; City of Los Angeles v. Hance, 122 Cal. 77; Johnston v. City of Macon, 62 Ga. 645; City of Terre Haute v. Kersey, 159 Ind. 300, 64 N. E. 469; State v. Menaugh, 151 Ind. 260, 43 L. R. A. 408; Fretwell v. City of Troy, 18 Kan. 271.

Lucas v. Attorney General, 11 Gill & J. (Md.) 490. "That a license is a tax is too palpable for discussion and comes within the terms of the law unless there is something in the idea that it is a political or police regulation intended to preserve, maintain and regulate the lottery system."

Banks v. McCosker, 82 Md. 518; City of Detroit v. Wayne Circuit Judge, 112 Mich. 317; Simard v. Sullivan, 71 Minn. 517; City of St. Charles v. Elsner, 155 Mo. 671; City of York v. Chicago, B. & Q. R. Co., 56 Neb. 572; State v. Boyd, 63 Neb.

this purpose, the principles of taxation as to uniformity and

829, 89 N. W. 417, 58 L. R. A. 108; Rosenbloom v. State, 64 Neb. 342, 89 N. W. 1053, 57 L. R. A. 922; Gerrard v. State, 64 Neb. 368, 89 N. W. 1062.

North Hudson County R. Co. v. City of Hoboken, 41 N. J. Law, 71. "The distinction between the power to license, as a police regulation, and the same power when conferred for revenue purposes, is of the utmost importance. If the power be granted with a view to revenue, the amount of the tax, if not limited by the charter, is left to the discretion and judgment of the municipal authorities, but if it be given as a police power for regulation merely, a much narrower construction is adopted; the power must then be exercised as a means of regulation and cannot be used as a source of revenue."

Brewing Imp. Co. v. State Board of Assessors, 65 N. J. Law, 466, 47 Atl. 426; Kennedy v. Borough of Belmar, 61 N. J. Law, 20; City of Wilmington v. Macks, 86 N. C. 88; State v. Klectzen, 8 N. D. 286, 78 N. W. 984; Com. v. Clark, 195 Pa. 634; City of Memphis v. American Exp. Co., 102 Tenn. 336, 52 S. W. 172; Thornburgh v. City of Tyler, 16 Tex. Civ. App. 439; Fleetwood v. Read, 21 Wash. 547, 47 L. R. A. 205; Cache County v. Jensen, 21 Utah, 207; Lewellen v. Lockharts, 21 Grat. (Va.) 570; Bogue v. City of Seattle, 19 Wash. 396.

McQuillin, Mun. Ord. pp. 618 et seq. "The various methods of delegating the power, as evidenced by municipal charters, and the somewhat divergent judicial views respecting the necessity of police regulation of certain occupations, has resulted in some confusion in judicial expressions, as well as apparent or real conflict in the decisions. * * *

"The general statement is often made that occupation taxes are imposed for revenue and license taxes or fees for police regulation. When imposed for the latter purpose the rule generally obtains that the amount demanded should be reasonable and not in excess of the sum required for issuing the license providing necessary or desirable police regulations. Express charter power confers authority to exact a license tax from those pursuing useful occupations, avocations or professions within the corporate limits, which are in themselves beneficial to the community. Accurately speaking, it would seem that this should be regarded as a tax. However, it is often spoken of as a 'license' or 'privilege' for carrying on the business. Undoubtedly such fee is collected for the purpose of revenue, but where a money payment is exacted for the privilege of pursuing occupations, looked upon as more or less injurious to society or which require careful police supervision (as the liquor traffic, theaters, dance houses, certain kinds of amusements, as circuses and the like) or trades which may become detrimental to health or become public nuisances (as slaughter houses, bone and rendering factories, garbage reduction plants, stone quarries, dairies and cow stables, laundries, wash houses and dyeing establishments), this is usually designated a license tax levied by virtue of the police power. In construing the power to levy such exactions courts are usually quite liberal. If charter power ex-

equality will apply.[624] If the fee is imposed as an exercise of the police power, then those rules and principles of law which control a government in the exercise of that power will control and govern its right.[625] As it has been said, it is impossible to lay

ists in such cases, the exaction may be made both for revenue and police protection, but if it is levied by virtue of general power, as power 'to regulate,' or under the general welfare clause, the amount, as stated, must not exceed what is reasonably required for police protection."

[624] Nashville, C. & St. L. R. Co. v. City of Attalla, 118 Ala. 362, 24 So. 450. The question of unreasonableness cannot be determined by the extent of the business of a single individual. Ex parte Frank, 52 Cal. 606. An ordinance imposing a license fee for the selling of goods cannot be unequal, partial, oppressive or in restraint of trade.

Ex parte Sims, 40 Fla. 432, 25 So. 280; Stewart v. Kehrer, 115 Ga. 184, 41 S. E. 680; Logan v. Pyne, 43 Iowa, 524, 22 Am. Rep. 261. The power to grant a monopoly of an occupation cannot be implied from a grant of the power to license. Cullinan v. City of New Orleans, 28 La. Ann. 102. A license fee based upon business transacted held unconstitutional and void. City of St. Charles v. Nolle, 51 Mo. 122; American Union Exp. Co. v. City of St. Joseph, 66 Mo. 675. The constitutional requirement of uniformity and equality is complied with if all persons engaged in the same business are taxed alike.

City of St. Charles v. Elsner, 155 Mo. 671; Johnson v. Borough of Asbury Park, 58 N. J. Law, 604, 33 Atl. 850. The constitutional provision requiring property to be assessed for taxation by uniform rules according to its true value does not apply to the imposition of a license on franchises, trades and occupations.

State v. Corson, 67 N. J. Law, 178, 50 Atl. 780; Johnson v. Borough of Asbury Park, 60 N. J. Law, 427; State v. Klectzen, 8 N. D. 286, 78 N. W. 984; F. S. Royster Guano Co. v. Town of Tarboro, 126 N. C. 68, 35 S. E. 231; Knisely v. Cotterel, 196 Pa. 614, 50 L. R. A. 86; State v. City of Columbia, 6 S. C. (6 Rich.) 1. A business and occupation tax with a different rate for each distinct business or occupation is not unconstitutional as violating its provision requiring uniformity of taxes with respect to persons and property.

Hill v. City Council of Abbeville, 59 S. C. 396, 38 S. E. 11; Hoefling v. City of San Antonio, 85 Tex. 228, 20 S. W. 85, 16 L. R. A. 608; Blue Jacket Consol. Copper Co. v. Scherr, 50 W. Va. 533, 40 S. E. 514; Poteet v. State, 41 Tex. Cr. App. 268, 53 S. W. 869; Rainey v. State, 41 Tex. Cr. App. 254, 53 S. W. 882; Brooks v. State, (Tex. Civ. App.) 58 S. W. 1032; Mullinnix v. State, 42 Tex. Cr. App. 526, 60 S. W. 768; Thomas v. Snead, 99 Va. 613, 39 S. E. 586; Newport News & O. P. R. & Elec. Co. v. City of Newport News, 100 Va. 157, 40 S. E. 645. So long as the license fee is uniform as to each occupation or class, this is sufficient. Stull v. De Mattos, 23 Wash. 71, 62 Pac. 451, 51 L. R. A. 892. There is no discrimination where all occupations or persons within the same class are taxed equally.

[625] Humes v. City of Ft. Smith, 93 Fed. 857; Denver City R. Co. v. City

down any rule for the construction of such grants aside from the general one that all delegated powers to tax should be closely scanned and strictly construed.

§ 400. Limitations upon the power.

Independent of local limitations and treating generally the right to impose a license fee whether based upon a police power or that of taxation, certain statutory[626] or constitutional restrictions and limitations exist upon this sovereign right.[627] The Federal constitution prohibits the states from exercising certain governmental powers and duties which the Federal government in the same instrument assumes exclusively for itself.[628] The power to regulate commerce between states, with foreign na-

of Denver, 21 Colo, 350, 41 Pac. 826, 29 L. R. A. 608; City of Terre Haute v. Kersey, 159 Ind. 300, 64 N. E. 469; The Germania v. State, 7 Md. 5; Holberg v. Macon, 55 Miss. 112; City of St. Louis v. Green, 6 Mo. App. 591. See, also, §§ 114 et seq., supra.

[626] Webster v. City of Sherbrooke, 24 Can. Sup. Ct. 268; People v. Martin, 60 Cal. 153; City of Westport v. McGee, 128 Mo. 152; State v. Ashbrook, 154 Mo. 375, 48 L. R. A. 265, 77 Am. St. Rep. 765; Bassett v. City of El Paso, 88 Tex. 168; City of Terre Haute v. Kersey, 159 Ind. 300, 64 N. E. 469; Kerrigan v. Poole, 131 Mich. 305, 91 N. W. 163.

[627] Alabama G. S. R. Co. v. City of Bessemer, 113 Ala. 668, 21 So. 64; Price v. People, 193 Ill. 114, 55 L. R. A. 588; City of Lebanon v. Welker, 9 Kan. App. 887, 58 Pac. 1036. The imposition of a license fee is not double taxation since the fee is imposed on the business, not the property used in the business.

Com. v. Smith, 69 Ky. (6 Bush) 303; Alexander v. City of Elizabeth, 58 N. J. Law, 71, 28 Atl. 51. An act authorizing cities of over 100,000 inhabitants to license race courses within their limits is in violation of N. J. Const., art. 4, § 7, par. 11, forbidding the passage of private, local or special laws "regulating the affairs of towns and counties" or "granting any corporation, association or individual any excessive privilege, immunity or franchises." Borough of Hightstown v. Glenn, 47 N. J. Law, 105; Borough of Taylor v. Postal Tel. Cable Co., 202 Pa. 583, 52 Atl. 128; Com. v. Anderson, 178 Pa. 171.

[628] See, also, authorities cited in § 408. San Benito County v. Southern Pac. R. Co., 77 Cal. 518; City of Macon v. First Nat. Bank, 59 Ga. 648; State v. Thompson, 160 Mo. 333, 60 S. W. 1077, 54 L. R. A. 950. The imposition of a pool license is not unconstitutional as repugnant to amendment 14, sec. 1 of the Constitution of the United States providing that no state shall make or enforce any law which shall abridge the privileges or immunities of its citizens. Debardelaben v. State, 99 Tenn. 649; 2 Mun. Corp. Cas. 439, 445, and cases cited.

tions and Indian tribes is one of these.[629] The implied limitation also exists that an agency of the Federal government cannot be taxed by state authorities.[630] The Federal constitution also prohibits the states from levying taxes or duties on imports or exports, but where a license fee does not amount to a regulation of commerce, its levy is not usually held to be such a duty or tax.[631] Some authorities also hold that where a state has fixed a license fee for the carrying on of a certain trade or occupation a subordinate political agency cannot exact a higher license fee or one in excess of a certain proportion for the same thing.[632]

A license fee or tax should not discriminate. It has been held quite generally that constitutional provisions relative to uniformity and equality of taxation do not apply to license fees or taxes when considered with reference to other taxation. This principle, however, does not operate to prevent the rule from applying to license fees and taxes for in order to be valid they should operate uniformly upon all within a certain class and must not discriminate as to individuals of the same class.[633]

[629] Downham v. Council of Alexandria, 77 U. S. (10 Wall.) 173; Guy v. City of Baltimore, 100 U. S. 434; Ward v. State, 31 Md. 279; City Council of Charleston v. Ahrens, 4 Strob. (S. C.) 241.

[630] Brooks v. State (Tex. Civ. App.) 58 S. W. 1032, citing Farmers' & Mechanics' Nat. Bank v. Dearing, 91 U. S. 29; Pacific Exp. Co. v. Seibert, 142 U. S. 339; McCulloch v. State, 4 Wheat. (U. S.) 316; Osborn v. Bank of U. S., 9 Wheat. (U. S.) 738.

[631] Osborne v. City of Mobile, 44 Ala. 493, affirmed in 83 U. S. (16 Wall.) 479, distinguishing Ward v. Maryland, 79 U. S. (12 Wall.) 423, and following Woodruff v. Parham, 75 U. S. (8 Wall.) 123; State v. Norris, 78 N. C. 443.

[632] Los Angeles County v. Eikenberry, 131 Cal. 461, 63 Pac. 766. A license may be imposed for carrying on the same business by a county as well as the city included within its limits. Town of Greenwood v. Delta Bank, 75 Miss. 162, 21 So. 747; Town of Paris v. Graham, 33 Mo. 94; Schroder v. City Council of Charleston, 2 Tread. Const. (S. C.) 726; Ex parte Slaren, 3 Tex. App. 662; Hoefling v. City of San Antonio, 85 Tex. 228, 20 S. W. 85, 16 L. R. A. 608; City of Laredo v. Loury (Tex. App.) 20 S. W. 89, overruling Hirshfield v. City of Dallas, 29 Tex. App. 242, 15 S. W. 124, so far as in conflict with this decision. City of Marshall v. Snediker, 25 Tex. 460.

[633] Singer Mfg. Co. v. Wright, 33 Fed. 121; City of Ft. Smith v. Scruggs, 70 Ark. 549, 58 L. R. A. 921; Ex parte Hurl, 49 Cal. 557; Cutliff v. City of Albany, 60 Ga. 597; Weaver v. State, 89 Ga. 639; McGhee v. State, 92 Ga. 21; Stewart v. Kehrer, 115 Ga. 184; Braun v. City of Chicago, 110 Ill. 186; Bright v. McCullough, 27 Ind. 223; City of Terre

This rule applies to residents and nonresidents, these, it has been held, cannot be classified directly or indirectly as such; the imposition or license fees or taxes therefore upon nonresidents, the same not applying to residents engaged in the same calling, under the same circumstances and conditions, is void.[634] The rule,

Haute v. Kersey, 159 Ind. 300, 64 N. E. 469; City of Leavenworth v. Booth, 15 Kan. 627; City of New Orleans v. Staiger, 11 La. Ann. 68; Walters v. Duke, 31 La. Ann. 668; McClellan v. Pettigrew, 44 La. Ann. 356; Browne v. Selser, 106 La. 691; Ash v. People, 11 Mich. 347; American Union Exp. Co. v. City of St. Joseph, 66 Mo. 675; Kansas City v. Richardson, 90 Mo. App. 450; City of St. Louis v. Bowler, 94 Mo. 630; State v. French, 17 Mont. 54, 30 L. R. A. 415; Magneau v. City of Fremont, 30 Neb. 843, 9 L. R. A. 786; Ex parte Robinson, 12 Nev. 263; Gatlin v. Town of Tarboro, 78 N. C. 119; State v. Powell, 100 N. C. 525; State v. Carter, 129 N. C. 560; City of Columbia v. Beasly, 20 Tenn. (1 Humph.) 232; Ex parte Williams, 31 Tex. Cr. App. 262, 20 S. W. 580, 21 L. R. A. 783; Hoefling v. City of San Antonio, 85 Tex. 228, 16 L. R. A. 608; Morrill v. State, 38 Wis. 428; State v. Willingham, 9 Wyo. 290, 52 L. R. A. 198.

[634] Gould v. City of Atlanta, 55 Ga. 678; Lucas v. City of Macomb, 49 Ill. App. 60; City of Indianapolis v. Bieler, 138 Ind. 30; City of Saginaw v. McKnight, Circuit Judge, 106 Mich. 32. "As said by Mr. Justice Cooley, in People v. Russell, 49 Mich. 619, 14 N. W. 568: 'That the regulation of hawkers and peddlers is important, if not absolutely essential, may be taken as established by the concurring practice of civilized states. They are a class of persons who travel from place to place among strangers, and the business may easily be made a pretense or a convenience to those whose real purpose is theft or fraud. The requirement of a license gives opportunity for inquiry into antecedents and character, and the payment of a fee affords some evidence that the business is not a mere pretense.' This may be measurably true of transient dealers; and it is to protect the community from imposition and fraud, rather than to obtain revenue, that, in our opinion, this power was conferred. If this is so, there is no reason for an ordinance that applies only to nonresidents, as a class, and which exempts inhabitants of the city. We do not discuss the extent to which the city may go in restricting and limiting the number of said dealers, and whether tests relating to character, etc., may be applied (see Kitson v. City of Ann Arbor, 26 Mich. 327; Sherlock v. Stuart, 96 Mich. 193, 55 N. W. 845, 21 L. R. A. 580), as this ordinance does not attempt to regulate this business upon these lines. It permits any one to engage in the business of transient dealer. If by this term is meant a dealer who goes about from place to place, there is no apparent reason for thinking that such business only needs regulation when conducted by nonresidents. It seems to us that this ordinance is aimed at nonresidents, and there is room for the suspicion that it was designed for the benefit of residents and therefore open to the criticism that it is in

however, does not operate to prevent a subclassification of those following a certain calling or occupation as based upon different

restraint of trade. Moreover, it borders very closely upon the line of unreasonable license fees. We think the case is within the doctrine of Brooks v. Mangan, 86 Mich. 576, 49 N. W. 633, if not of Chaddock v. Day, 75 Mich. 527, 4 L. R. A. 809."

City of St. Louis v. Consolidated Coal Co., 113 Mo. 83; Morgan v. City of Orange, 50 N. J. Law, 389; Thompson v. Camp Meeting Ass'n, 55 N. J. Law, 507; Borough of Sayre v. Phillips, 148 Pa. 482, 16 L. R. A. 49; Borough of Shamokin v. Flannigan, 156 Pa. 43.

Clements v. Town of Casper, 4 Wyo. 494. "The distinction made by the ordinance of the Town of Casper, under consideration, between agents and drummers selling exclusively by sample or otherwise to regular merchants of the town and those selling to the public generally cannot alter the situation. The Constitution of the United States having given to Congress the power to regulate commerce, not only with foreign nations, but among the several states, that power is necessarily exclusive whenever the subjects of it are national in their character, or admit only of one uniform system or plan of regulation; and when Congress has failed to make express regulations of the commerce among the states this indicates its will that the subject shall be left free from any restrictions or impositions, and any regulation of the subject by the state is repugnant to such freedom, except in matters of local concern only, where the state by virtue of its police power, and its jurisdiction of persons and property within its limits, provides for the security of the lives, limbs, health and comfort of persons and the protection of property; or when the state does those things which may otherwise incidentally affect commerce, such as the establishment and regulation of highways, canals, railroads, wharves, ferries, and other commercial facilities; or by the passage of inspection laws seeks to secure the due quality and measure of products and commodities; or by the passage of laws regulates or restricts the sale of articles deemed injurious to the health or morals of the community; or imposes taxes upon persons residing within the state or belonging to its population, and upon avocations and employments pursued therein, not directly connected with foreign or interstate commerce, or with some business or employment exercised under authority of federal, constitutional, or statutory law; or imposes taxes upon all property within the state, mingled with and forming the great mass of property therein. But the state, in making such necessary police and revenue regulations which are permissible, cannot impose taxes upon persons passing through the state, or coming into it merely for a temporary purpose, especially if connected with interstate or foreign commerce; nor can it impose such taxes upon property imported into the state from abroad, or from another state, and not yet become part of the common mass of property therein. No discrimination can be made by any such regulations adversely to the persons or property of other states; and no regulation can be

conditions or degrees of knowledge or other qualifications.[635] Neither does the rule prohibiting discriminatory license fees or taxes prevent a public corporation from prescribing certain qualifications or certain degrees of fitness which must be possessed before a license fee can be exacted or granted, the absence of such qualifications operating as a prohibition in this respect. It may be deemed expedient and wise to prohibit entirely those lacking

made directly affecting interstate commerce, as such taxation or regulation would be an unauthorized interference with the power given to Congress. * * * The ordinance is void, as it is within the ban of the federal constitution as interpreted by the supreme court of the United States, both as an unlawful and unconstitutional interference with interstate commerce, and as an attempted discrimination adverse to nonresidents of the state. It appears to us that the license fee of $25 for each 24 hours—which undoubtedly means a day—is excessive and unreasonable, but it is unnecessary to consider that question as the ordinance is void for the reasons assigned."

But see the following case holding otherwise, on the ground that the word "transient" refers to the nature of the business and not to residence. City of Ottumwa v. Zekind, 95 Iowa, 622, 29 L. R. A. 734, distinguishing Town of Pacific Junction v. Dyer, 64 Iowa, 38.

See, also, the following cases holding that such an ordinance is void as being an interference with interstate commerce: Daniel v. Trustees of Richmond, 78 Ky. 542; Simrall v. City of Covington, 90 Ky. 444, 9 L. R. A. 556; Pullman Palace Car Co. v. State, 64 Tex. 274; Clements v. Town of Casper, 4 Wyo. 494, supra. See, also, cases cited under § 408, post.

[635] Clark v. City of Titusville, 184 U. S. 329. An ordinance classifying merchants held valid. Ex parte McKenna, 126 Cal. 429. An ordinance is void which imposes a license only on merchants using trading stamps. Johnston v. City of Macon, 62 Ga. 645. An ordinance imposing a tax on draymen according to the number of horses used is valid. But see to the contrary. State v. Endom, 23 La. Ann. 663, and Cullinan v. City of New Orleans, 28 La. Ann. 102.

Parish of Orleans v. Cochran, 20 La. Ann. 373; Davis v. City of Macon, 64 Ga. 128. Not a discrimination to exempt farmers selling their own produce from the payment of a license fee. State v. Liverpool, L. & G. Ins. Co., 40 La. Ann. 463; Moore v. City of St. Paul, 61 Minn. 427; State v. Elofson, 86 Minn. 103. A classification of dairy herds on the basis of counties is void. City of St. Louis v. Sternberg, 69 Mo. 289 (Lawyers); City of Aurora v. McGannon, 138 Mo. 38; State v. French, 17 Mont. 54, 30 L. R. A. 415; City of Pittsburg v. Coyle, 165 Pa. 61 (Brokers); Texas Banking & Ins. Co. v. State, 42 Tex. 636 (Brokers); Town of Danville v. Shelton, 76 Va. 325; Stull v. De Mattos, 23 Wash. 71, 51 L. R. A. 892 (Auctioneers).

certain moral or other qualifications from engaging in a certain business or occupation.[636]

§ 401. Delegation of the power for exercise by municipal corporations.

The state, as suggested, may delegate to a subordinate agency this right of imposing a license fee to be exercised in a manner, and at a time, within its discretion. The power as thus delegated is one to which is applied, because of its character, the rule of strict construction. General language, it has been repeatedly held, will not confer the right.[637] The doctrines of inference or implication cannot be invoked to grant the power where the language of the charter or of the statute fails clearly to give it,[638]

[636] Jones v. Hilliard, 69 Ala. 300; In re Bickerstaff, 70 Cal. 35; State v. Brown, 19 Fla. 563; Whitten v. City of Covington, 43 Ga. 421; Groesch v. State, 42 Ind. 547; Mason v. Trustees of Lancaster, 67 Ky. (4 Bush) 406; Kansas City v. Flanders, 71 Mo. 281; House v. State, 41 Miss. 737; Rohrbacher v. City of Jackson, 51 Miss. 735. An ordinance requiring that an applicant for a license as saloon keeper shall have a petition signed by a majority of the male citizens over twenty-one and a majority of the female citizens over eighteen is valid.

[637] City of San Jose v. San Jose & S. C. R. Co., 53 Cal. 476. Whether the power "to license and regulate" occupations would include the power to tax them for revenue purposes is to be determined from the whole charter. McKinney v. City of Alton, 41 Ill. App. 508; Shuman v. City of Ft. Wayne, 127 Ind. 109, 26 N. E. 560, 11 L. R. R. 378. The power to pass ordinances "not unconstitutional with the laws of this state and necessary to carry out the objects of the corporation" implies no authority to license pawnbrokers. Com. v. Turner, 55 Mass. (1 Cush.) 493; City of St. Paul v. Stoltz, 33 Minn. 233; City of St. Louis v. Laughlin, 49 Mo. 559. The rule of construction followed that where general words follow particular ones the former should be construed as applicable only to persons or things of the same general character or class. City of New York v. Second Ave. R. Co., 34 Barb. (N. Y.) 41; Appeal of City of Pittsburgh (Pa.) 16 Atl. 92; Salt Lake City v. Wagner, 2 Utah, 400.

[638] In re Wan Yin, 22 Fed. 701. A right to license a laundry is included within a power given "to regulate" them. City of Washington v. Meigs, 1 MacArthur (D. C.) 53; Town of Mena v. Smith, 64 Ark. 363; City of Terre Haute v. Kersey, 159 Ind. 300, 64 N. E. 469; City of Burlington v. Bumgardner, 42 Iowa, 673. The power to regulate does not include the power to license. Town of Plaquemine v. Roth, 29 La. Ann. 261; New Iberia Trustees v. Migues, 32 La. Ann. 923; Ex parte Taylor, 58 Miss. 478; City of St. Louis v. Boatmen's Ins. & Trust Co., 47 Mo. 150; City of Nashville v. Althrop, 45 Tenn. (5

and on the other hand an exemption will not be allowed unless it clearly appears.[639]

Where the power has been properly delegated, courts will not interfere in its exercise except where there has been a gross abuse by the municipal authorities[640] of the discretion which it is held they must possess because of their greater knowledge of the needs of the municipality and the extent of the protection afforded either to the public or the licensees by the exaction of the license.[641] The power must be exercised as given, this rule applying to amount of fee and conditions regulating it.[642]

Cold.) 554; International Trading Stamp Co. v. City of Memphis, 101 Tenn. 181, 47 S. W. 136; State v. Stroud (Tenn. Ch. App.) 52 S. W. 697.

[639] Roy v. Schuff, 51 La. Ann. 86, 24 So. 788; State v. American Sugar Refining Co., 51 La. Ann. 562; Swords v. Baillio, 105 La. 328; State v. Willingham, 9 Wyo. 290, 62 Pac. 797, 52 L. R. A. 198.

[640] Southern Car & Foundry Co. v. State, 133 Ala. 624, 32 So. 235; State v. Tippecanoe County Com'rs, 45 Ind. 501; City of Burlington v. Putnam Ins. Co., 31 Iowa, 102; In re Martin, 62 Kan. 638, 64 Pac. 43; Mason v. City of Cumberland, 92 Md. 451, 48 Atl. 136. A municipality is vested with a discretionary power in regard to the amount to be charged as a license fee. Van Baalen v. People, 40 Mich. 258; Potter v. Common Council of Homer, 59 Mich. 8. An abuse of discretion may be remedied by mandamus. State v. Schoenig, 72 Minn. 528, 75 N. W. 711; Margolies v. Atlantic City, 67 N. J. Law, 82, 50 Atl. 367; City of Portland v. Schmidt, 13 Or. 17. The principle includes the exercise of discretion in fixing the amount of the license fee. Borough of New Hope v. Postal Tel. Cable Co., 202 Pa. 532, 52 Atl. 127; Van Hook v. City of Selma, 70 Ala. 361, 45 Am. Rep. 85; Borough of Taylor v. Postal Tel. Cable Co., 202 Pa. 583, 52 Atl. 128; Toole's Appeal, 90 Pa. 376; Oil City v. Oil City Trust Co., 151 Pa. 454; Davis v. State, 2 Tex. App. 425; Woodall v. City of Lynchburg, 100 Va. 318, 40 S. E. 915.

[641] Washington v. State, 13 Ark. 752; Bishoff v. State, 43 Fla. 67, 30 So. 808. This discretion also applies to the amount imposed. Carson v. City of Forsyth, 94 Ga. 617; Darling v. City of St. Paul, 19 Minn. 389 (Gil. 336); In re White, 43 Minn. 250.

[642] Southern Exp. Co. v. City of Tuscaloosa, 132 Ala. 326, 31 So. 460; People v. Village of Crotty, 93 Ill. 180; People v. Harrison, 185 Ill. 307; Hart v. Beauregard, 22 La. Ann. 238; Com. v. Gage, 114 Mass. 328; City of Grand Rapids v. Braudy, 105 Mich. 670, 64 N. W. 29, 32 L. R. A. 116. It is not unreasonable to require applicants for licenses to furnish proof of their good character and reputation. City of Mt. Clemens v. Sherbert, 122 Mich. 674, 81 N. W. 926; Sexson v. Kelley, 3 Neb. 104. Driscoll v. City of Salem, 67 N. J. Law, 113, 50 Atl. 475. An ordinance which leaves the fixing of the license to a city official is void.

§ 402. By what body exercised.

The exercise of all governmental powers can only be effected through various designated agencies, the power of which is strictly limited to the accomplishment of the particular purpose for which the agency is organized or created. A license fee, therefore, to be valid must have been authorized and imposed by the lawful authority and in the manner designated by law.[643] This principle applies not only to the existence of authority to license but also to the mode in or time at which the particular license may be imposed.[644]

[643] Phœnix Carpet Co. v. State, 118 Ala. 143, 22 So. 627; Ex parte Pfirrmann, 134 Cal. 143, 66 Pac. 205; In re Guerrero, 69 Cal. 88; Walsh v. City of Denver, 11 Colo. App. 523, 53 Pac. 458; Holliman v. City of Hawkinsville, 109 Ga. 107; City of Kinmundy v. Mahan, 72 Ill. 462. Where the power to license is expressly conferred on the city council, it cannot be delegated by ordinance to the mayor of the city. Webber v. City of Chicago, 148 Ill. 313; Wiley v. Owens, 39 Ind. 429; Com. v. Gage, 114 Mass. 328; Auditor General v. Sparrow, 116 Mich. 574; State v. Dwyer, 21 Minn. 512.

Darling v. City of St. Paul, 19 Minn. 389 (Gil. 336). A delegated power involving discretion cannot be delegated in whole or in part to any other person or authority. State v. Finch, 78 Minn. 118, 46 L. R. A. 437; State v. Bezoni, 51 Mo. 254; State v. Thompson, 160 Mo. 333, 60 S. W. 1077, 54 L. R. A. 950; McArdle v. Jersey City, 66 N. J. Law, 590, 49 Atl. 1013; City of Cape May v. Cape May Transp. Co., 64 N. J. Law, 80, 44 Atl. 948; People v. Wurster, 14 App. Div. 556, 43 N. Y. Supp. 1088. The right to exercise a reasonable discretion is implied in a grant of power vested in the mayor to grant licenses unless the authority is mandatory in its terms. State v. Dobson, 65 N. C. 346; Com. v. Bacon, 8 Serg. & R. (Pa.) 135; Morgan v. Com., 98 Va. 812, 35 S. E. 448.

[644] City of East St. Louis v. Wehrung, 50 Ill. 28. The court here said that "as a general rule, where power is conferred upon a municipal corporation to regulate any calling or business they are powerless to delegate a discretionary authority to others or to an individual. In creating such bodies it is designed to aid the government in the preservation of good order and to protect more effectually persons in the particular community from injuries and annoyances that cannot be so readily guarded against by the general laws of the state. And in conferring the power upon the corporate body it is with the intention that it shall be exercised by the body created and in the mode prescribed and any departure from such authority or any attempt by the body to transfer their powers to others is unwarranted." Molihan v. State, 30 Ind. 266; Schlict v. State, 31 Ind. 246; Halloran v. McCullough, 68 Ind. 179; Town of Decorah v. Dunstan, 38 Iowa, 96; Mar-

If the authority is mandatory granting the license upon compliance with certain conditions, no discretion is vested in the authorities to whom the power is delegated but they must grant the license as directed by statute.[645]

The rule here given with reference to the exercise of discretionary and delegated powers prevents the passage of an ordinance which leaves the right to a particular body or official to determine arbitrarily whether the requisite conditions have been complied with, or, in other words, which leaves the granting of the license to the unrestrained whim of a subordinate body or official. "The ordinance should provide all the terms under which the license is to be issued and prescribe a uniform rule applicable to all of the class to which it is intended to apply without discrimination or delegation of power to the officer or board empowered to receive the parties upon the application which will permit unreasonable discrimination."[646]

golies v. Atlantic City, 67 N. J. Law, 82, 50 Atl. 367.

Child v. Bemus, 17 R. I. 230, 21 Atl. 539, 12 L. R. A. 57. An ordinance imposing a license fee, however, is not invalid because it reserves in the mayor the right to revoke the license upon a failure to comply with the conditions prescribed. Roche v. Jones, 87 Va. 484, 12 S. E. 965.

[645] Moseley v. Tift, 4 Fla. 402; Potter v. Common Council of Homer, 59 Mich. 8; Amperse v. Common Council of Kalamazoo, 59 Mich. 78; City of Kansas v. Flanders, 71 Mo. 281. A wrongful refusal by a city official to issue a license is no defense in a prosecution for a failure to take out such a license. In re O'Rourke, 9 Misc. 564, 30 N. Y. Supp. 375; Phœnix Carpet Co. v. State, 118 Ala. 143, 72 Am. St. Rep. 143.

[646] Barthet v. City of New Orleans, 24 Fed. 563; In re Bickerstaff, 70 Cal. 35; Bills v. City of Goshen, 117 Ind. 221, 3 L. R. A. 261; Town of State Center v. Barenstein, 66 Iowa, 249; State v. Mahner, 43 La. Ann. 496; City of Baltimore v. Radecke, 49 Md. 217; City of Newton v. Belger, 143 Mass. 598; Robison v. Miner, 68 Mich. 549; Darling v. City of St. Paul, 19 Minn. 389 (Gil. 336). An ordinance is void permitting the licensee to determine the time his license shall be in force. "No specific time for which a license shall be granted, is fixed by the ordinance. The provision of the ordinance is that any person 'may, by paying to the city treasurer the sum of five dollars for every three days, obtain a license.' It is apparent that, in order to ascertain the amount of license money to be paid in any case, the time for which the license is to continue must first be determined. How is this to be done? The most favorable construction for the defendant which can fairly be given to the ordinance as it is framed, it seems to us, is that it authorizes the license to be granted for any time for which the licensee

Street parades; consent of property owners. This principle applies especially to licenses or permits for the use of streets by parades or processions.[647]

shall be willing to pay, and shall pay, at the rate of five dollars for every three days thereof, thus authorizing the licensee in every instance to determine for what length of time the license shall continue. This, it will be observed, is not a permission to the licensee to elect between licenses for different terms of time established by the city council, but a delegation to the licensee of power to determine the term for which the license shall be granted. This, we have seen, cannot be done, and the second section of the ordinance thus construed is void."

Hennepin County Com'rs v. Robinson, 16 Minn. 381 (Gil. 340); State v. Kantler, 33 Minn. 69; Town of Trenton v. Clayton, 50 Mo. App. 535. "Again the ordinance in question is objectionable, in that it assumes to transfer or delegate to the mayor a power given to the council. The charter of Trenton, as already quoted, reposed authority in the town council by ordinance to license, etc., peddlers. This ordinance turns over the entire matter to the caprice or discretion of the mayor. It leaves the granting or not granting peddlers' licenses—to whom, for what period, and for what cost—altogether with the town mayor. 'The principle is a plain one, that the powers or trusts devolved by law or charter upon the council or governing body, to be exercised by it when and in such manner as it shall judge best, cannot be delegated to others.' Neither can this ordinance find any support from the thirteenth clause of plaintiff's charter, which empowers the council 'to pass all such ordinances as may be expedient in maintaining the peace, good government, health, and welfare of the town.' The authority to pass such ordinance must affirmatively appear in the charter. It is not to be inferred from terms of such doubtful import." Winants v. City of Bayonne, 44 N. J. Law, 114. The power to grant a license for the sale of liquor cannot be delegated by the city council to the mayor.

But see the following cases holding that under the particular circumstances noted, there was a legal delegation of power. In re Christensen, 43 Fed. 243; Swarth v. People, 109 Ill. 621; Gundling v. City of Chicago, 176 Ill. 340, 48 L. R. A. 230; Town of Decorah v. Dunstan, 38 Iowa, 96.

In re White, 43 Minn. 250; City of St. Louis v. Meyrose Lamp Mfg. Co., 139 Mo. 560. An ordinance is valid giving authority to a board of engineers to examine applicants for licenses to act as stationary engineers with the power to reject or grant such applications; this action based upon the examination. Bradley v. City of Rochester, 54 Hun (N. Y.) 140; Child v. Bemus, 17 R. I. 230, 12 L. R. A. 57.

[647] City of Chicago v. Trotter, 136 Ill. 430, affirming 33 Ill. App. 206. A delegation to the police department to grant permits for parades and processions is void as a delegation of the legislative power of granting such permits.

Anderson v. City of Wellington, 40 Kan. 173, 2 L. R. A. 110; In re

The rule also renders nugatory all of those attempts of municipal councils to delegate to property owners the power of de-

Frazee, 63 Mich. 396. An ordinance requiring the consent of the mayor or common council as necessary to the right of using the street for a parade or procession with musical instruments held void; the court said: "This by-law is unreasonable because it suppresses what is in general perfectly lawful and because it leaves the power of permitting or restraining processions and their courses to an unregulated official discretion when the whole matter if regulated at all must be by permanent legal provisions operating generally and impartially."

State v. Dering, 84 Wis. 585, 19 L. R. A. 858. "Nearly all the processions, parades, etc., that ordinarily occur are excepted from the ordinance in question, followed by a provision that permission to march or parade shall at no time 'be refused to any political party having a regular state organization.' It is difficult to see how this can be considered municipal legislation, dictated by a fair and equal mind, which takes care to protect and provide for the parades and processions with trumpets, drums, banners, and all the accompaniments of political turnouts and processions, and at the same time provides, in effect, that the Salvation Army, or a Sunday school, or a temperance organization with music, banners and devices, or a lodge of Odd Fellows or Masons, shall not in like manner parade or march in procession on the streets named without getting permission of the mayor, and that it shall rest within the arbitrary, uncontrolled discretion of this officer whether they shall have it at all. The ordinance resembles more nearly the means and instrumentalities frequently resorted to in practicing against and upon persons, societies, and organizations a petty tyranny, the result of prejudice, bigotry, and intolerance, than any fair or legitimate provision in the exercise of the police power of the state to protect the public peace and safety. It is entirely un-American, and in conflict with the principles of our institutions and all modern ideas of civil liberty. It is susceptible of being applied to offensive and improper uses, made subversive of the rights of private citizens, and it interferes with and abridges their privileges and immunities, and denies them the equal protection of the laws in the exercise and enjoyment of their undoubted rights. In the exercise of the police power, the common council may, in its discretion, regulate the exercise of such rights in a reasonable manner, but cannot suppress them, directly or indirectly, by attempting to commit the power of doing so to the mayor or any other officer. The discretion with which the council is vested is a legal discretion, to be exercised within the limits of the law, and not a discretion to transcend it or to confer upon any city officer an arbitrary authority, making him in its exercise a petty tyrant. Such ordinances or regulations, to be valid, must have an equal and uniform application to all persons, societies, or organizations similarly circumstanced, and not be susceptible of unjust discriminations, which may

termining whether in certain instances a license or permit for the carrying on of a certain occupation or business should be granted.[648]

It should be clearly understood, however, that where the delegation of the original power involves action of the character or by those named, the right can only be exercised in such a manner, and the consent of the property owners or action by particular officers is necessary to the validity of the license granted or of an ordinance relative to the subject.

§ 403. The power to license the sale of intoxicating liquors.

The sale and consumption of intoxicating liquors, it is unanimously held by all legal and economic authorities, tends to poverty, disease and crime;[649] clearly then, it is within a legitimate

be arbitrarily practiced to the hurt, prejudice, or annoyance of any. An ordinance which expressly secures to political parties having state organizations the absolute right to street parades and processions with all their usual accompaniments, and denies it to the societies and other like organizations already mentioned, except by permission of the mayor, who may arbitrarily refuse it, is not valid, and offends against all well-established ideas of civil and religious liberty. The people do not hold rights as important and well settled as the right to assemble and have public parades and processions with music and banners and shouting and songs, in support of any laudable or lawful cause, subject to the power of any public officer to interdict or prevent them." But see Com. v. Plaisted, 148 Mass. 375, 2 L. R. A. 142, as sustaining a delegation by the city council of Boston to the Board of Police of the power to adopt rules for the regulation of itinerant musicians and requiring the taking out of a license for such occupation.

[648] In re Quong Woo, 13 Fed. 229; Jones v. Hilliard, 69 Ala. 300; Groesch v. State, 42 Ind. 547; House v. State, 41 Miss. 737; City of St. Louis v. Russell, 116 Mo. 248, 20 L. R. A. 721. An ordinance requiring a person to obtain in writing the consent of the owners of one-half the ground in the block in which he desires to erect a livery stable held invalid because of a delegation of the power to grant a license to property owners. But see City of Chicago v. Stratton, 162 Ill. 494, 35 L. R. A. 84, and Martens v. People, 186 Ill. 314, sustaining ordinances passed by the city of Chicago requiring the consent of two-thirds of the freeholders of a block in which there is no saloon as requisite to the issuing of a license to keep a saloon in such a block.

[649] Duluth Brewing & Malting Co. v. City of Superior, 123 Fed. 353. "It is not disputed that, if the ordinance in question was enacted in the exercise of the police power, it would not be in conflict with the interstate commerce provision of the Constitution. But it is claimed that the or-

exercise of the police power that the state or a delegated agency should impose a license fee upon the liquor traffic, since the business cannot be classed as a useful or honorable occupation.[650]

dinance was passed, not with a view to regulation, but of revenue. It may be conceded that a state or a municipality, exercising the sovereignty of the state, may not, under the guise of police regulation exact a tax; that if revenue only is designated, it is not a police regulation. It is doubtless true that the legislation must have reference to the supervision, control and regulation of some act or thing which may in some way injuriously affect the peace, good order, health, morality, or safety of society; but we are unable to say that it clearly appears upon the face of this ordinance, that the purpose of it was to exact a tax and not to impose a license for regulation. The subject-matter is one peculiarly within the province of state regulation. The abuse of the appetite is productive of such evil tending to vice and immorality that the courts while zealous to protect the rights of property, should be alike careful not to invade the province of the lawmaking power of the state in the exercise of its police power to regulate those things which may become potential to the injury of society. It may be that the sale of liquor in original packages does not in itself require the same strict regulation as does the saloon; but it is not improper for a local legislature in view of the evil sought to be regulated, to impose upon the wholesale traffic such regulations as will effectually prevent the abuse of the right to sell at wholesale and to exercise the police power to that end." Town of Mt. Carmel v. Wabash County, 50 Ill. 69. See § 129, supra.

[650] Intendant of Marion v. Chandler, 6 Ala. 899; Sheppard v. Dowling, 127 Ala. 1, 28 So. 791. The Alabama dispensary law (Acts 1898–99, p. 108), held constitutional. In re Jones, 78 Ala. 419; Barton v. Town of Gadsden, 79 Ala. 495; Tuck v. Town of Waldron, 31 Ark. 462. The charter authority to license or regulate the sale of liquor does not confer power to prohibit entirely its sale.

City of Sacramento v. Dillman, 102 Cal. 107, 36 Pac. 385. The power to license confers a power to recover by civil action the amount delinquent upon a saloonkeeper's license. Los Angeles County v. Eikenberry, 131 Cal. 461, 63 Pac. 766; Ex parte Benninger, 64 Cal. 291; In re Bickerstaff, 70 Cal. 35; Daus v. City of Macon, 103 Ga. 774, 30 S. E. 670; Decker v. McGowan, 59 Ga. 805; Nathan v. City of Bloomington, 46 Ill. 347; People v. Town of Normal, 170 Ill. 468; Kiel v. City of Chicago, 176 Ill. 137; Lutz v. City of Crawfordsville, 109 Ind. 466; Wray v. Harrison, 116 Ga. 93, 42 S. E. 351. Town of Pikeville v. Huffman, 23 Ky. L. R. 1692, 65 S. W. 794. Cider held as an intoxicating drink. Hodgson v. City of New Orleans, 21 La. Ann. 301; Com. v. Brennan, 103 Mass. 70; City of St. Paul v. Troyer, 3 Minn. 291 (Gil. 200); Hennepin County Com'rs v. Robinson, 16 Minn. 381 (Gil. 340); Trustees of Aberdeen Academy v. City of Aberdeen, 21 Miss. 645; State v. Kantler, 33 Minn. 69.

Leonard v. City of Canton, 35 Miss. 189. The power "to tax or entirely suppress all petty grocer-

It is also within the power of the state to impose a license fee on the right to sell liquors as a means solely of raising revenue.[651]

§ 404. Nature of license.

A license when issued is not generally considered in the nature of a contract,[652] is personal,[653] and may be revoked at any time without liability by the authorities granting it upon a failure to comply with the conditions imposed either by general

ies" does not confer the right to license retailers of liquor. Licks v. State, 42 Miss. 316; Holberg v. Town of Macon, 55 Miss. 112; Boomershine v. Uline, 159 Ind. 500, 65 N. E. 513; Roberson v. City of Lambertville, 38 N. J. Law, 69; Williams v. Iredell County Com'rs, 132 N. C. 300, 43 S. E. 896; City of Portland v. Schmidt, 13 Or. 17. The sale of liquor cannot be absolutely prohibited under a power to restrain intoxication and provide for the good order of a city; its sale on particular days or at particular places may, however, be prohibited. Durach's Appeal, 62 Pa. 491; Schlaudecker v. Marshall, 72 Pa. 200; Bancroft v. Dumas, 21 Vt. 456; Moundsville v. Fountain, 27 W. Va. 182; Wallace v. Town of Cubanola, 70 Ark. 395, 68 S. W. 485. See, also, 10 Mun. Corp. Cas. 841.

[651] Kitson v. City of Ann Arbor, 26 Mich. 325; Kansas City v. Richardson, 90 Mo. App. 450; City of Lamar v. Adams, 90 Mo. App. 35; State v. Bennett, 19 Neb. 191; Caldwell v. City of Lincoln, 19 Neb. 569; Harris v. State, 4 Tex. App. 131; Tonella v. State, 4 Tex. App. 312; Carr v. State, 5 Tex. App. 153.

[652] Boyd v. State, 46 Ala. 329. After the payment of a license fee the privilege of transacting the business authorized for the time for which the payment was made cannot be taken away. Bishoff v. State, 43 Fla. 67, 30 So. 808. But it has also been held that it cannot be abrogated at any time without just and sufficient cause. City of St. Charles v. Hackman, 133 Mo. 634.

[653] Powell v. State, 69 Ala. 10; Irving v. City of Highlands, 11 Colo. App. 363, 53 Pac. 234; Bishoff v. State, 43 Fla. 67, 30 So. 808; Lewis v. United States, 1 Morris (Iowa) 199. A license not capable of assignment. Columbus City v. Cutcomp, 61 Iowa, 672; Stokes v. Prescott's Adm'r, 43 Ky. (4 B. Mon.) 37; Mabry's Ex'rs v. Bullock, 37 Ky. (7 Dana) 337; Pfefferling v. City of Baltimore, 88 Md. 475, 41 Atl. 778; Calder v. Kurby, 71 Mass. (5 Gray) 597; Youngblood v. Sexton, 32 Mich. 406; City of Grand Rapids v. Braudy, 105 Mich. 670, 64 N. W. 29, 32 L. R. A. 116. But see Martin v. O'Brien, 34 Miss. 21; Reed v. Beall, 42 Miss. 472; Coulson v. Harris, 43 Miss. 728. People v. Commissioners of Pilots, 54 Barb. (N. Y.) 145. But a license cannot be revoked for the commission of acts prior to its date.

State v. Morrison, 126 N. C. 1123; Branson v. City of Philadelphia, 47 Pa. 329. The right of the licensee is taken subject to the exercise of the power of eminent domain whenever the public good requires it. Gibson v. Kauffield, 63 Pa. 168. The license is a special personal privilege and cannot be used by an employe

law or special provision at the time it was granted.[654] It further only affords protection for acts done[655] within the period which it covers, and if one is exacted for the performance of certain acts, a violation of the law can be punished in the manner provided.[656] The act, when in violation of the law that is without

of the licensee. Martin v. McNight, 1 Tenn. (1 Overt.) 330; 2 Mun. Corp. Cas. 245.

[654] Schwuchow v. City of Chicago, 68 Ill. 444. "Much stress is placed on the supposed vested right to the privileges conferred by the license. If, as we have seen, the control of the sale of liquors is a police regulation, then no one can obtain such a vested right in it as that it may not be resumed when the interests of society require it. In the cases (citing Illinois cases) this question was discussed and it was intimated that the legislature could not so far divest itself of the right to exercise the police power that it could not resume it, whether delegated to individuals or to corporations. * * * So here we cannot infer that the legislature or the city intended to unconditionally part with the power for the period for which the license was granted. This being true, appellant took this license subject to be controlled by the police power. We can never hold that a person can acquire an absolute vested right to such a license for any definite period beyond the control of the police power of the state." Hurber v. Baugh, 43 Iowa, 514; Calder v. Kurby, 71 Mass. (5 Gray) 597; Metropolitan Board of Excise v. Barrie, 34 N. Y. 657; State v. Holmes, 38 N. H. 225; Child v. Bemus, 17 R. I. 230, 21 Atl. 539, 12 L. R. A. 57.

[655] Elsberry v. State, 52 Ala. 8; State v. Lindsay, 34 Ark. 372; State v. Myers, 63 Mo. 324. An application for a license without securing it is no defense to an indictment for doing business without a license. City Council of Charleston v. Corleis, 2 Bailey (S. C.) 186; Davis v. State, 2 Tex. App. 425.

[656] United States v. Smith, 75 U. S. (8 Wall.) 587. The penalty on a bond cannot be enforced for acts done after the expiration of the license granted in connection with the bond. See the cases of Aycock v. Town of Rutledge, 104 Ga. 533, 30 S. E. 815, and Papworth v. City of Fitzgerald, 105 Ga. 491, 30 S. E. 837, as holding that a statute conferring power on a designated court to punish the commission of acts already punished under the general laws of the state is unconstitutional as special legislation.

Johnson v. City of Macon, 114 Ga. 426, 40 S. E. 322; Schwuchow v. City of Chicago, 68 Ill. 444. The punishment may in part consist of a revocation of the license granted. Jackson v. Boyd, 53 Iowa, 536; Com. v. Wilkins, 121 Mass. 356. The penalty may be so excessive as to be void under a power to pass reasonable by-laws and ordinances. City of St. Louis v. Green, 6 Mo. App. 591; Id., 7 Mo. App. 468. The nonpayment of a purely revenue tax cannot be made a misdemeanor. State v. Colby, 67 N. H. 391, 36 Atl. 252; Howe v. Treasurer of Plainfield, 37 N. J. Law, 145; Arnold v. Ford, 53 App. Div. 25, 65 N. Y. Supp. 528; City Council of Charleston v.

the license, usually creates no civil or contract rights as between the parties to that transaction.[657]

§ 405. License fee; when recovered.

A public corporation which has collected an illegal and void tax or license fee is liable to the party paying it for the amount paid irrespective of its having been collected by compulsion or paid under protest,[658] though some authorities hold to the contrary on this proposition.[659] The principle controlling the right of recovery by an individual applies in cases where a portion of the license fee paid was illegal as well as in cases where it is entirely void.[660]

Ashley Phosphate Co., 34 S. C. 541; State v. Manz, 46 Tenn. (6 Cold.) 557.

[657] Bohon's Assignee v. Brown, 101 Ky. 354, 19 Ky. L. R. 540, 41 S. W. 273, 38 L. R. A. 503; Id., 20 Ky. L. R. 1496, 49 S. W. 450; Asher v. Com., 24 Ky. L. R. 96, 68 S. W. 130; Stanwood v. Woodward, 38 Me. 192. An innkeeper must prove himself duly licensed before he can establish a lien upon the property of his guests. Johnston v. Dahlgren, 166 N. Y. 354; Rearden v. Henson (Miss.) 29 So. 764.

See, however, as holding that a valid sale and delivery of goods can be made without a license, the case of Brett v. Marston, 45 Me. 401, and see Jones v. Berry, 33 N. H. 209, where a peddler selling goods without a license was held to have the right to recover their price in a suitable action.

Shepler v. Scott, 85 Pa. 329. To collect commission for a sale of real estate it is not necessary to show the possession of a license to act as a real estate broker. But see Singer Mfg. Co. v. Jenkins (Tenn. Ch. App.) 59 S. W. 660.

[658] Callaway v. City of Milledgeville, 48 Ga. 309; Bruner v. Town of Stanton, 102 Ky. 459; Orton v. Brown, 35 Miss. 426; Town of Tupelo v. Beard, 56 Miss. 532. A license fee cannot be recovered when paid under a misapprehension of the law. John Kyle Steam Boat Co. v. City of New Orleans, 23 Int. Rev. Rec. 19; City of Galveston v. Sydnor, 39 Tex. 236; 1 Mun. Corp. Cas. 172, and cases cited.

[659] Rooney v. Snow, 131 Cal. 51, 63 Pac. 155. The voluntary payment of a license fee cannot be recovered. Scottish Union & Nat. Ins. Co. v. Herriott, 109 Iowa, 606, citing Swift Co. v. United States, 111 U. S. 23; Shelton v. Platt, 139 U. S. 594; Cunningham v. Munroe, 81 Mass. (15 Gray) 471; Carew v. Rutherford, 106 Mass. 1; State v. Nelson, 41 Minn. 25, 42 N. W. 548, 4 L. R. A. 300; Beckwith v. Frisbie, 32 Vt. 559.

Bean v. City of Middlesborough, 22 Ky. L. R. 415, 57 S. W. 478; Cook v. City of Boston, 91 Mass. (9 Allen) 393; Douglas v. Kansas City, 147 Mo. 428, 48 S. W. 851; Florida Cent. & P. R. Co. v. City of Columbia, 54 S. C. 266, 32 S. E. 408.

[660] Board of Council of Harrodsburg v. Renfro, 22 Ky. L. R. 806, 58 S. W. 795. In this case the defend-

§ 406. How payable and use of moneys.

The authority granting the license in the first instance may provide the manner[661] and the time[662] of its payment, and also the use to which the moneys derived shall be put.[663] Such pro-

ant had paid $700 license tax on his saloon when the ordinance provided that license fees should be $600 save on Main street, where defendant's saloon was situated and on that street the license fee should be $900. Defendant sues for $100. The court say: "The whole spirit of the constitution is that all laws shall be uniform within the limit of the law making power and especially that all taxation shall be equal and uniform within the territorial limits of the authority levying the tax. The state legislature is prohibited from enacting local and special legislation. It cannot be that the council of one of our cities can enact local or special legislation to apply to a part of the territory, or to a special person within the limits of such city. All persons are guaranteed the equal protection of the laws and no grant of exclusive privileges can be made to any person, except in consideration of public services. We are clearly of the opinion that the ordinance fixed the license fee at $600 and no more. The provision or exception as to Main street was special and local legislation and is invalid. The council could have made the license for the city at $900 but, if it had done so, it could not have then excepted business not conducted on Main street and provided that such business not on Main street should pay only $600. This would have been equally objectionable. The charter of a municipal corporation is a delegation of powers to its governing authority by the legislative branch of the government and no powers will be presumed to have been granted that are not mentioned or necessarily included in a general grant of power. Certainly a power that the legislature itself cannot exercise will not be presumed to be granted to a municipal corporation. It appears from the answer and counterclaim that appellee had paid $100 in excess of the license fee. He was entitled to recover same from the city." Bruner v. Town of Stanton, 102 Ky. 459.

[661] Rountree v. Wood, 132 Ala. 584, 31 So. 451; Powers v. Town of Decatur, 54 Ala. 214. A note for the price of a liquor license may be taken instead of cash and if unpaid at its due date, an action of assumpsit may be maintained by the municipal corporation against the maker. Williams v. Com., 76 Ky. (13 Bush) 304; State v. Administrator of Finance, 27 La. Ann. 493.

[662] State of Aitken, 61 Neb. 490, 85 N. W. 395. The payment in advance of an occupation tax cannot be made a condition precedent for the obtaining of the license, citing and following State v. Wilcox, 17 Neb. 219; State v. Bennett, 19 Neb. 191.

[663] State v. Forkner, 70 Ind. 241; State Board of Education v. City of Aberdeen, 56 Miss. 518; State v. Leidtke, 12 Neb. 171; King v. State, 50 Neb. 66, 69 N. W. 307; German-American Fire Ins. Co. v. City of Minden, 51 Neb. 870, 71 N. W. 995; State v. Aitken, 61 Neb. 490, 85 N. W. 395; Steidl v. State, 63 Neb. 695,

visions in common with others relating to the exercise of this power are strictly construed,[664] and municipal officials have no right to vary in the least respect from their authority as granted,[665] or use the moneys collected for other and different purposes than those contemplated by law.[666]

§ 407. Specific illustrations of the imposition of license fees.

Without attempting to distinguish except as may be suggested in the notes, the basis for the imposition of a license fee as between the exercise of the police power and the power of taxation, authorities are found sustaining the power of the state or its delegated agencies to impose a license fee upon amusements,[667] the professions,[668] peddlers or itinerant merchants,[669] the carrying

88 N. W. 853; State v. Boyd, 63 Neb. 829, 89 N. W. 417, 58 L. R. A. 108; State v. Duryee, 65 N. J. Law, 449, 47 Atl. 1064; Exempt Firemen's Ass'n v. Exempt Firemen's Benev. Fund, 34 App. Div. 138, 54 N. Y. Supp. 621. Such a law, however, may be special and, therefore, unconstitutional where the passage of special legislation is prohibited. Fox v. Mohawk & H. R. Humane Soc., 165 N. Y. 517, 59 N. E. 353. If the moneys raised are given to a private undertaking the law will be held void. Zeigler v. Com., 59 Pa. 92; Churchill v. Herrick, 32 Wis. 357; Green County v. Village of Monroe, 55 Wis. 175; Town of Plainfield v. Village of Plainfield, 67 Wis. 525.

[664] City of Savannah v. Hartridge, 8 Ga. 23; City of Elgin v. Picard, 24 Ill. App. 340; Harris v. Com., 81 Va. 240.

[665] Snyder v. City of North Lawrence, 8 Kan. 82; State v. Hatfield, 73 Mo. App. 506.

[666] City of New Orleans v. Finnerty, 27 La. Ann. 681; Village of Grosse Pointe v. Wayne County Treasurer, 85 Mich. 44, 48 N. W. 153.

[667] *Generally.* City of Chicago v. Hardy, 66 Ill. App. 524; Selectmen v. Spalding, 8 La. Ann. 87; Germania v. State, 7 Md. 1; City of Nashville v. Althrop, 45 Tenn. (5 Cold.) 554.

Theaters and theatrical exhibitions. Jacko v. State, 22 Ala. 73. A theater license will not protect one who exhibits feats of legerdemain or sleight of hand. Gillman v. State, 55 Ala. 248. The use of a small room for petty dramatic exhibitions is not the keeping of a theater.

Charity Hospital v. Stickney, 2 La. Ann. 550; Charity Hospital v. De Bar, 11 La. Ann. 385; City of Boston v. Schaffer, 26 Mass. (9 Pick.) 415. "The levying of an excise has been practiced in regard to other occupations, and the constitutionality of it has never been doubted. There can, therefore, be no objection to it in the present case, admitting theatrical entertainments to be as meritorious as other occupations. But it seems to be peculiarly proper in employments of this kind. They require to be watched. Towns are put to expense in preserving order, and it is

proper they should be indemnified for inconveniences or injuries occasioned by employments of this nature." Hodges v. City of Nashville, 21 Tenn. (2 Humph.) 61. See, also, Bell v. Mahn, 121 Pa. 225, 1 L. R. A. 364.

Bowling alleys. Smith v. City of Madison, 7 Ind. 86.

Exhibitions. Ex parte Felchlin, 96 Cal. 360; State v. Bowers, 14 Ind. 195; Selectmen v. Spalding, 8 La. Ann. 87. The right to require a license fee from a boat on which circus exhibitions are given is held valid in this case. State v. Schonhausen, 37 La. Ann. 42; Com. v. Gee, 60 Mass. (6 Cush.) 174. The statute does not apply to the teaching of dancing. City of New York v. Eden Musee American Co., 102 N. Y. 593.

Dramatic entertainments. Society for Reformation of Juvenile Delinquents v. Diers, 10 Abb. Pr. (N. S.; N. Y.) 216.

Billiard and pool rooms. Washington v. State, 13 Ark. 752; Hill v. State, 120 Ala. 392, 24 So. 929; Ex parte Bernert, 62 Cal. 524; City of Burlington v. Lawrence, 42 Iowa, 681; City of New Orleans v. Turpin, 13 La. Ann. 56; Metz v. Com., 59 Ky. (2 Metc.) 14; Merriam v. City of New Orleans, 14 La. Ann. 318; Hinckley v. Germania Fire Ins. Co., 140 Mass. 38; Com. v. McCarty, 141 Mass. 420; State v. Pate, 67 Mo. 488; State v. Hatfield, 73 Mo. App. 506; Sears v. West, 5 N. C. (1 Murph.) 291; Morgan v. State, 64 Neb. 369, 90 N. W. 108; Wright v. State, 41 Tex. Cr. R. 200, 53 S. W. 640; Village of Winooski v. Gokey, 49 Vt. 282.

668 Browne v. Selser, 106 La. 691. An act imposing a license tax on trades and professions is not unconstitutional if the classification and tax is equal and uniform on all persons in the same class. Templar v. State Board of Examiners of Barbers, 131 Mich. 254, 90 N. W. 1058; Borough of Belmar v. Barkalow, 67 N. J. Law, 504, 52 Atl. 157; Harmon v. State, 66 Ohio St. 249, 64 N. E. 117; Ex parte Northrup, 41 Or. 489, 69 Pac. 445.

Architects. City of St. Louis v. Herthel, 88 Mo. 128; Cardiff v. Board of Architects, 69 N. J. Law, 172, 54 Atl. 294; Wilson v. City Council of Greenville, 65 S. C. 426, 43 S. E. 966; Burke v. City of Memphis, 94 Tenn. 692.

Lawyers. Goldthwaite v. City Council of Montgomery, 50 Ala. 486; Ex parte Montgomery City Council, 64 Ala. 463. City of Sonora v. Curtin, 137 Cal. 583. Not given right to extort taxes. Young v. Thomas, 17 Fla. 169; City of Rome v. McWilliams, 52 Ga. 251; City of Savannah v. Hines, 53 Ga. 616; Wright v. City of Atlanta, 54 Ga. 645; Garden City v. Abbott, 34 Kan. 283; City of St. Louis v. Sternberg, 4 Mo. App. 453; State v. Forcier, 65 N. H. 42; Holland v. Isler, 77 N. C. 1; City of Wilmington v. Max, 86 N. C. 88; Languille v. State, 4 Tex. App. 312; Ould v. City of Richmond, 23 Grat. (Va.) 464, 14 Am. Rep. 139; City of Petersburg v. Cocke, 94 Va. 244, 26 S. E. 576, 36 L. R. A. 432; Blanchard v. City of Bristol, 100 Va. 469; Fleetwood v. Read, 21 Wash. 547, 47 L. R. A. 205; Blanchard v. City of Bristol, 100 Va. 469, 41 S. E. 948.

Physicians. Watkins Medical Co. v. Paul, 87 Ill. App. 278; White v. Lapeer Ct. Judge, 133 Mich. 93, 94 N. W. 601; City of Girard v. Bissell, 45 Kan. 66, 25 Pac. 232; Holland v. Isler, 77 N. C. 1; State v.

Powell, 69 N. H. 353; Parks v. State, 159 Ind. 211, 64 N. E. 862, 59 L. R. A. 190; City of Cherokee v. Perkins, 118 Iowa, 405, 92 N. W. 68; Volp v. Saylor, 42 Or. 546, 71 Pac. 980.

Magnetic healers and faith healers. Steiner v. Liggett, 67 Kan. 822, 72 Pac. 577.

669 Howe Mach. Co. v. Gage, 100 U. S. 676; Ex parte Hanson, 28 Fed. 127. In re Wilson, 19 D. C. (8 Mackey) 341, 12 L. R. A. 624. The salaried agent of the manufacturers selling "Soapine" held a peddler. Seymour v. State, 51 Ala. 52; Ex parte Heylman, 92 Cal. 492; Merriam v. Langdon, 10 Conn. 461.

State v. Conlon, 65 Conn. 478, 31 L. R. A. 55. An act which in effect is a trade regulation of harmless business and which grants to public officials within their discretion the power to issue a license or refrain from so doing is unconstitutional as violating "Bill of Right," section one, which declares that all men are equal in rights and that no man or class of men are entitled to exclusive privileges from the community.

Hall v. State, 39 Fla. 637, 23 So. 119; Duncan v. State, 105 Ga. 457, 30 S. E. 755; Holliman v. City of Hawkinsville, 109 Ga. 107. Under the act exempting disabled Confederate soldiers residents of the state from paying the usual peddler's license fee, it is not necessary that the disability was brought about by service in the army. See, also, as construing the same statute, Hartfield v. City of Columbus, 109 Ga. 112, 34 S. E. 288.

City of Peoria v. Gugenheim, 61 Ill. App. 374. A license fee of $200 per month for transient or itinerate merchants is unreasonable and extortionate and, therefore, illegal.

McDermott v. City of Lewistown, 92 Ill. App. 474; McRoberts v. City of Sullivan, 67 Ill. App. 435. A license fee which is unreasonable in amount and which discriminates in authority or against any business that is lawful in itself or in its methods is illegal. City of South Bend v. Martin, 142 Ind. 31, 29 L. R. A. 531; City of Mt. Pleasant v. Clutch, 6 Iowa, 546; Iowa City v. Newell, 115 Iowa, 55, 87 N. W. 739. The reasonableness of such an ordinance is for the court to determine, and the presumption in the absence of competent evidence to the contrary is that the license charged is reasonable.

State Center v. Barenstein, 66 Iowa, 249. An ordinance which provides that the mayor in his discretion can require peddlers to pay license "not less than one nor more than $25" is void as to uncertainty and unreasonableness. City of Ottumwa v. Zekind, 95 Iowa, 622, 29 L. R. A. 734. The court in this case held that an ordinance requiring transient merchants to pay a license was not open to the objection of a want of uniformity in its operation or that it was class legislation, but where the amount of the license fee was fixed at $250 a month or $25 per day, the ordinance was held void as unreasonable.

City of Cherokee v. Fox, 34 Kan. 16; City of Carlisle v. Hechinger, 20 Ky. L. R. 74, 45 S. W. 358; Standard Oil Co. v. Co., 21 Ky. L. R. 1339, 55 S. W. 8. The state may require proof of the good moral character of an applicant for a peddler's license and also a description entered of record of the person. Bohon's Assignee v. Brown, 20 Ky. L. R. 1496, 49 S. W. 450; Kirkpatrick v. Davis Clock Co., 49 La. Ann. 871;

Andrews v. White, 32 Me. 388; Burbank v. McDuffee, 65 Me. 135; State v. Montgomery, 92 Me. 433. A statute is not void for discrimination which exempts, from the payment of a license fee for peddling, disabled soldiers or soldiers in the war of the Rebellion, but it is unconstitutional as contrary to the 14th amendment of the United States when it discriminated between citiens and aliens. See State v. Montgomery, 94 Me. 192.

Com. v. Ober, 66 Mass. (12 Cush.) 493; Com. v. Crowell, 156 Mass. 215, 30 N. E. 1015; Com. v. Ellis, 158 Mass. 555, 33 N. E. 651; Com. v. Cusick, 120 Mass. 183; Com. v. Newhall, 164 Mass. 338; City of Saginaw v. McKnight, 106 Mich. 32, 63 N. W. 985. An ordinance imposing a license fee on nonresidents only is invalid.

People v. Sawyer, 106 Mich. 428, 64 N. W. 333; People v. Baker, 115 Mich. 199, 73 N. W. 115; People v. Hotchkiss, 118 Mich. 59, 76 N. W. 142. Brooks v. Mangan, 86 Mich. 576. The regulations of the Bay City charter in respect to license fees for hawkers and peddlers held so unreasonable and prohibitory as to render them invalid, and that which exempts city residents from the operation of an ordinance imposing a license upon such occupations is illegal as an unjust discrimination against nonresidents.

People v. Sawyer, 106 Mich. 428; City of St. Paul v. Briggs, 85 Minn. 290, 88 N. W. 984; State v. Downing, 22 Mo. App. 504; State v. Snoddy, 128 Mo. 523, 31 S. W. 36; State v. Holmes, 62 Mo. App. 178; State v. Smithson, 106 Mo. 149; Temple v. Sumner, 51 Miss. 13; Gerrard v. State, 64 Neb. 368, 89 N. W. 1062; Bradley v. City of Rochester, 54 Hun, 140, 7 N. Y. Supp. 237; Jones v. Foster, 43 App. Div. 33, 59 N. Y. Supp. 738; State v. Morrell, 100 N. C. 506, 6 S. E. 418; State v. Franks, 127 N. C. 510, 37 S. E. 70; Wrought Iron Range Co. v. Carver, 118 N. C. 328; Com. v. Gardner, 133 Pa. 419, 19 Atl. 550; Hart v. Willetts, 62 Pa. 15; Com. v. Brinton, 132 Pa. 69.

Com. v. Harmel, 166 Pa. 89, 27 L. R. A. 388. A requirement is valid that one applying for a peddler's license shall make proof of their good moral character. State v. Foster, 21 R. I. 251, 46 Atl. 833; State v. Wilson, 70 Tenn. (2 Lea) 28; Woolman v. State, 32 Tenn. (2 Swan) 353; In re Butin, 28 Tex. App. 304; Saulsbury v. State (Tex. Civ. App.) 63 S. W. 568; Spanish Fork City v. Mortensen, 7 Utah, 33; State v. Hodgdon, 41 Vt. 139; State v. Harrington, 68 Vt. 622, 34 L. R. A. 100. That an act requiring a license from "itinerant vendors" is oppressive does not necessarily make it unconstitutional. Morrill v. State, 38 Wis. 428.

In the following cases the individuals in question were not regarded as peddlers. The cases almost without exception hold that one on salary or commission soliciting the purchase of goods and selling by sample, the goods to be subsequently delivered, is not a peddler within the ordinary meaning of that word as used in statutes, ordinances or constitutions granting the power to license hawkers and peddlers. The cases below cited sustain this proposition and also make the other distinctions noted. In re Spain, 47 Fed. 208, 14 L. R. A. 97; In re Flinn, 57 Fed. 496; Randolph v. Yellowstone Kit, 83 Ala. 471, 3 So. 706; Keller v. State, 123 Ala. 94, 26 So.

323. To constitute a peddler, it is sufficient that the person be engaged in the business for their livelihood or profit.

Kennedy v. People, 9 Colo. App. 490, 49 Pac. 373. A peddler is defined as "a trader who carries with him the goods which he sells." State v. Kumpel (Del.) 43 Atl. 173; Gould v. City of Atlanta, 55 Ga. 678; Kimmel v. City of Americus, 105 Ga. 694; Ezell v. Thrasher, 76 Ga. 817; Wrought Iron Range Co. v. Johnson, 84 Ga. 754, 8 L. R. A. 273. One selling goods by sample is not a peddler. Bohannon v. Wrought Iron Range Co., 111 Ga. 860. A corporation cannot be regarded as a peddler. City of Elgin v. Picard, 24 Ill. App. 340. One soliciting subscriptions for books for future delivery is not a peddler. Rawlings v. Village of Cerro Gordo, 32 Ill. App. 215; Delisle v. City of Danville, 36 Ill. App. 659; Twining v. City of Elgin, 38 Ill. App. 356; City of Olney v. Todd, 47 Ill. App. 439; Wiggins v. City of Chicago, 68 Ill. 372; City of Waterloo v. Heely, 81 Ill. App. 310; Naegle v. City of Centralia, 81 Ill. App. 334; City of Carrollton v. Bazzette, 159 Ill. 284, 31 L. R. A. 522; City of Huntington v. Cheesbro, 57 Ind. 74.

City of Davenport v. Rice, 75 Iowa, 74, 39 N. W. 191. One soliciting orders for goods is not a peddler within the meaning of an ordinance requiring a license for hawking and peddling goods. City of Stuart v. Cunningham, 88 Iowa, 191, 55 N. W. 311, 20 L. R. A. 430; City of Davenport v. Rice, 75 Iowa, 74; Snyder v. Closson, 84 Iowa, 184; State v. Gouss, 85 Iowa, 21; City of Stuart v. Cunningham, 88 Iowa, 191, 20 L. R. A. 430; Kansas City v. Collins, 34 Kan. 434; Com. v. Jones, 70 Ky. (7 Bush) 502.

Roy v. Schuff, 51 Ky. L. R. 86, 24 So. 788. The definition of a peddler will not include a farmer retailing his own crop in a small wagon. Standard Oil Co. v. Com., 21 Ky. L. R. 1339, 55 S. W. 8; Coffey v. Hendrick, 23 Ky. L. R. 1328, 65 S. W. 127; Pegues v. Ray, 50 La. Ann. 574, 23 So. 904; Com. v. Ober, 66 Mass. (12 Cush.) 493; Com. v. Farnum, 114 Mass. 269; Com. v. Reid, 175 Mass. 325; People v. Baker, 115 Mich. 199; Town of Trenton v. Clayton, 50 Mo. App. 535; State of Hoffman, 50 Mo. App. 585; City of Moberly v. Hoover, 93 Mo. App. 663, 67 S. W. 721; State v. Powell, 69 N. H. 353, 41 Atl. 171; State v. Wells, 69 N. H. 424, 45 Atl. 143, 48 L. R. A. 99; State v. Angelo, 71 N. H. 224, 51 Atl. 905; Hewson v. Inhabitants of Englewood, 55 N. J. Law, 522, 21 L. R. A. 736, 27 Atl. 904; Driscoll v. City of Salem, 67 N. J. Law, 113, 50 Atl. 475; People v. Jarvis, 19 App. Div. 466, 46 N. Y. Supp. 596; Village of Stamford v. Fisher, 140 N. Y. 187.

City of Greensboro v. Williams, 124 N. C. 167, 32 S. E. 492. One who sells articles without traveling or who delivers goods already solicted, merely collecting the price, is not a peddler or itinerant merchant. State v. Lee, 113 N. C. 681; Burgunder v. Weil, 60 Ohio St. 234; Com. v. Eichenberg, 140 Pa. 158; State v. Belcher, 1 McMul. (S. C.) 40. The selling of a single shipment of goods at auction is not hawking and peddling within the meaning of the South Carolina act of 1835.

State v. Moorehead, 42 S. C. 211, 20 S. E. 544, 26 L. R. A. 585; State v. Ninestein, 132 N. C. 1039, 43 S. E. 936; Alexander v. Greenville County, 49 S. C. 527, 27 S. E. 469; State v. Coop, 52 S. C. 508, 41 L. R. A. 501; State v. Bevins, 70 Vt. 574;

on or engaging in certain trades or occupations[670] and the use of vehicles for hire.[671] The phrase "trades or occupations" in-

State v. Franks, 130 N. C. 724, 41 S. E. 785; P. F. Collier & Son v. Burgin, 130 N. C. 632, 41 S. E. 874. See, also, 10 Mun. Corp. Cas. 210, and cases cited; and McQuillin, Mun. Ord. pp. 658-660.

[670] City of Mobile v. Richards, 98 Ala. 594, 12 So. 793; Southern Car & Foundry Co. v. State, 133 Ala. 624, 32 So. 235; Asher v. Com., 113 Ky. 296, 68 S. W. 130; City of New Orleans v. Bienvenu, 23 La. Ann. 710. Statute authority for imposing a license tax on "trades, occupations and professions" does not include a notary public.

Youngblood v. Sexton, 32 Mich. 406, 20 Am. Rep. 654; Town of Greenwood v. Delta Bank, 75 Miss. 162; German-American Fire Ins. Co. v. City of Minden, 51 Neb. 870, 71 N. W. 995. Where the method for the enforcement of an occupation tax is illegal, the whole ordinance is rendered thereby void. Edenton Com'rs v. Capeheart, 71 N. C. 156; Cobb v. Durham County Com'rs, 122 N. C. 307; Florida Cent. & P. R. Co. v. City of Columbia, 54 S. C. 266, 32 S. E. 408; Roche v. Jones, 87 Va. 484; City of Norfolk v. Norfolk Landmark Pub. Co., 95 Va. 564; Lent v. City of Portland, 42 Or. 488, 71 Pac. 645; Chehalis Boom Co. v. Chehalis County, 24 Wash. 135, 63 Pac. 1123.

[671] Kentz v. City of Mobile, 120 Ala. 623, 24 So. 952; Browne v. City of Mobile, 122 Ala. 159, 25 So. 223; Davis v. Petrinovich, 112 Ala. 654, 36 L. R. A. 615. But a tax cannot be imposed upon a bicycle used only by its owner for pleasure. Brewster v. City of Pine Bluff, 70 Ark. 28, 65 S. W. 934; San Luis Obispo County v. Greenberg, 120 Cal. 300; Johnson v. City of Macon, 114 Ga. 426, 40 S. E. 322; City of Griffin v. Powell, 64 Ga. 625.

Joyce v. City of East St. Louis, 77 Ill. 156. A license can be imposed upon wagons and other vehicles conveying loads in the city as a means of protecting the streets.

City of Terre Haute v. Kersey, 159 Ind. 300, 64 N. E. 469. A classification, held proper, of vehicles, according to the wear upon the streets probably resulting from their use. City of Burlington v. Unterkircher, 99 Iowa, 401, 68 N. W. 795. A license fee imposed on "each vehicle used for passengers" does not include a hearse.

Snyder v. City of North Lawrence, 8 Kan. 82; City of Covington v. Woods, 98 Ky. 344, 33 S. W. 84; City of Henderson v. Marshall, 22 Ky. L. R. 671, 58 S. W. 518. And the rule does not apply to wagons used by merchants in the delivery of goods sold their customers.

Walker v. City of New Orleans, 31 La. Ann. 828. A city imposing a license fee on vehicles cannot require the owners to purchase from it at a certain fixed and exorbitant price that which the ordinance has prescribed for the convenient identification of the vehicles.

Mason v. City of Cumberland, 92 Md. 451, 48 Atl. 136; City of St. Louis v. Weitzel, 130 Mo. 600, 31 S. W. 1045; City of St. Louis v. Grone, 46 Mo. 574, and City of Collinsville v. Cole, 78 Ill. 114, hold that such a license fee cannot be imposed upon vehicles used by owners for their own convenience or in the transaction of their own private

cludes, according to the adjudicated cases, agents,[672] auctioneers,[673] bakers,[674] bicycle dealers,[675] butchers or meat dealers,[676] blacksmiths or horseshoers,[677] brewers and distillers,[678] bankers and brokers,[679] canvassers, drummers, solicitors or traveling sales-

business and not engaged in any public employment.

City of St. Louis v. Green, 70 Mo. 562. A license tax upon vehicles using the streets of the city in this case held valid. City of St. Louis v. Woodruff, 71 Mo. 92; State v. Rodecker, 145 Mo. 450; Johnson v. Borough of Asbury Park, 58 N. J. Law, 604, 33 Atl. 850; Bennett v. Borough of Birmingham, 31 Pa. 15; City Council of Charleston v. Pepper, 1 Rich. Law (S. C.) 364; City of Memphis v. Battaile, 55 Tenn. (8 Heisk.) 524; Ex parte Gregory, 20 Tex. App. 210; Frommer v. City of Richmond, 31 Grat. (Va.) 646; City of Cheyenne v. O'Connell, 6 Wyo. 491, 46 Pac. 1088. City of South Bend v. Martin, 142 Ind. 31, 29 L. R. A. 531; City of New York v. Reesing, 38 Misc. (N. Y.) 129; 5 Mun. Corp. Cas. 421, and cases cited.

[672] Stewart v. Kehrer, 115 Ga. 184, 41 S. E. 680. In discussing the proposition mentioned in the text the court in this case said: "The specific tax 'upon all agents of packing houses doing business in this state' which is levied by paragraph 19 of section two of the general tax act, approved December 21st, 1900 (Acts 1900, p. 21), is a vocation or occupation tax; and construing together the various provisions of the act applicable to this tax, it is apparent that the act in effect declares that an agent representing a packing house and carrying on its business in any county of this state is pursuing a vocation or occupation and is himself doing business in this state and is liable to the tax." McClelland v. City of Marietta, 96 Ga. 749; Overton v. City of Vicksburg, 70 Miss. 558; Hurford v. State, 91 Tenn. 669; Graffty v. City of Rushville, 107 Ind. 502, 57 Am. Rep. 128.

[673] Fowle v. Common Council of Alexandria, 3 Pet. (U. S.) 398; Carroll v. City of Tuskaloosa, 12 Ala. 173; City of Goshen v. Kern, 63 Ind. 468; Town of Decorah v. Dunstan, 38 Iowa, 96. A discretionary power vested in the mayor to fix the license fee within certain limits does not render it void.

Crosdale v. City of Cynthiana, 21 Ky. L. R. 36, 50 S. W. 977; Margolies v. Atlantic City, 67 N. J. Law, 82, 50 Atl. 367. People v. Grant, 58 Hun, 611, 12 N. Y. Supp. 889; Sipe v. Murphy, 49 Ohio St. 536; Neal v. Com., 21 Grat. (Va.) 511; Stull v. De Mattos, 23 Wash. 71, 62 Pac. 451, 51 L. R. A. 892; Hayes v. City of Appleton, 24 Wis. 542. And see 1 Am. & Eng. Enc. Law (1st Ed.) p. 978. Auctions and auctioneers. Atlantic City v. Freisinger, 69 N. J. Law, 132, 54 Atl. 249; Ryan v. City of New York, 40 Misc. (N. Y.) 228.

[674] City of Mobile v. Yuille, 3 Ala. 137.

[675] Alexander v. State, 109 Ga. 805. "A dealer in bicycles who sold the same on his own account, and not as agent, is liable to pay to the state a tax of $100 for the year 1899 if he sold any bicycles the

manufacturers of which had not paid such a tax for that year; but, after paying the tax of $100 for the year mentioned, such dealer had the right during its continuance to sell bicycles of as many different 'makes' as he chose, without paying any additional tax for that year. The mere fact that his license from the comptroller general, or his registration as a dealer in bicycles, purported to limit his authority to sell two 'makes' of a particular kind, did not render it unlawful for him to sell other 'makes.'"

[676] Davis v. City of Macon, 64 Ga. 128; Pegues v. Ray, 50 La. Ann. 574; Ash v. People, 11 Mich. 347, 83 Am. Dec. 740; State v. McMahon, 62 Minn. 110, 64 N. W. 92; City of Biloxi v. Borries, 78 Miss. 657, 29 So. 466; City of St. Louis v. Spiegel, 8 Mo. App. 478; City of St. Joseph v. Dye, 72 Mo. App. 214; Trustees of Rochester v. Pettinger, 17 Wend. (N. Y.) 265; State v. Carter, 129 N. C. 560, 40 S. E. 11; State v. Spaugh, 129 N. C. 564, 40 S. E. 60. An exemption of farmers without a regular place of business and selling their own products, from the payment of a license fee is valid.

City of Pittsburgh v. Kalchthaler, 114 Pa. 547; City Council of Camden v. Roberts, 55 S. C. 374, 33 S. E. 456; Hoefling v. City of San Antonio, 85 Tex. 228, 20 S. W. 85, 16 L. R. A. 608; Sledd v. Com., 19 Grat. (Va.) 813; Newson v. City of Galveston, 76 Tex. 559, 7 L. R. A. 797.

[677] Bessette v. People, 193 Ill. 334, 56 L. R. A. 558, following and citing Howland v. City of Chicago, 108 Ill. 496; Hawthorn v. People, 109 Ill. 302; Braun v. City of Chicago, 110 Ill. 186.

[678] Duluth Brewing & Malting Co. v. City of Superior, 123 Fed. 353; United States Distilling Co. v. City of Chicago, 112 Ill. 19. A license fee is not a "tax" in the constitutional sense. City of Indianapolis v. Bieler, 138 Ind. 30, 36 N. E. 857. But an ordinance which discriminates between residents and nonresidents is void, and the same rule is held in Clements v. Town of Casper, 4 Wyo. 494, 35 Pac. 472; State v. Bixman, 162 Mo. 1, 62 S. W. 828.

[679] City of Little Rock v. Barton, 33 Ark. 436. A dealer in real estate for others, defined as a broker. Hinckley v. City of Belleville, 43 Ill. 183; Gast v. Buckley, 23 Ky. L. R. 992, 64 S. W. 632; City of New Orleans v. Metropolitan Loan Sav. & Pledge Bank, 31 La. Ann. 310; City of New Orleans v. New Orleans Sav. Inst., 32 La. Ann. 527.

State v. Citizens' Bank, 52 La. Ann. 1086. The fact that a charter of a bank exempts its "capital" from taxation does not relieve it of its liability for payment of an occupation or privilege license. Citing Bucher v. Cheshire R. Co., 125 U. S. 555; First Nat. Bank of Aberdeen v. Chehalis County, 166 U. S. 440; Nobles v. Georgia, 168 U. S. 398; Bisland v. Provosty, 14 La. Ann. 174; City of New Orleans v. People's Bank, 27 La. Ann. 646; Id., 32 La. Ann. 84.

City of New Orleans v. New Orleans Canal & Banking Co., 32 La. Ann. 104; and State v. Assessors for Parish of Orleans, 48 La. Ann. 39.

State v. Field, 49 Mo. 270; State v. Knox, 52 Mo. 418; Wooddy v. Com., 29 Grat. (Va.) 837. A single

men,[680] contractors,[681] one operating cotton press,[682] dealers in cotton seed oil,[683] common carriers,[684] dealers in second-hand goods,[685]

transaction does not constitute one a ship broker. Fairly v. Wappoo Mills, 44 S. C. 227, 29 L. R. A. 215. Raeder v. Butler, 19 Pa. Super. Ct. 604.

[680] In re Nichols, 48 Fed. 164, and In re Tyerman, 48 Fed. 167, hold that the imposition of a license fee from persons soliciting orders for goods, books, etc., cannot be upheld as a legitimate exercise of the police power.

Thomas v. City of Hot Springs, 34 Ark. 553. Such an ordinance held void as applied to competent physicians. L. B. Price Co. v. City of Atlanta, 105 Ga. 358, 31 S. E. 619; Kimmel v. City of Americus, 105 Ga. 694; City of Brookfield v. Kitchen, 163 Mo. 546, 63 S. W. 825; State v. Caldwell, 127 N. C. 521, 37 S. E. 138; Lewis v. Dugar, 91 N. C. 16. A drummer's license to be a protection must be in his possession while doing business. State v. Miller, 93 N. C. 511. A single sale of flour will not constitute one having a regular place of business a drummer within the meaning of the statute. Brownback v. Borough of North Wales, 194 Pa. 609, 49 L. R. A. 446; City of Norfolk v. Norfolk Landmark Pub. Co., 95 Va. 564.

[681] Figg v. Thompson, 20 Ky. L. R. 1322, 49 S. W. 202. But an ordinance requiring a license fee from contractors engaged in the business of contracting for public work is void as it tends to reduce competition in bidding for the construction of public works and, therefore, indirectly increases the burden of abutting property.

[682] State v. Hemard, 23 La. Ann. 263.

[683] Hazlehurst v. Decell (Miss.) 33 So. 412.

[684] Nashville, C. & St. L. R. Co. v. City of Attalla, 118 Ala. 362; People v. Stitt, 14 Colo. App. 43, 59 Pac. 62. But one must come within the definition of a common carrier before the payment of a license fee can be imposed. Goodwin v. City of Savannah, 53 Ga. 410; Gartside v. City of East St. Louis, 43 Ill. 47. The rule applied to an ordinance requiring persons hauling coal in wagons within the city limits to procure a license. Chicago General R. Co. v. City of Chicago, 176 Ill. 253; City of York v. Chicago, B. & Q. R. Co., 56 Neb. 572, 76 N. W. 1065. See, to the contrary, the case of City of Lynchburg v. Norfolk & W. R. Co., 80 Va. 237.

Nashville, C. & St. L. R. Co. v. Alabama City, 134 Ala. 414, 32 So. 731; 1 Mun. Corp. Cas. 608, 622.

[685] Lasley v. District of Columbia, 14 App. D. C. 407; Hotelling v. City of Chicago, 66 Ill. App. 289; Eastman v. City of Chicago, 79 Ill. 178. A book seller who occasionally buys and sells second-hand books is not a dealer in second-hand goods within the meaning of the ordinance which requires the payment of a license from such. City of Grand Rapids v. Braudy, 105 Mich. 670, 64 N. W. 29, 32 L. R. A. 116; Rosenbaum v. City of Newbern, 118 N. C. 83, 24 S. E. 1, 32 L. R. A. 123; City Council of Charleston v. Goldsmith, 12 S. C. (12 Rich.) 470; Shelton v. Silverfield, 104 Tenn. 67.

druggists or vendors of medicines,[686] emigrant agencies or agents,[687] express or draymen,[688] employment agencies,[689] engineers,[690] ferrymen,[691] fishermen,[692] "gift, fire and bankrupt

[686] Hildreth v. Crawford, 65 Iowa, 339; City of Walla Walla v. Ferdon, 21 Wash. 308, 57 Pac. 796.

[687] Williams v. Fears, 179 U. S. 270, affirming 110 Ga. 584, 35 S. E. 699, 50 L. R. A. 685. A law which requires the payment of a license fee to legally engage in the business of hiring persons to labor outside the state and not from persons engaged in hiring laborers to work within the state is not unconstitutional as denying the equal protection of the laws. Theus v. State, 114 Ga. 53, 39 S. E. 913. One employing laborers for his own service is not an "emigrant agent." State v. Hunt, 129 N. C. 686, 40 S. E. 216; Shepperd v. Sumpter County Com'rs, 59 Ga. 535; Williams v. Fears, 110 Ga. 584, 50 L. R. A. 685; Varner v. State, 110 Ga. 595.

[688] City of Cairo v. Adams Exp. Co., 54 Ill. App. 87; City of Cincinnati v. Bryson, 15 Ohio, 625; Edwards v. State (Tex. Cr. App.) 69 S. W. 144. A person carrying on one, two or more occupations should pay a license fee fixed for each.

[689] Price v. People, 193 Ill. 114, 55 L. R. A. 588; Moore v. City of St. Paul, 48 Minn. 331, 51 N. W. 219. Where the fee charged is neither uniform nor equal, the ordinance is void. See, also, Id., 61 Minn. 427, 63 N. W. 1087, citing Moore v. City of Minneapolis, 43 Minn. 422. "If the ordinance in question had provided for a uniform charge of $150 for a license for one year to carry on the business of 'an intelligence or employment office for males,' it would not have been so excessive or unreasonable as to justify us in holding the ordinance void. But under the provisions of this ordinance, no matter at what time in the year the application is made, the applicant is required to pay the fixed and invariable sum of $150 for a license for the unexpired part of the current year, that is until the first following January. * * * No doubt the city may, for its own convenience, make all licenses expire with the current year by charging for a license for a fraction of a year only a proportionate part of the fee required for a full year. But it has no authority to adopt any such arbitrary and unequal scale of charges as is provided for in this ordinance. The ordinance is clearly void." State v. Hunt, 129 N. C. 686, 40 S. E. 216.

[690] Ballard v. City of Chicago, 69 Ill. App. 638; City of St. Louis v. Meyrose Mfg. Co., 139 Mo. 560; Harmon v. State, 66 Ohio St. 249, 64 N. E. 117, 58 L. R. A. 618.

[691] Arkadelphia Lumber Co. v. City of Arkadelphia, 56 Ark. 370, 19 S. W. 1053; Burlington & H. C. Ferry Co. v. Davis, 48 Iowa, 133, 30 Am. Rep. 390. An exclusive license may be granted. City of Newport v. Taylor's Ex'rs, 55 Ky. (16 B. Mon.) 699; Chilvers v. People, 11 Mich. 43; Cauble v. Craig, 94 Mo. App. 675, 69 S. W. 49.

[692] Hastings v. Anacortes Packing Co., 29 Wash. 224, 69 Pac. 776; White Crest Canning Co. v. Sims, 30 Wash. 374, 70 Pac. 1003; Morgan

sales,"[693] "horse or cattle dealers,"[694] hackmen or drivers,[695]

v. Com., 98 Va. 812, 35 S. E. 448. In this case the claim was made that a license tax upon fishermen was against the Federal Constitution. The court said: "Neither is a license tax upon the residents of the state for the privilege of fishing in the waters belonging to the state in violation of any provision of the constitution of the state or of the United States. The navigable waters of the state and the soil under them within its territorial limits are the property of the state for the benefit of its own people, and it has a right to control them as it sees proper, provided it does not interfere with the authority granted the United States to regulate commerce and navigation. If the state has the right to require a license tax of merchants and others engaging in business upon their own capital, it certainly has the right to require a license tax of those who use the property of the state in carrying on their business as do the fishermen mentioned in the statute."

[693] State v. Schoenig, 72 Minn. 528, 75 N. W. 711. "We have no doubt that it is as much within the police power of the state to require licenses for conducting 'gift,' 'fire' and 'bankrupt' sales as it is to require licenses from pawnbrokers, peddlers, keepers of junk shops, ticket scalpers, keepers of loan offices and the like. This class of sales now has a well defined and well understood meaning. They are usually conducted by transients and strangers, who stay only a short time in one place, who are sometimes honest men but often sharpers who may deal honestly but who often and even generally sell shoddy and inferior goods and who attract trade by falsely representing that their goods are being sold at a great sacrifice because they have been somewhat injured by fire or because the owners are bankrupt or by luring ignorant people to buy by the promise to distribute gifts to purchasers. They frequently practice frauds on the public, but, because of their transient character, they are gone before the fraud is discovered. The goods are usually sold at auction. It is a business which is legitimate if honestly conducted but which, by reason of its peculiar character, is liable to become the means of perpetrating fraud and imposition on the public. The regulation of such a business by license and other legitimate means is, therefore, within the police power of the state."

Gift enterprises. Humes v. City of Ft. Smith, 93 Fed. 857; Fleetwood v. Read, 21 Wash. 547, 47 L. R. A. 205. See, also, Ex parte McKenna, 126 Cal. 429.

[694] City of St. Louis v. Knox, 74 Mo. 79.

[695] Stephens v. District of Columbia, 16 App. D. C. 279; City of Sacramento v. California Stage Co., 12 Cal. 134. A license fee can be imposed by a city though a part of the stage route is beyond the city limits.

City of Collinsville v. Cole, 78 Ill. 114. Such an ordinance, however, does not apply to one not making this his calling but who may, occasionally, in an emergency, haul a load of goods for another. Scudder v. Hinshaw, 134 Ind. 56, 33 N. E. 791; City of Burlington v. Unterkircher, 99 Iowa, 401, 68 N. W. 795; Com. v. Page, 155 Mass. 227; Ker-

hucksters,[696] insurance agents or companies,[697] jewelers, keepers

rigan v. Poole, 131 Mich. 305, 91 N. W. 163; State v. Finch, 78 Minn. 118, 80 N. W. 856, 46 L. R. A. 437. Where the license fees fixed are unreasonable in amount and discriminatory in their character, the ordinance fixing them will be held invalid. Borough of Belmar v. Barkalow, 67 N. J. Law, 504, 52 Atl. 157; City of New York v. Hexamer, 59 App. Div. 4, 69 N. Y. Supp. 198; Odell v. Bretney, 62 App. Div. 595, 71 N. Y. Supp. 449; City of New York v. Reesing, 38 Misc. 129, 77 N. Y. Supp. 82; Child v. Bemus, 17 R. I. 230, 12 L. R. A. 57.

[696] District of Columbia v. Oyster, 4 Mackey (D. C.) 285; State v. Smith, 67 Conn. 541; Bean v. City of Middlesborough, 22 Ky. L. R. 415, 57 S. W. 478. Com. v. Reid, 175 Mass. 325. The term "provisions" as used in public statutes, c. 68, § 1, requiring a person, going from place to place exposing goods for sale, to procure a license, does not include ice.

Dunham v. Trustees of Rochester, 5 Cow. (N. Y.) 462. An ordinance held void requiring the payment of a license fee from hucksters because it did not expressly appear that prudence required such an ordinance, and, moreover, it was in restraint of trade and void as contrary to the general principles and policies of the laws of the state. Brown v. Com., 98 Va. 366, 36 S. E. 485.

[697] Home Ins. Co. v. City Council of Augusta, 93 U. S. 116. A city ordinance imposing an annual license tax upon an insurance company in another state doing business in the city is not void as being within the prohibition of the national constitution which declares that no state shall pass any law impairing the obligation of a contract. Clark v. Port of Mobile, 67 Ala. 217; City & County of San Francisco v. Liverpool, L. & G. Ins. Co., 74 Cal. 113. A tax cannot be imposed on agents of foreign insurance companies, the proceeds to be used in creating and maintaining a firemen's relief fund for the county or state in which the property insured is situated. Home Ins. Co. v. City Council of Augusta, 50 Ga. 530; Illinois Mut. Life Ins. Co. v. City of Peoria, 29 Ill. 180; McKinney v. City of Alton, 41 Ill. App. 508. Insurance agent not included in term "broker." Walker v. City of Springfield, 94 Ill. 364; City of Chicago v. Phoenix Ins. Co., 126 Ill. 276. Cannot exact license of insurance companies. City of Burlington v. Putnam Ins. Co., 31 Iowa, 102; Scottish Union & Nat. Ins. Co. v. Herriott, 109 Iowa, 606; City of Leavenworth v. Booth, 15 Kan. 627; Simrall v. City of Covington, 90 Ky. 444, 9 L. R. A. 556. License fee may be exacted from agents. State v. Hibernia Ins. Co., 38 La. Ann. 465; City of New Orleans v. Liverpool, L. & G. Ins. Co., 52 La. Ann. 1904; City of New Orleans v. Penn Mut. Life Ins. Co., 106 La. 31; City of Lamar v. Adams, 90 Mo. App. 35; City of St. Louis v. Boatmen's Ins. & Trust Co., 47 Mo. 150; City of St. Joseph v. Ernst, 95 Mo. 360; City of Farmington v. Rutherford, 94 Mo. App. 328; Taylor v. Ashby, 3 Mont. 248; Humphreys v. City of Norfolk, 25 Grat. (Va.) 97; Templeton v. City of Tekamah, 32 Neb. 542; German-American Fire Ins. Co. v. City of Minden, 51 Neb. 870. Such a tax is valid if it is uniform. Aetna Fire Ins. Co. v. Reading, 119 Pa. 417;

of taverns, inns, hotels, or eating houses,[698] lotteries,[699] laundries,[700] livery or feed stables,[701] manufacturers,[702] merchants and

Milwaukee Fire Dept. v. Helfenstein, 16 Wis. 136; Vorys v. State, 67 Ohio St. 15, 65 N. E. 150.

[698] City of St. Louis v. Bircher, 7 Mo. App. 169; City of St. Louis v. Siegrist, 46 Mo. 593; Tiger v. Morris County Ct., 42 N. J. Law, 631; Black v. Gloucester City (N. J. Law) 48 Atl. 1112; State v. Hall, 73 N. C. 252; Com. v. Givin, 21 Pa. Super. Ct. 401; Mayo v. James, 12 Grat. (Va.) 17; Sights v. Yarnalls, 12 Grat. (Va.) 292.

[699] Johnson v. State, 137 Ala. 101, 34 So. 1018; Boyd v. State, 46 Ala. 329.

[700] Com. v. Pearl Laundry Co., 105 Ky. 259, 49 S. W. 26. A laundry license fee can be collected for each separate place "where clothes are washed." State v. Camp Sing, 18 Mont. 128, 32 L. R. A. 635; State v. French, 17 Mont. 54, 30 L. R. A. 415.

[701] Williams v. Garignes, 30 La. Ann. 1094; Morgan v. State, 64 Miss. 511.

State v. Powell, 100 N. C. 525. In this case objection was made to the license fee because the property was also subject to an ad valorem tax. The court said: "The appellant complains that the tax upon livery stable keepers is not measured by the value of the property employed in the business nor the extent of their operations. This is a matter addressed to the sound discretion of those who make the assessment and is not a usurpation of undelegated authority. The error consists in regarding the tax as imposed on property in which both uniformity and the ad valorem principle must be observed. This is not a property tax, but a tax upon an occupation or vocation and is not less so because the appurtenances to a livery stable necessary in conducting the business may be horses, carriages and other property. Indeed these articles though so used are still subject to the ad valorem assessment as property. As other trades purely personal without regard to the magnitude of the business carried on may be subjected to a tax of a fixed sum, we see no reason why those which require the use of property may not be." Bell v. Watson, 71 Tenn. (3 Lea) 328.

[702] American Sugar Refining Co. v. Louisiana, 179 U. S. 89. A discrimination against those refining the products of their own plantations and those engaged in the business of refining sugar by imposing a license fee upon the latter and not the former is not unconstitutional as denying such persons the equal protection of the law.

In re West Norfolk Lumber Co., 112 Fed. 759; State v. Anniston Rolling Mills, 125 Ala. 121, 27 So. 921; City of New Orleans v. Mannessier, 32 La. Ann. 1075; City of New Orleans v. Ernst, 35 La. Ann. 746; State v. A. W. Wilbert's Sons Lumber & Shingle Co., 51 La. Ann. 1223. Defining a manufacturer within the meaning of the exemption from the license tax as established by constitution of 1898, art. 229.

State v. Horton Land & Lumber Co., 161 Mo. 664, 61 S. W. 869; City of Joplin v. Leckie, 78 Mo. App. 8. The statutory authority to levy an occupation tax on a corporation

dealers in or vendors of merchandise,[703] milk vendors or dairy-

does not include the power to exact one from a natural person engaged in the same business. People v. Morgan, 59 App. Div. 302, 69 N. Y. Supp. 263. One to come within the exemption of domestic manufacturing corporations from the payment of a license tax must be wholly engaged in the business of manufacturing. F. S. Royster Guano Co. v. Town of Tarboro, 126 N. C. 68, 35 S. E. 231; State v. Chadbourn, 80 N. C. 479.

[703] Clark v. City of Titusville, 184 U. S. 329. A license tax upon merchants of a city according to the amount of their sales is not unconstitutional. City of Mobile v. Craft, 94 Ala. 156, 10 So. 534; Goldsmith v. City of Huntsville, 120 Ala. 182, 24 So. 509; Saks v. City of Birmingham, 120 Ala. 190, 24 So. 728; Long v. State, 27 Ala. 32. A license is a personal privilege and one issued to a member of the firm personally confers no authority upon his co-partner.

Ames v. People, 25 Colo. 508, 55 Pac. 725; Porter v. State, 58 Ala. 66; Merritt v. State, 59 Ala. 46; City & County of Sacramento v. Crocker, 16 Cal. 119; Ex parte Haskell, 112 Cal. 412, 44 Pac. 725, 32 L. R. A. 527; Ex parte Mount, 66 Cal. 448; Singer Mfg. Co. v. Wright, 97 Ga. 114, 35 L. R. A. 497. The principle of uniformity required by Ga. Const. art. 7, § 2, par. 1, is not violated so long as a given tax or license fee is made uniform upon all individuals belonging to the particular class on which it is imposed. The fact that the statutory authority includes certain occupations and excludes others is no objection so long as the principle above stated is followed. Joseph v. City of Milledgeville, 97 Ga. 513; Colson v. State, 7 Blackf. (Ind.) 590; City of Oskaloosa v. Tullis, 25 Iowa, 440; Snyder v. Closson, 84 Iowa, 184, 50 N. W. 678; Fecheimer v. City of Louisville, 84 Ky. 306. An ordinance requiring a license from a merchant of another state selling his goods by sample and not required by a resident of the state is unconstitutional as contravening United States Const. art. 4, § 2. See, also, as holding the same, State v. Bracco, 103 N. C. 349.

City of New Orleans v. Lusse, 21 La. Ann. 1. A statute forbidding cities to tax sales of articles manufactured within the state held constitutional. Murrell v. Bokenfohr, 108 La. 19, 32 So. 176. A license fee can be exacted for each place of business carried on by a single person.

City of New Orleans v. Koen, 38 La. Ann. 328. Merchants doing both a wholesale and retail business are subject to a license tax in each capacity. Union Oil Co. v. Marrero, 52 La. Ann. 357; Valentine v. Berrien Circuit Judge, 124 Mich. 664, 83 N. W. 594, 50 L. R. A. 493. A law is unconstitutional that requires merchants selling farm products upon commission to pay a license fee and give a bond in the sum of $5,000 for the faithful performance of their contracts.

Craig v. Pattison, 74 Miss. 881, 21 So. 756; Folkes v. State, 63 Miss. 81; Kansas City v. Lorber, 2 Mo. App. Rep'r, 1051; State v. Whittaker, 33 Mo. 457; State v. West, 34 Mo. 424. One selling goods upon the previous orders of customers is not a merchant within the meaning

men,[704] money loaners,[705] plumbers,[706] pawn brokers,[707] packing

of the Missouri statutes providing for the taxing and licensing of merchants. City of Aurora v. McGannon, 138 Mo. 38, 39 S. W. 469; City of Springfield v. Jacobs, 101 Mo. App. 339, 73 S. W. 1097; City of St. Charles v. Elsner, 155 Mo. 671; Thompson v. Ocean Grove Camp Meeting Ass'n, 55 N. J. Law, 507, 26 Atl. 798. License fee ordinances discriminating against nonresident merchants in favor of residents are void. Following, Morgan v. City of Orange, 50 N. J. Law, 389.

State v. Briggs, 130 N. C. 693, 41 S. E. 676; State v. Cohen, 84 N. C. 771; State v. Barnes, 126 N. C. 1063. The word "lumber dealer" implies a habitual course of buying and selling in that commodity; occasional sales will not make an ordinary merchant a lumber dealer. City of Williamsport v. Wenner, 172 Pa. 173; Com. v. Clark, 195 Pa. 634; Brown v. Com., 98 Va. 366, 36 S. E. 485. A person selling country products from his wagon on the market square is not liable to a fine as doing business as a merchant in such city.

[704] State v. Tyrrell, 73 Conn. 407, 47 Atl. 686. A city cannot pass an ordinance requiring a license from all milk vendors when the same is regulated by state constitution.

Mason v. City of Cumberland, 92 Md. 451, 48 Atl. 136; State v. Elofson, 36 Minn. 103, 90 N. W. 309. An ordinance exacting a license fee from vendors of milk held in violation of Gen. Laws 1895, c. 203, which provided inspection and license free of charge and prohibited the passage of ordinances in conflict with the act. Littlefield v. State, 42 Neb. 223, 28 L. R. A. 588; Blanke v. Board of Health of Hoboken, 64 N. J. Law, 42, 44 Atl. 847, citing Benson v. City of Hoboken, 33 N. J. Law, 280; North Hudson County R. Co. v. City of Hoboken, 41 N. J. Law, 71; Muhlenbrinck v. Long Branch Com'rs, 42 N. J. Law, 364; and Clark v. City of New Brunswick, 43 N. J. Law, 175.

People v. Mulholland, 82 N. Y. 324, 37 Am. Rep. 568; City of Norfolk v. Flynn, 101 Va. 473, 44 S. E. 717; Walton v. City of Toledo, 23 Ohio Cir. Ct. R. 547; 10 Mun. Corp. Cas. 614, and cases cited.

[705] Morton v. City of Macon, 111 Ga. 162, 50 L. R. A. 485. The imposition of a license fee which in amount is prohibitory is invalid. City of Davenport v. Rice, 75 Iowa, 74; City of New Orleans v. Comptoir Nat. D'Escompte De Paris, 104 La. 214, 29 So. 910; State v. Tolman, 106 La. 662. A license can be exacted though the licensee loans his own money. Mace v. Buchanan (Tenn. Ch. App.) 52 S. W. 505. Such a law does not include the purchaser of a judgment on a note for less than its face. City of Seattle v. Barto, 31 Wash. 141, 71 Pac. 735.

[706] City of Chicago v. Wilkie, 88 Ill. App. 315, reversed in 188 Ill. 444, 58 N. E. 1004; Franke v. Paducah Water Supply Co., 11 Ky. L. R. 17, 11 S. W. 432, 718; Johnston v. Dahlgren, 166 N. Y. 354; State v. Benzenberg, 101 Wis. 172, 76 N. W. 345; Schnaier v. Navarre Hotel & Imp. Co., 82 App. Div. 25, 81 N. Y. Supp. 633.

[707] City of Chicago v. Hulbert, 118 Ill. 632; Beiling v. City of Evansville, 144 Ind. 644, 35 L. R. A. 272; City of Grand Rapids v. Braudy,

houses,[708] photographers,[709] "privilege tax,"[710] scavengers,[711] dealers in illuminating oils,[712] tobacco dealers or buyers,[713] sellers of

105 Mich. 670, 32 L. R. A. 116; City of St. Paul v. Lytle, 69 Minn. 1, 71 N. W. 703. In this case the ordinance declares that any one "who by any means, method or device loans money on personal property when the same is deposited for security or is deposited for any other purpose, is hereby defined and declared a pawnbroker for the purpose of this ordinance." The license was attacked on the ground that the definition of a pawnbroker as given was too broad. The court said: "The second point is that the first section of the ordinance is invalid for the reason that it attempts to establish a definition of a 'pawnbroker' different from the commonly understood and accepted definition of that word. It may be conceded that under authority to license and regulate pawnbrokers the city of St. Paul can acquire no power to license and regulate some other business by merely calling it the business of pawnbroker. * * * But, even if the definition is broader than the ordinary meaning of the word, the ordinance would not be invalid. The attempted broader definition alone would be invalid." City of St. Joseph v. Levin, 128 Mo. 588, 31 S. W. 101; State v. Taft, 118 N. C. 1190, 32 L. R. A. 122; City of Seattle v. Barto, 31 Wash. 141, 71 Pac. 735.

[708] Chicago Packing & Provision Co. v. City of Chicago, 88 Ill. 221. The power to regulate implies the power to license. The general law of the state of Illinois gives the council power to "regulate" packing houses. The court say: "Then does the power to regulate the management include the power to prescribe their duties and require them to obtain a license to pursue their business on the prescribed terms? We are clearly of opinion that the power to require a license is one of the means of regulating the exercise or pursuit of this business. There are no doubt, a great variety of other means that might be adopted to accomplish the purpose but these municipalities are not restricted as to the means they shall employ to regulate the business. In the various illustrations of the meaning of the word 'regulate' we find among others, 'To direct; to rule; to govern; to conduct.' As the language is used in reference to the power of a city or village government, we must suppose it was intended to mean that such bodies might rule or govern this character of business. * * * We are, therefore, clearly of opinion that the power is conferred to require the license in this case under the * * * general law."

[709] State v. Schlier, 50 Tenn. (3 Heisk.) 281; City of New Orleans v. Robira, 42 La. Ann. 1098, 11 L. R. A. 141.

[710] Paul v. Virginia, 75 U. S. (8 Wall.) 168.

[711] Vandine's Case, 23 Mass. (6 Pick.) 187; De Lano v. Doyle, 120 Mich. 258, 79 N. W. 188; City of St. Louis v. Weitzel, 130 Mo. 600; Cavanaugh v. City of Pawtucket, 23 R. I. 102, 49 Atl. 494.

[712] Standard Oil Co. v. City of Spartanburg, 66 S. C. 37.

[713] See Carter v. State, 44 Ala. 29, for the definition of a "dealer in tobacco." Gundling v. City of Chica-

cigarettes,[714] traders,[715] telegraph companies,[716] those engaged in the business of "raising, grazing and pasturing sheep,"[717] and every sewing machine company selling sewing machines.[718] In defining an occupation or business within the meaning of such statutes or ordinances, it is not necessary to establish the fact that the person pursued it during a protracted length of time,[719] neither, on the other hand, does a single act or transaction bring a person within the statute or ordinances.[720]

§ 408. As affected by the interstate commerce clause.

In section 400 the limitations imposed by the Federal constitution upon the power of the state to impose a license fee are referred to and the principle stated that when such a license fee violates the Federal constitution it necessarily follows that it is void. The provision in the Federal constitution most frequently urged as an objection to its validity is that one vesting in Congress the exclusive power to regulate commerce between the states with foreign nations and Indian tribes and in connection with cases imposing license taxes or fees on occupations, generally speaking, drummers, peddlers and auctioneers. The early cases commencing with Osborne v. City of Mobile, 83 U. S. (16 Wall.) 479,[721] decided

go, 176 Ill. 340, 48 L. R. A. 230; State v. Irvin, 126 N. C. 989; Blaufield v. State, 103 Tenn. 593.

[714] Cook v. Marshall County, 119 Iowa, 384, 93 N. W. 372.

[715] Johnson v. State, 44 Ala. 414; Weil v. State, 52 Ala. 19; City of Little Rock v. Barton, 33 Ark. 436.

[716] Western Union Tel. Co. v. Village of Wakefield (Neb.) 95 N. W. 659; Mann's Choice Borough v. Western Union Tel. Co., 21 Pa. Super. Ct. 438; Western Union Tel. Co. v. City of Richmond, 26 Grat. (Va.) 1; Hodges v. Western Union Tel. Co., 72 Miss. 910, 29 L. R. A. 770.

[717] Flanigan v. Sierra County, 122 Fed. 24; Ex parte Mirande, 73 Cal. 365; Mono County v. Flanigan, 130 Cal. 105, 62 Pac. 293. Such an ordinance does not, however, apply to one who merely drives his sheep through the county as expeditiously as possible. But, see, to the contrary, Cache County v. Jensen, 21 Utah, 207.

[718] Quartlebaum v. State, 79 Ala. 1; Baker v. State, 44 Ark. 134; New Home Sewing Mach. Co. v. Fletcher, 44 Ark. 139.

[719] Johnson v. State, 44 Ala. 414.

[720] Cary v. Borough of North Plainfield, 49 N. J. Law, 110; Ayrnett v. Edmundson, 68 Tenn. (9 Baxt.) 610; Wooddy v. Com., 29 Grat. (Va.) 837.

[721] Charlotte, C. & A. R. Co. v. Gibbes, 142 U. S. 386; Pittsburgh, C., C. & St. L. R. Co. v. Backus, 154 U. S. 421; New York L., E. & W. R. Co. v. Pennsylvania, 158 U. S. 431; Southern Exp. Co. v. Virginia, 168

by the supreme court of the United States in 1872, distinguished between the occupation itself and the business carried on, and held that the state could license an occupation although the business or a portion of it carried on by the licensee was interstate in its character. This doctrine was modified by succeeding decisions, and finally in the case of Leloup v. Port of Mobile,[722] the court expressly overruled the Osborne Case, and held that where the business of a corporation or individual was that of carrying on interstate commerce, a state could not impose a license fee upon such corporation when it could not regulate or tax the business itself.[723] And this general principle includes the subordinate one

U. S. 705; Western Union Tel. Co. v. Village of Wakefield (Neb.) 95 N. W. 659; Tide Water Pipe Co. v. State Board of Assessors, 57 N. J. Law, 516, 27 L. R. A. 684; People v. Campbell, 74 Hun (N. Y.) 210; Com. v. Lehigh Valley R. Co., 129 Pa. 308; State v. State Board of Assessment & Equalization, 3 S. D. 338.

[722] Leloup v. Port of Mobile, 127 U. S. 640. "The question is squarely presented to us whether a state as a condition of doing business within its jurisdiction may exact a license tax from a telegraph company a large part of whose business is the transmission of messages from one state to another and between the United States and foreign countries and which is invested with the powers and privileges conferred by the act of Congress, passed July 24, 1866, and other acts incorporated in Title LXV of the Revised Statutes? Can a state prohibit such a company from doing such a business within its jurisdiction, unless it will pay a tax and procure a license for the privilege? If it can, it can exclude such companies and prohibit the transaction of such business altogether. We are not prepared to say that this can be done. Ordinary occupations are taxed in various ways, and, in most cases, legitimately taxed. But we fail to see how a state can tax a business occupation when it cannot tax the business itself. Of course, the exaction of a license tax, as a condition of doing any particular business, is a tax on the occupation; and a tax on the occupation of doing a business is surely a tax on the business."

[723] Ward v. Maryland, 79 U. S. (12 Wall.) 418; Western Union Tel. Co. v. Texas, 105 U. S. 460; Pensacola Tel. Co. v. Western Union Tel. Co., 96 U. S. 1; Moran v. City of New Orleans, 112 U. S. 69; Pickard v. Pullman Southern Car Co., 117 U. S. 34; Philadelphia & S. Steamship Co. v. Pennsylvania, 122 U. S. 326; Ratterman v. Western Union Tel. Co., 127 U. S. 411; Western Union Tel. Co. v. Alabama State Board of Assessment, 132 U. S. 472; Norfolk & W. R. Co. v. Pennsylvania, 136 U. S. 114, reversing 114 Pa. 256; McCall v. California, 136 U. S. 104; Crutcher v. Kentucky, 141 U. S. 47. Stockard v. Morgan, 185 U. S. 27. A privilege tax imposed by a state statute upon residents of that state as merchandise brokers whose business is exclusively confined to soliciting orders from jobbers and wholesale dealers within the state as agents for non-

that a state cannot impose a tax upon a person engaged in soliciting orders for goods for his nonresident employer by whom such goods are to be delivered from without the state.[724] Neither can a sale, by sample or otherwise, of goods owned by nonresidents and not yet brought within a state, be subjected to a state tax or

resident parties, firms or corporations for goods to be shipped by such nonresident principals to such jobbers or dealers is not unconstitutional or in violation of the commerce clause of the constitution of the United States. The court in its opinion by Mr. Justice Peckham say: "The fact that the state or the court may call the business of an individual when employed by more than one person outside of the state to sell their merchandise upon commission, a 'brokerage business,' gives no authority to the state to tax such a business as complainants; the name does not alter the character of the transaction nor prevent the tax thus laid from being a tax upon interstate commerce. As was said by Mr. Justice Bradley in Robbins v. Shelby County Taxing Dist., 120 U. S. 489. 'The mere calling the business of a drummer a privilege cannot make it so. Can the State Legislature make it a Tennessee privilege to carry on the business of importing goods from foreign countries? If not, has it any better right to make it a state privilege to carry on interstate commerce?' It is still a carrying on of interstate commerce whether the party is acting for one or more principals residing outside of the state and selling their goods through his procurement, acting for them as their agent." See, also, notes, 1 L. R. A. 56; 5 L. R. A. 559; 6 L. R. A. 579; 9 L. R. A. 366; 10 L. R. A. 616; 11 L. R. A. 179; 13 L. R. A. 107, and note to Stockard v. Morgan, 46 L. Ed. 785; City of Leavenworth v. Smith, 5 Kan. App. 165, 48 Pac. 924; People v. Wemple, 138 N. Y. 1, 19 L. R. A. 694, and 2 Mun. Corp. Cas. 439, 445.

[724] Brennan v. City of Titusville, 153 U. S. 289, reversing Titusville v. Brennan, 143 Pa. 642; Louisiana v. Lagarde, 60 Fed. 186; In re Mitchell, 62 Fed. 576; Ex parte Hough, 69 Fed. 330; In re Tinsman, 95 Fed. 648; Stratford v. City Council of Montgomery, 110 Ala. 619; Ex parte Thomas, 71 Cal. 204; Rodgers v. McCoy, 6 Dak. 238; McClelland v. City of Marietta, 96 Ga. 749; Martin v. Town of Rosedale, 130 Ind. 109; McClellan v. Pettigrew, 44 La. Ann. 356; People v. Bunker, 128 Mich. 160, 87 N. W. 90; Richardson v. State (Miss.) 11 So. 934; Overton v. City of Vicksburg, 70 Miss. 558; State v. Caldwell, 127 N. C. 521; State v. O'Connor, 5 N. D. 629; Baxter v. Thomas, 4 Okl. 605; State v. Coop, 52 S. C. 508, 41 L. R. A. 501; City of Laurens v. Elmore, 55 S. C. 477, 45 L. R. A. 249; Hurford v. State, 91 Tenn. 669; State v. Scott, 98 Tenn. 254, 36 L. R. A. 461. A person soliciting orders for pictures to be enlarged outside the state is not subject to a privilege tax imposed by a state statute on all persons other than resident photographers who do such business. Talbutt v. State, 39 Tex. Cr. R. 64; Turner v. State, 41 Tex. Cr. App. 545, 55 S. W. 835; French v. State, 42 Tex. Cr. App. 222, 58 S. W. 1015, overruled in Saulsbury v. State, 43 Tex. Cr. App. 90, 63 S. W. 568, relying on Emert v. Missouri, 156 U. S. 296.

license fee.[725] Neither is a Federal franchise or right to engage in an occupation or business the subject of a license fee imposed by a state for the purpose of raising revenue.[726] The law given above does not conflict with the right of a state to regulate or control, by virtue of its police power, a business or an occupation, and to charge a reasonable fee for the sole purpose of meeting the expense of such regulation or control.[727] Neither does it interfere

[725] Robbins v. Shelby County Taxing Dist., 120 U. S. 490; Corson v. Maryland, 120 U. S. 502; Asher v. Texas, 128 U. S. 130; Stoutenburgh v. Hennick, 129 U. S. 141; Ex parte Stockton, 33 Fed. 95; In re Spain, 47 Fed. 208, 14 L. R. A. 97; Ex parte Loeb, 72 Fed. 657; In re Lebolt, 77 Fed. 587; In re Bergen, 115 Fed. 343; State v. Agee, 83 Ala. 110; Ex parte Murray, 93 Ala. 78; Gunn v. White Sewing Mach. Co., 57 Ark. 24, 18 L. R. A. 206; McLaughlin v. City of South Bend, 126 Ind. 471, 10 L. R. A. 357; City of Ft. Scott v. Pelton, 39 Kan. 764; State v. Hickox, 64 Kan. 650, 68 Pac. 35; Simmons Hardware Co. v. McGuire, 39 La. Ann. 848; Ferraris v. Kyle, 19 Nev. 435; State v. Bracco, 103 N. C. 349; Adkins v. City of Richmond, 98 Va. 91, 47 L. R. A. 583; State v. Lichtenstein, 44 W. Va. 99.

[726] Harmon v. City of Chicago, 147 U. S. 396; Postal Tel. Cable Co. v. City of Charleston, 153 U. S. 692; Postal Tel. Co. v. Adams, 155 U. S. 688. This case holds the commonly accepted doctrine, namely, that taxation of commerce or any of its industries or means should be regarded in effect as a regulation. Central Pac. R. Co. v. California, 162 U. S. 91; Southern Pac. R. Co. v. California, 162 U. S. 167; Osborne v. Florida, 164 U. S. 650, 39 Am. St. Rep. 99; State v. Butler, 71 Tenn. (3 Lea) 222.

[727] In re State Freight Tax, 82 U. S. (15 Wall.) 232; Morgan's Steamship Co. v. Louisiana Board of Health, 118 U. S. 455; City of St. Louis v. Western Union Tel. Co., 148 U. S. 92. In this connection, the general principle holds that "where the whole or any part of such collections go to defray governmental expenses it is perhaps the strongest evidence that the payment required is in fact a tax. On the other hand, where the amount contributed to the government is small and the payment required is reasonably related to the service rendered, the evidence strongly supports the conclusion that such a requirement is not a tax but is compensation for services." But see Gundling v. City of Chicago, 177 U. S. 183. In this case the court holds that a license fee sufficiently high to make it partake of a privilege tax as well as to provide means for the regulation of the business is not in violation of any portion of the Federal Constitution.

Brewster v. City of Pine Bluff, 70 Ark. 28, 65 S. W. 934; State v. Glavin, 67 Conn. 29; Price v. People, 193 Ill. 114, 55 L. R. A. 588; West v. City of Mt. Sterling, 23 Ky. L. R. 1670, 65 S. W. 120; State v. Snowman, 94 Me. 99, 50 L. R. A. 544; State v. Ashbrook, 154 Mo. 375, 48 L. R. A. 265. To be valid, such a statute must come strictly within the principles laid down in the text; act of May 16, 1899, relative to a

with its right to control and regulate the right of a foreign corporation to do business within its borders.[728] On these questions, Federal courts are not bound by state decisions construing provisions authorizing the imposition of such fees and if in effect such a statute or ordinance amounts to a regulation of interstate commerce as broadly defined, or a levying of a tax upon the Federal agency, it will be held void.[729] As the supreme court said in a recent case,[730] "In all cases of this kind, it has been repeatedly held that when the question is raised whether the state statute is a just exercise of state power, or is intended by roundabout means to invade the domain of Federal authority, this court will look into the operation and effect of the statute to discern its purpose." In respect to the validity of a license fee imposed upon drummers, peddlers and auctioneers, as already suggested, the early cases made no distinction between the occupation itself and the business carried on. The substantial business of both the merchant and a drummer or peddler is the sale of goods. A merchant has a fixed place of business, while a drummer has none, and solicits orders for merchandise to be subsequently shipped to the purchaser. A peddler, on the other hand, not only solicits the sale of goods but transports these with him from place to place. The authorities hold, although there are some to the contrary,[731] that the occupation of a drummer or merchant soliciting the sale of articles of

license tax on mortgages held void. Citing Goldsmith v. City of Huntsville, 120 Ala. 182; Kimmel v. City of Americus, 105 Ga. 694; City Council of Camden v. Roberts, 55 S. C. 374.

State v. Bevins, 70 Vt. 574, 41 Atl. 655; Prentice & E. Commerce Clause, p. 148.

[728] No attempt will be made to make an exhaustive citation of authorities on this point. See Clark & M. Private Corp. pp. 786 et seq.; Cook, Corp. §§ 996 et seq.; 4 Thompson, Corp. §§ 5460 et seq.; Prentice & E. Commerce Clause, pp. 274 et seq.

Osborne v. Florida, 164 U. S. 650.

[729] Georgia Packing Co. v. City of Macon, 60 Fed. 774, 22 L. R. A. 775; Ames v. People, 25 Colo. 508; Jackson Min. Co. v. Auditor General, 32 Mich. 488.

[730] Morgan's Steamship Co. v. Louisiana Board of Health, 118 U. S. 455, citing, also, as sustaining the text, Cannon v. City of New Orleans, 87 U. S. (20 Wall.) 587; Henderson v. City of New York, 92 U. S. 259; Chy Lung v. Freeman, 92 U. S. 275.

[731] Singer Mfg. Co. v. Wright, 33 Fed. 121; Hynes v. Briggs, 41 Fed. 468; In re Nichols, 48 Fed. 164; American Harrow Co. v. Shaffer, 68 Fed. 750; Weaver v. State, 89 Ga. 639; Metz v. Hagerty, 51 Ohio St. 521; State v. Pinckney, 10 Rich. Law (S. C.) 474; Biddle v. Com., 13 Serg. & R. (Pa.) 405

interstate commerce, or of peddlers selling goods in the original packages, cannot be taxed through the exaction of a license fee.[732] The authorities, however, universally hold that a state tax on peddlers who carry goods and deliver them upon the making of a sale is not a regulation of interstate commerce and therefore not unconstitutional, provided no discrimination is made against persons or property of other states,[733] even though such merchandise

[732] Ward v. Maryland, 79 U. S. (12 Wall.) 418; Welton v. Missouri, 91 U. S. 275; Robbins v. Shelby County Taxing Dist., 120 U. S. 489; Corson v. Maryland, 120 U. S. 502; Asher v. Texas, 128 U. S. 129; Brennan v. City of Titusville, 153 U. S. 289; In re Kimmel, 41 Fed. 775; In re White, 43 Fed. 913, 11 L. R. A. 284; In re Spain, 47 Fed. 208, 14 L. R. A. 97; In re Houston, 47 Fed. 539, 14 L. R. A. 719; In re Rozelle, 57 Fed. 155; In re Flinn, 57 Fed. 496; In re Mitchell, 62 Fed. 576; Ex parte Hough, 69 Fed. 330; In re Hennick, 5 Mackey (D. C.) 489; State v. Agee, 83 Ala. 110; Ex parte Murray, 93 Ala. 78; Stratford v. City Council of Montgomery, 110 Ala. 619; McClelland v. City of Marietta, 96 Ga. 749; Wrought Iron Range Co. v. Johnson, 84 Ga. 754, 8 L. R. A. 273; City of Bloomington v. Bourland, 137 Ill. 534; McLaughlin v. City of South Bend, 126 Ind. 471, 10 L. R. A. 357; Martin v. Town of Rosedale, 130 Ind. 109; City of Huntington v. Mahan, 142 Ind. 695; City of Ft. Scott v. Pelton, 39 Kan. 764.

City of Caldwell v. Prunelle, 57 Kan. 511: Where the question of interstate commerce is not involved, the fact that a larger license fee is required from a nonresident than a resident does not necessarily render invalid the ordinance. Fecheimer v. City of Louisville, 84 Ky. 306; Wilcox Cordage & Supply Co. v. Mosher, 114 Mich. 64, 72 N. W. 117; Coit v. Sutton, 102 Mich. 324, 25 L. R. A. 819; Richardson v. State (Miss.) 11 So. 934; Overton v. City of Vicksburg, 70 Miss. 558; Ex parte Rosenblatt, 19 Nev. 439; State v. Bracco, 103 N. C. 349. See, to the contrary, Woodruff v. Parham, 41 Ala. 334; Id., 75 U. S. (8 Wall.) 139.

State v. O'Connor, 5 N. D. 629; Baxter v. Thomas, 4 Okl. 605; Rothermel v. Meyerle, 136 Pa. 250, 9 L. R. A. 366; Hurford v. State, 91 Tenn. 669; Ex parte Holman, 36 Tex. Cr. App. 255; Talbutt v. State, 39 Tex. Cr. R. 64, 44 S. W. 1091; Clements v. Town of Casper, 4 Wyo. 494.

[733] Howe Mach. Co. v. Gage, 100 U. S. 676; Emert v. Missouri, 156 U. S. 296; American Harrow Co. v. Shaffer, 68 Fed. 750; Preston v. Finley, 72 Fed. 850; Hall v. State, 39 Fla. 637; Singer Mfg. Co. v. Wright, 97 Ga. 114, 35 L. R. A. 497; Walton v. City Council of Augusta, 104 Ga. 757; L. B. Price Co. v. City of Atlanta, 105 Ga. 358; Chrystal v. City of Macon, 108 Ga. 27; City of South Bend v. Martin, 142 Ind. 31, 29 L. R. A. 531; State v. Montgomery, 92 Me. 433; People v. Sawyer, 106 Mich. 428; State v. Emert, 103 Mo. 241, 11 L. R. A. 219; State v. Snoddy, 128 Mo. 523; State v. Wessell, 109 N. C. 735. One engaged in selling sewing machines on his own account though manufactured without the state is not engaged in interstate commerce.

Wrought Iron Range Co. v. Carver,

is still the property of a foreign corporation and is sold in the same form and shape in which the goods were imported into the state.[734] The distinction should be had in mind at all times between an exercise of the police power in this respect or an attempted exercise of the power of taxation amounting in effect to a regulation of interstate commerce,[735] and also between laws adopted in good faith for the regulation of peddlers or others and those of a discriminatory nature against nonresidents whether such be the ostensible purpose or otherwise.[736] The law recognizes the difference between the occupations of a drummer and peddler, and the authorities quite generally hold that the occupation of peddling can be licensed as a legitimate exercise of the police power.[737]

118 N. C. 328; Com. v. Gardner, 133 Pa. 284, 7 L. R. A. 666; Com. v. Dunham, 191 Pa. 73; Saulsbury v. State, 43 Tex. Cr. R. 90, 63 S. W. 568; Kirkpatrick v. State, 42 Tex. Cr. R. 459, 60 S. W. 762; State v. Pratt, 59 Vt. 590; State v. Willingham, 9 Wyo. 290, 62 Pac. 797; Clements v. Town of Casper, 4 Wyo. 494. But see Racine Iron Co. v. McCommons, 111 Ga. 536, 51 L. R. A. 134, where the court said: "It appears very plain to us that when a traveling salesman so far departs from the vocation ordinarily pursued by a commercial traveler as to actually vend the goods for which he solicits orders he ceases to be a mere 'drummer' in the sense in which that term is used by Mr. Justice Bradley in Robbins' Case." See, also, note 14 L. R. A. 97.

[734] City of Carrollton v. Bazzette, 159 Ill. 289; State v. Wheelock, 95 Iowa, 577, 30 L. R. A. 429; West v. City of Mt. Sterling, 23 Ky. L. R. 1670, 65 S. W. 120; Rash v. Farley, 91 Ky. 344; Com. v. Newhall, 164 Mass. 338; Kimmell v. State, 104 Tenn. 184; Croy v. Obion County, 104 Tenn. 525, 51 L. R. A. 254. But see Pegues v. Ray, 50 La. Ann. 574; and City of Huntington v. Mahan, 142 Ind. 695.

[735] Erie R. Co. v. State, 31 N. J. Law, 531, 86 Am. Dec. 226; Lumberville Delaware Bridge Co. v. State Board of Assessors, 55 N. J. Law, 529, 25 L. R. A. 134; State v. Gorham, 115 N. C. 721, 44 Am. St. Rep. 494, 25 L. R. A. 810.

[736] In re Schechter, 63 Fed. 695; Ames v. People, 25 Colo. 508; Com. v. Myer, 92 Va. 809, 31 L. R. A. 379.

[737] Howe Mach. Co. v. Gage, 100 U. S. 676; Emert v. Missouri, 156 U. S. 296, affirming 103 Mo. 241, 11 L. R. A. 219; Singer Mfg. Co. v. Wright, 33 Fed. 121; In re Tyerman, 48 Fed. 167; American Harrow Co. v. Shaffer, 68 Fed. 750; Hall v. State, 39 Fla. 637; Weaver v. State, 89 Ga. 639; Martin v. Town of Rosedale, 130 Ind. 109, 29 N. E. 410; Sears v. Warren County Com'rs, 36 Ind. 267; City of South Bend v. Martin, 142 Ind. 31, 29 L. R. A. 531; Cole v. Randolph, 31 La. Ann. 535; City of Grand Rapids v. Norman, 110 Mich. 544, 68 N. W. 269. A maximum amount of $15 per day held not unreasonable. City of

§ 409. Road or poll tax.

As an additional source of revenue imposed for a specific purpose, it is clearly within the power of the legislature to require a prescribed service for the improvement of streets and highways from such individuals as may be designated, or, in lieu of personal service or labor, the payment of a money substitute.[738] That a

Duluth v. Krupp, 46 Minn. 435, 49 N. W. 235.

State v. Wagener, 69 Minn. 206, 72 N. W. 67, 38 L. R. A. 677. Laws 1897, c. 107, pertaining to the license of hawkers and peddlers throughout the state held unconstitutional as contravening sections 33 and 34 of art. 4 of the constitution prohibiting partial and class legislation. State v. Shapleigh, 27 Mo. 344; State v. Parsons, 124 Mo. 436; State v. Snoddy, 128 Mo. 523; Wilmington Com'rs v. Roby, 30 N. C. (8 Ired.) 250; State v. Wessell, 109 N. C. 735; Wrought Iron Range Co. v. Carver, 118 N. C. 328; Metz v. Hagerty, 51 Ohio St. 521; Com. v. Walker, 3 Pa. Dist. R. 534; Port Clinton Borough v. Shafer, 5 Pa. Dist. R. 583; State v. Pinckney, 10 Rich. Law (S. C.) 474; Biddle v. Com., 13 Serg. & R. (Pa.) 405; State v. Richards, 32 W. Va. 348, 3 L. R. A. 705. McQuillin, Mun. Ord. p. 658. "'A peddler, within the general accepted meaning of the word, is a small retail dealer, who carries his merchandise with him, traveling from place to place, and from house to house, exposing his goods for sale and selling them.' There are five elements which constitute a peddler: 1. He should have no fixed place of dealing, but should travel from place to place. 2. He should carry with him the wares he offers for sale, not merely samples thereof. 3. He should sell them at the time he offers them, not merely enter into an executory contract for future sale. 4. He should deliver the goods then and there, not merely contract to deliver them in the future. 5. The sales made by him should be to consumers and not confined exclusively to dealers in the articles sold by him. 'The fact that the sales are to consumers and not to dealers is the distinguishing feature.'"

[738] Baader v. City of Cullman, 115 Ala. 539, 22 So. 19; Chiles v. State, 45 Ark. 143; Moore v. Town of Jonesboro, 107 Ga. 704, 33 S. E. 435; Macomb v. Twaddle, 4 Ill. App. 254; Village of Wapella v. Davis, 39 Ill. App. 592; Town of Fenton v. Peters, 50 Ill. App. 41; Wahl v. City of Nauvoo, 64 Ill. App. 17; Cooper v. Ash, 76 Ill. 11; Leedy v. Town of Bourbon, 12 Ind. App. 486, 40 N. E. 640; In re Hagan, 65 Kan. 857, 68 Pac. 1104; State v. City of Topeka, 36 Kan. 76; Stone v. Bean, 81 Mass. (15 Gray) 42; Town of Tipton v. Norman, 72 Mo. 380; Wallace v. Bradshaw, 56 N. J. Law, 339; Hampton v. Hamsher, 46 Hun (N. Y.) 144; Buncombe Turnpike Co. v. McCarson, 18 N. C. (1 Dev. & B.) 306.

State v. Gillikin, 114 N. C. 832. The fact that a person does not use a road upon which he is required to work is no defense to his liability. State v. Joyce, 121 N. C. 610, 28 S. E. 366; Town of Grand Isle v. Towns of

public or quasi public corporation exercise this right, it is necessary that the legislative authority exist.[739] It follows that as the power is one derived or delegated, all the provisions of the granting statutes in respect to notice required,[740] and the enforcement of the right, must be strictly followed,[741] and only the property

Milton & Colchester, 68 Vt. 234; State v. Sharp, 125 N. C. 628, and cases cited; State v. Neal, 109 N. C. 859.

See decisions collected in 27 Am. & Eng. Corp. Cas. p. 12, note, and see, also, Ex parte Grace, 9 Tex. App. 381, where it was held that the power "to open, widen, extend, improve or abolish streets" did not authorize a city to compel citizens to work the street subject to a fine upon a failure to do so.

[739] Galloway v. Town of Tavares, 37 Fla. 58, 19 So. 170; Cleveland, C., C. & St. L. R. Co. v. Randle, 183 Ill. 364; Chicago & N. W. R. Co. v. People, 193 Ill. 539; Bradish v. Lucken, 38 Minn. 186; Wallace v. Bradshaw, 56 N. J. Law, 339; Ex parte Campbell (Tex. Cr. R.) 22 S. W. 1020.

[740] State v. Snyder, 41 Ark. 226. It is necessary to allege how the notice was given in an indictment for failing to work the road after notice. Moore v. State, 52 Ark. 265; Lowry v. State, 52 Ark. 270; State v. Wainright, 60 Ark. 280; Wahl v. City of Nauvoo, 64 Ill. App. 17; Chicago & N. W. R. Co. v. People, 183 Ill. 196; Id., 184 Ill. 174; Heman v. St. Louis Merchants' Land Imp. Co., 75 Mo. App. 372; Burlington & M. R. R. Co. v. Lancaster County, 4 Neb. 293. The failure to give the proper notice will not release land subject to the laws of the road tax. State v. Baker, 108 N. C. 799, 13 S. E. 214; State v. Yoder, 129 N. C. 544, 40 S. E. 3; State v. Telfair, 130 N. C. 645, 40 S. E. 976; State v. Pool, 106 N. C. 698; State v. Sharp, 125 N. C. 628, and cases cited; State v. Covington, 125 N. C. 641.

[741] Kinney v. People, 52 Ill. App. 359. But the statutory provision that complaint shall be made within twenty days after a certain specified time against those not paying their poll tax held directory merely and the prosecution will not be barred by the lapse of more than twenty days. Reynolds v. Town of Foster, 89 Ill. 257. A person in an action brought against him to recover the penalty for neglect or refusal to work his road tax cannot raise the question of the existence of the highway.

Chicago & N. W. R. Co. v. People, 197 Ill. 411; In re Ashby, 60 Kan. 101, 55 Pac. 336. Kan. Laws 1891, c. 114. The "eight-hour law" controlling the length of day's labor required by city laborers, applies to persons working out their poll tax. An ordinance requiring, therefore, a poll tax of two days' labor of ten hours per day is void. Tufts v. Inhabitants of Lexington, 72 Me. 516; Inhabitants of Sumner v. Gardiner, 88 Me. 584. But see the case of Auditor General v. Longyear, 110 Mich. 223, 68 N. W. 130.

Lake Superior Ship Canal R. & Iron Co. v. Thompson Tp., 56 Mich. 493; Hamilton & Merryman Co. v. L'Anse Tp., 107 Mich. 419, 65 N. W. 282; State v. Tracy, 82 Minn. 317, 84 N. W. 1015; Madison County v. Collier, 79 Miss. 220, 30 So. 610; Wallace v. Bradshaw, 55 N. J. Law, 117,

or individuals that clearly come within the provisions of the statute will be held subject to the burden.[742] Exemptions are not liberally construed,[743] and those remedies alone that may be given by law for the enforcement of the tax can be pursued,[744] and in the manner and court prescribed.[745]

25 Atl. 271; State v. Witherspoon, 75 N. C. 222. The illegality of the highway cannot be urged as an objection to the enforcement of the poll tax.

State v. Smith, 103 N. C. 403; In re Delinquent Poll Tax (R. I.) 44 Atl. 805. A provision for imprisonment upon a failure to pay poll tax is not in violation of constitution, art. 1, sections 11 and 15 relating to imprisonment of a debtor.

[742] On Yuen Hai Co. v. Ross, 14 Fed. 338. Temporary employment as laborers within a road district does not make one a "resident" and subject to the performance of road labor. Ward v. State, 88 Ala. 202; Ward v. City of Little Rock, 41 Ark. 526. Where the constitution provides that convicts may be worked on "public improvements," a city ordinance forbidding their employment on the city streets is invalid.

Porter v. State, 141 Ind. 488; Dees v. State (Miss.) 7 So. 326; Watkins v. State (Miss.) 11 So. 532. Temporary sickness will excuse a person from work on a road when legally required. Van Dien v. Hopper, 5 N. J. Law (2 Southard) 764; Woolard v. McCullough, 23 N. C. (1 Ired.) 432; Frasier v. Road Com'rs for Christ Church Parish, 3 Rich. Law (S. C.) 326. Persons cannot be compelled to work out a road tax outside the highway district in which they reside. See, also, as holding the same, De Tavernier v. Hunt, 53 Tenn. (6 Heisk.) 599, and Mason County v. Simpson, 13 Wash. 250.

State v. Hathcock, 20 S. C. 419; Cantrell v. Pinkney, 30 N. C. (8 Ired.) 436; State v. Johnston, 118 N. C. 1188.

[743] Hill v. City of Birmingham, 73 Ala. 74; Lewin v. State, 77 Ala. 45; Sherrick v. Town of Houston, 29 Ill. App. 381; Town of Pleasant v. Kost, 29 Ill. 490, McDonald v. County of Madison, 43 Ill. 22; Town of Fenton v. Peters, 50 Ill. App. 41; Leedy v. Town of Bourbon, 12 Ind. App. 486, 40 N. E. 640; Porter v. State, 141 Ind. 488, 40 N. E. 1061; Winfield Tp. v. Wise, 73 Ind. 71. But see the case of Martin v. Gadd, 31 Iowa, 75; Sanders v. Levi, 42 La. Ann. 406, 7 So. 692; City of Faribault v. Misener, 20 Minn. 396 (Gil. 347); Chidsey v. Town of Scranton (Miss.) 12 So. 545; State v. Wabash, St. L. & P. R. Co., 90 Mo. 166, 2 S. W. 275; Moore v. Vaughan, 127 Mo. 538, 30 S. W. 162; State v. Womble, 112 N. C. 862, 17 S. E. 491, 19 L. R. A. 827; State v. Craig, 81 N. C. 588; State v. Covington, 125 N. C. 641. Sickness a valid excuse for a failure to work roads as required. Jackson v. State, 101 Tenn. 138, 46 S. W. 450; Ex parte Taylor (Tex. Cr. R.) 37 S. W. 422.

[744] Waters v. State, 117 Ala. 189, 23 So. 28; City of Montgomery v. Shoemaker, 51 Ala. 114; Brown v. State, 63 Ala. 97; Coulson v. Harris, 43 Miss. 728; Gross v. State, 4 Tex. App. 249.

[745] Bettis v. Nicholson, 1 Stew. (Ala.) 349; Geneva County v. Hall, 93 Ala. 488; Ford v. State, 51 Ark.

IV. The Disbursement of Public Revenues.

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§ 410. In general.

In preceding sections,[746] the ordinary methods of raising revenue for the use of public corporations have been discussed and its disbursement will now be considered. In this respect the power of a public corporation is restricted by the application of the legal principles, namely, that it is not only a corporation and therefore of limited powers as compared with a natural person, but further, a corporation of a special character organized for a particular purpose for carrying on some one or more of the functions of government for the advantage, good and benefit of the public in general instead of a particular individual. The powers of a public corporation are also restricted through the fact that it is an artificial person acting necessarily through agents.[747]

The purposes for which public moneys may be legally disbursed naturally fall into those for the maintenance of its government and political machinery; the care of dependants, including criminals, the sick and unfortunate, the indigent and defective classes; expenditures having for their purpose the preservation of the public health and safety including the maintenance of courts, police, militia, and fire protection, the inspection of foods and other commodities and buildings, the regulation of certain occupations, the enforcement of sanitary measures and other protective functions; disbursements for what may be termed the public convenience, namely, the construction of bridges, streets, parks and sewers with their care; disbursements having for their object the dissemination of culture and information, including the construction and maintenance of schools, libraries, public museums, public monuments and other objects of a similar character; the engaging in by the public corporation of what might be termed quasi private business enterprises including under this head the construction and operation of waterworks and lighting plants, the maintenance and care of public wharves, ferries, markets and rarely the doubtful purpose of the construction and maintenance of a transportation system. Examples of the expenditures of money for these various purposes will be considered in the succeeding sections and the law governing and limiting such disbursements given so far as settled.

[746] §§ 300 et seq.

[747] Bank of Chillicothe v. Town of Chillicothe, 7 Ohio, 31.

§ 411. The distribution of public moneys in different funds.

It is an elementary principle that the state or one of its subordinate agencies exercises its revenue-producing powers only by virtue of the authority given indirectly by the legislature or directly by the people in constitutional convention. Such provisions are usually carefully drawn and necessarily so, having for their purpose in this respect the protection of the public treasury against extravagant, dishonest or corrupt guardians. The authority to levy taxes for specific purposes must exist,[748] and that the expenditure of moneys thus raised be legal and proper, it must be within the time [749] and the purpose [750] for which collected.

[748] Vance v. City of Little Rock, 30 Ark. 435; City & County of San Francisco v. Broderick, 111 Cal. 302, 43 Pac. 960. On the point mentioned in the text this case holds that "under Consolidation act requiring the board of supervisors of San Francisco city and county when making the levy of taxes for a fiscal year, to apportion and divide the taxes to certain specific funds, the board is limited to the funds therein named and is not authorized to subdivide the general fund and limit the subdivisions to the objects indicated."

Town of New Milford v. Litchfield County, 70 Conn. 435. Where the authority to levy taxes for a specific purpose exists, the beneficiary may enforce the payment of the authorized amount.

City of East St. Louis v. Board of Trustees, 6 Ill. App. 130. A corporation cannot be compelled by mandamus to levy a larger tax than its charter permits.

Chestnut Tp. Highway Com'rs v. Newell, 80 Ill. 587; People v. Swigert, 107 Ill. 496. Any unexpected balance may be transferred to the general revenue fund. Stetson v. Kempton, 13 Mass. 272; Ryerson v. Laketon Tp., 52 Mich. 509; Daily v. Swope, 47 Miss. 367; Langhorne v. Robinson, 20 Grat. (Va.) 661; Jones v. Kolb, 56 Wis. 263. See, also, §§ 300, et seq., supra.

[749] Board of Education of Newport v. Nelson, 22 Ky. L. R. 680, 58 S. W. 700. "Kentucky Statutes, § 3219, providing as to cities of the second class for a tax to defray the expenses of schools during the 'current fiscal year' refers to the fiscal year of the city, beginning the 1st day of January and ending the 31st day of December; and while the amount derived from the state school fund for the benefit of the city schools is to be devoted to the maintenance of the schools during the state fiscal year beginning the 1st of July and ending the 30th of June this amount should be apportioned between the city fiscal years."

[750] Irwin v. Exton, 125 Cal. 622. Moneys collected by the city for the payment of interest on void waterworks bonds can be carried to the general funds of the city. Badger v. City of New Orleans, 49 La. Ann. 804, 21 So. 870, 37 L. R. A. 540. The payment from current revenues of accumulated debts and

The first limitation, therefore, upon the expenditure of public moneys is that when provided for a specific use, their appropriation or use for other purposes or objects will be illegal.[751]

liabilities is illegal. See, also, as holding the same, State v. Siebert, 103 Mo. 401, 15 S. W. 761.

State v. City of Elizabeth, 51 N. J. Law, 246, 17 Atl. 91. But an unexpended balance may be transferred.

See Mason v. Cranbury Tp., 68 N. J. Law, 149, 52 Atl. 568, for the authority of a township committee to apply unexpended and unappropriated moneys under N. J. Laws 1899, p. 372, and also Whaley v. Com., 23 Ky. L. R. 1292, 61 S. W. 35, in respect to the right to devote to general purposes surplus moneys remaining after the purpose for which the fund was raised is accomplished.

Spaulding v. Arnold, 125 N. Y. 194; Board of Education of Bladen County v. Bladen County Com'rs, 113 N. C. 379.

[751] Coler v. Stanly County Com'rs, 89 Fed. 257. Where a fund expressly authorized by law has been accumulated for the purpose of paying interest on county bonds, it is imposed with a trust, the enforcement of which is a proper subject of equity jurisdiction. The court in part say: "Having been once levied and collected, no other tax for the same purpose could be again levied and collected. If, therefore, the county commissioners in the exercise of rights claimed by them in their view of the invalidity of these bonds, had appropriated and used for other purposes the proceeds of the tax levied and collected for the coupons of the bonds, the holders of these coupons, if perchance they establish the validity of their bonds, will be without remedy against the county. In this view of the case, the taxpayers of the county having once furnished the money by paying the special levy cannot be called upon to furnish it again. Therefore, an injunction would be appropriate to prevent the use of this fund. Necessarily all this proceeds upon the idea that the fund created for the payment of these coupons is impressed with a trust. Assume now for the sake of the argument that the act under which the bonds were issued is valid. The act authorized the subscription to be made in bonds with coupons, also the levy of the tax to pay the coupons. All these—the authority to subscribe, the mode of subscription, the tax to meet the terms of the subscription, the collection of the tax and holding its proceeds—are the several steps by which the legislature secures the performance of the powers given by it to the county. If the collection and application of the proceeds of this tax to the interest of the bonds so authorized, be not secured, the intent of the legislature will not be completed. This being the case, these funds are dedicated to a special object and cannot be applied to any other. In other words, they are impressed with a trust and that trust can well be enforced in a court of equity."

Bilby v. McKenzie, 112 Cal. 143, 44 Pac. 341; Camron v. Weil, 57 Cal. 547; Higgins v. City of San

Moneys raised for the support and maintenance of public schools must be expended for this object,[752] and the like principle applies to the many purposes suggested in the preceding section if

Diego, 131 Cal. 294, 63 Pac. 470. A temporary diversion held not illegal. Chamberlain v. City of Tampa, 40 Fla. 74, 23 So. 572; Park v. Candler, 113 Ga. 647, 39 S. E. 89; City of Chicago v. Williams, 182 Ill. 135, 55 N. E. 123, reversing 80 Ill. App. 33.

Florer v. McAffee, 135 Ind. 540, 35 N. E. 277. The duty of apportionment or division of funds for different purposes may be vested in certain officials subject to revision by the courts in case of an abuse of authority.

Allen v. City of Davenport, 107 Iowa, 90, 77 N. W. 532. Funds raised for the paving of certain streets constitute a trust fund not capable of appropriation by the city to pay for paving other streets. Field v. Stroube, 19 Ky. L. R. 957, 44 S. W. 363. Ky. Const. § 180, forbids the diversion of taxes from the purposes for which they were levied. A surplus remaining in a special fund after the purpose for which it was created has been accomplished can, however, be treated as a part of the general revenue of the county.

State v. Pickett, 46 La. Ann. 7; Putnam v. City of St. Paul, 75 Minn. 514; State v. Wright, 17 Mont. 565; State v. Cook, 14 Mont. 332, 36 Pac. 177. An unexpected appropriation for the construction of a state prison cannot be transferred to the general fund. Dawson County v. Clark, 58 Neb. 756; Fox v. Kountze, 58 Neb. 439; Walsh v. Richards, 22 Misc. 610, 50 N. Y. Supp. 1114; Esser v. Spaulding, 17 Nev. 289. But if the statute permit a temporary transfer from one fund to another, this can be done.

Gardner v. City of New Berne, 98 N. C. 228, 3 S. E. 500; Jenifer v. Hamilton County Com'rs, 2 Disn. (Ohio) 139; State v. Bader, 56 Ohio St. 718, 47 N. E. 564; In re State House Commission, 19 R. I. 390, 33 Atl. 870. Funds derived from the sale of state house bonds, but not needed at a particular time cannot be used for the payment of general expenses of the state; even though the amount thus used was to be replaced from the general revenue when it was needed for the completion of the state house.

Walker v. State, 12 S. C. 200; Culberson v. Gilmer Bank, 20 Tex. Civ. App. 565; State v. Hopkins, 12 Wash. 602; State v. Hastings, 11 Wis. 448; Turner v. City of Guthrie, 13 Okl. 26, 73 Pac. 283.

Where disbursements are to be made out of a particular fund, the city cannot be compelled to pay the same out of any other fund. State v. Haben, 22 Wis. 101.

[752] City of New Orleans v. Fisher, 91 Fed. 574. Where there has been an unlawful diversion or retention of moneys, interest can be collected by the beneficiary of the funds diverted or withheld. Los Angeles County v. Lankershim, 100 Cal. 525; County of Glynn v. Brunswick Terminal Co., 101 Ga. 244; City of Cynthiana v. Board of Education, 21 Ky. L. R. 731, 52 S. W. 969; Board of Education of Paducah v. City of Paducah, 108 Ky. 209, 56 S. W. 149. Where, how-

there be specific authority for the levy of taxes for any special purpose,[753] and the converse principle holds that the obligations connected with specific uses or objects can only be met from funds established or raised by law for such purpose.[754] Where, however, there has been a levy for a particular purpose in excess of the original estimate of amount needed, the excess of revenue raised can be used for general purposes. Endly v. Whitsett, 85 Mo. App. 79; King v. State, 50 Neb. 66, 69 N. W. 307; Rose v. Hufty, 63 N. J. Law, 195, 42 Atl. 836; Bailey v. City of Philadelphia, 167 Pa. 569. A moral obligation may be recognized and payment made accordingly.

[753] Carter v. Tilghman, 119 Cal. 104; In re House Resolution No. 25, 15 Colo. 602. Unexpended balances in special funds may be transferred to the general revenues.

Vanover v. Davis, 27 Ga. 354; People v. Power, 25 Ill. 187; City of Chicago v. Williams, 80 Ill. App. 33. The salary of a stenographer employed to report trials in which police officers are parties defendant is properly payable from the law department contingency fund.

Speight v. People, 87 Ill. 600; Fuller v. Heath, 89 Ill. 296; Locker v. Keiler, 110 Iowa, 707, 80 N. W. 433; Neumeyer v. Krakel, 110 Ky. 624, 62 S. W. 518; Public School Com'rs v. Allegany County Com'rs, 20 Md. 449; Flynn v. Turner, 99 Mich. 96, 57 N. W. 1092; State v. Appleby, 136 Mo. 408; State v. Cobb, 44 Neb. 434, 62 N. W. 867; Perez v. Ter., 6 N. M. 618, 30 Pac. 923; People v. Son, 64 Hun, 321, 19 N. Y. Supp. 309; People v. Fitch, 9 App. Div. 439, 41 N. Y. Supp. 349. But if the law forbids the transfer of funds from certain departments omitting others, it leaves unaffected the funds of such department.

As to disposition of surplus, see In re Simis, 11 App. Div. 24, 42 N. Y. Supp. 282; Arendell v. Worth, 125 N. C. 111; Kerr v. City of Bellefontaine, 59 Ohio St. 446, 52 N. E. 1024.

[754] State v. Street, 117 Ala. 203, 23 So. 807; Franklin County v. McRaven, 67 Ark. 562; Higgins v. City of San Diego, 131 Cal. 294, 63 Pac. 470. Under particular charter provisions, however, if there is a deficiency in a special fund, claims payable out of this fund may be met from the general revenues.

Bates v. Porter, 74 Cal. 224; Priet v. Reis, 93 Cal. 85; Parks v. Commissioners of Soldiers' & Sailors' Home, 22 Colo. 86, 43 Pac. 542; Mitchell v. Speer, 39 Ga. 56. Theiss v. Hunter, 4 Idaho, 788, 45 Pac. 2; Springfield Water Com'rs v. Hall, 98 Ill. 371; Bartholomew County Com'rs v. State, 116 Ind. 329. If there has been a diversion of moneys from one fund to another, the beneficiary of the diverted fund may recover interest from the date of such diversion. Carr v. State, 127 Ind. 204, 11 L. R. A. 370; Wadsworth v. City of New Orleans, 48 La. Ann. 886; Morson v. Town of Gravesend, 89 Hun, 52, 35 N. Y. Supp. 94; City of Blair v. Lantry, 21 Neb. 247, 31 N. W. 790; In re Taxpayers & Freeholders of Plattsburgh, 27 App. Div. 353, 50 N. Y.

ever, the moneys expended are taken from the general revenues,[755] the only limitation which then exists upon such disbursement is the principle that they must be applied to or used in furtherance of what is termed "a public purpose,"[756] a phrase which has also been discussed in the sections relating to the incurring of indebtedness by a public corporation[757] and the issuance of bonds.[758]

Supp. 356; Gardner v. City of New Berne, 98 N. C. 228; Allibone v. Ames, 9 S. D. 74, 33 L. R. A. 585; Kennedy v. Montgomery County, 98 Tenn. 165.

[755] People v. Brooks, 16 Cal. 28. "To an appropriation within the meaning the constitution, nothing more is requisite than a designation of the amount and the fund out of which it shall be paid. It is not essential to its validity that funds to meet the same should be at the time in the treasury. As a matter of fact there have seldom been in the treasury the necessary funds to meet the several amounts appropriated under the general appropriation acts of each year. The appropriation is made in anticipation of the receipt of the yearly revenues. It constitutes, indeed, the authority of the controller to draw his warrants, and of the treasurer, when in funds, to pay the same, and that is all. When the constitution, therefore, says that 'no money shall be drawn from the treasury but in consequence of appropriations made by law,' it only means that no money shall be drawn except in pursuance of law; and when the act of April 13th, 1854, provides that no warrants shall be drawn except there be 'an unexhausted specific appropriation' to meet the same it means only that the controller shall not draw a warrant for a specific object when he has already drawn for the full amount of the appropriation made for that object." Ingram v. Colgan, 106 Cal. 113, 38 Pac. 315, 39 Pac. 437, 28 L. R. A. 187. A statute is void which provides for the payment of a bounty out of the general fund without making an appropriation for a specific amount. Montague v. Horton, 12 Wis. 597.

[756] Fletcher v. Inhabitants of Buckfield, 17 Me. 81, and Davis v. Inhabitants of Bath, 17 Me. 141, hold that the Maine act of 1838, c. 311, authorizes a distribution per capita among the inhabitants of the town of its share of the moneys received on account of the repayment of a loan by the United States. Pease v. Inhabitants of Cornish, 19 Me. 191; Stetson v. Kempton, 13 Mass. 272; Cooley v. Inhabitants of Granville, 64 Mass. (10 Cush.) 56. Mahon v. Board of Education, 171 N. Y. 263, 63 N. E. 1107. "Laws 1900, c. 725, empowering the board of education to place on the list of retired teachers entitled to receive as an annuity one-half of the salary paid them prior to the time of their retiring certain teachers who had retired prior to the passage of the act creating the pension fund is unconstitutional within Const. art. 8, § 10, forbidding any city to give money in aid of any individual, it being on account of its retroactive operation, a mere gratuity."

[757] See §§ 145 et seq.

[758] See §§ 172 et seq.; State v. Wapello County, 13 Iowa, 405; Hil-

Different public organizations, a city, town, county or school district, for example, may be entitled each to a designated portion of a tax levied for a special purpose, and upon its collection by the proper official it should be distributed among the various departments or organizations entitled to a share. This duty can be enforced.[759] Statutory or constitutional provisions of this character are generally sustained.

§ 412. The appropriation of public moneys for specific purposes.

Independent of the limitation given in the preceding section, as to the use of public moneys for "public purposes," where a fund is not derived from the levy of taxes for a special purpose as authorized by law but from the general funds or revenues of the state, before such funds or any portion of them can be expended even for a public purpose, it may be necessary that there be an appropriation, as it is termed, by that branch or agency of government having as one of its powers the disbursement of public moneys.[760] Where such system exists either as a result of

bish v. Catherman, 64 Pa. 159. See, also, notes 59 Am. Dec. 782; 19 Am. Rep. 69.

[759] Clarke County v. Smith, 108 Ga. 327; Manor v. State, 149 Ind. 310; Clare County v. Auditor General, 41 Mich. 182; State v. Welbes, 11 S. D. 86, 75 N. W. 820; Webster v. Wheeler, 119 Mich. 601, 78 N. W. 657; City of Muskegon v. Soderberg, 111 Mich. 559; Swift County Com'rs v. Knudson, 71 Minn. 461; Town of White Sulphur Springs v. Pierce, 21 Mont. 130, 53 Pac. 103; Ross v. Walton, 63 N. J. Law, 435, 44 Atl. 430; Walsh v. Richards, 22 Misc. 610, 50 N. Y. Supp. 1114; Spaulding v. Arnold, 125 N. Y. 194; Board of Education of Duplin County v. State Board of Education, 114 N. C. 313; State v. Bryan, 26 Or. 502, 38 Pac. 618. But a division of funds cannot be compelled unless it appears that there is a fund on hand for apportionment. Northup v. Hoyt, 31 Or. 524.

Town of Parkston v. Hutchinson County, 10 S. D. 294, 73 N. W. 76, holds that an unincorporated city or town is not a township within the meaning of Laws of 1895, c. 176. State v. City of Columbia (Tenn. Ch. App.) 52 S. W. 511; Clayton v. Galveston County, 20 Tex. Civ. App. 591; Grand Island & N. W. R. Co. v. Baker, 6 Wyo. 369, 34 L. R. A. 835; State v. Laramie County Com'rs, 8 Wyo. 104, 55 Pac. 451; Duluth, S. S. & A. R. Co. v. Douglas County, 103 Wis. 75.

[760] Sutherland-Innes Co. v. Village of Evart, 86 Fed. 597, 30 C. C. A. 305; White v. Town of Decatur, 119 Ala. 476; Goodykoontz v. Acker, 19 Colo. 360; In re Appropriations by General Assembly, 13 Colo. 316, 22 Pac. 464. Such an appro-

direct legislation or of a settled public policy, before public moneys can be legally expended, there must have been a compliance with the rules established.[761] An expenditure for an unauthor-

priation, however, is controlled and limited as to amount and purpose by constitutional provisions.

In re House Bill No. 168, 21 Colo. 46, 39 Pac. 1096. A house bill containing a number of appropriations each for a specific amount violates Colo. Const. art. 5, § 32, which provides that all other than general appropriations shall be made by separate bills each embracing but one subject. Beshoar v. Las Animas County Com'rs, 7 Colo. App. 444, 43 Pac. 912. Culbertson v. City of Fulton, 127 Ill. 30, 18 N. E. 781. The general rule does not apply to a city having a special charter requiring no such action.

Carr v. State, 127 Ind. 204, 11 L. R. A. 370, n.; Martin v. Francis, 13 Kan. 220; State v. Stover, 47 Kan. 119; State v. Bailey, 56 Kan. 81; Neumeyer v. Krakel, 110 Ky. 624, 62 S. W. 518; Norman v. Kentucky Board of Managers, 93 Ky. 537, 18 L. R. A. 556; Becker v. City of Henderson, 100 Ky. 450; State v. City of New Orleans, 40 La. Ann. 299, 3 So. 584; Weston v. Dane, 51 Me. 461; City of Baltimore v. Gorter, 93 Md. 1, 48 Atl. 445; Tennant v. Crocker, 85 Mich. 328; City of Greenville v. Laurent, 75 Miss. 456; State v. Seibert, 123 Mo. 424; State v. Kenney, 11 Mont. 553; State v. Cook, 14 Mont. 332; State v. Babcock, 24 Neb. 787, 40 N. W. 316; State v. Martin, 27 Neb. 441, 43 N. W. 244; Christensen v. City of Fremont, 45 Neb. 160, 63 N. W. 364; Providence Washington Ins. Co. v. Weston, 63 Neb. 764, 89 N. W. 253; Weston v. Herdman, 64 Neb. 24, 89 N. W. 384; State v. Omaha Nat. Bank, 59 Neb. 483, 81 N. W. 319; Raton Waterworks Co. v. Town of Raton, 9 N. M. 70; Allison v. Corker, 67 N. J. Law, 596, 52 Atl. 362, 60 L. R. A. 564, n.; Quackenbush v. State, 57 N. J. Law, 18; Sheehey v. City of Hoboken, 62 N. J. Law, 182.

People v. Fitch, 9 App. Div. 439, 41 N. Y. Supp. 349. A unanimous vote of the appropriation board unnecessary. Engstad v. Dinnie, 8 N. D. 1; Com. v. Barnett, 199 Pa. 161, 48 Atl. 976, 55 L. R. A. 882, n.; Cutting v. Taylor, 3 S. D. 11, 51 N. W. 949, 15 L. R. A. 691. Such action, however, cannot be retroactive. Pollock v. Lawrence County, 2 Pittsb. R. 137, Fed. Cas. No. 11,255. The making of a formal estimate of county expenses is not the equivalent of an appropriation as required by law.

Cutting v. Taylor, 3 S. D. 11, 15 L. R. A. 691; Collins v. State, 3 S. D. 18; Carter v. Thorson, 5 S. D. 474, 59 N. W. 469, 24 L. R. A. 734; City of Cleburne v. Cleburne Water, Ice & Lighting Co., 14 Tex. Civ. App. 229; State v. Rogers, 24 Wash. 417, 64 Pac. 515; Stedman v. City of Berlin, 97 Wis. 505.

[761] State v. Street, 117 Ala. 203, 23 So. 807; Wolf v. Taylor, 98 Ala. 254. All appropriations other than those of a general character must be by separate bill under Ala. Const. art. 4, § 32, and a law violating this provision is invalid. State v. Sloan, 66 Ark. 575. A new capitol building held a necessary

ized purpose or one for which the moneys are not specifically set apart or "appropriated" will not be legal[762] and can be pre-

expense and, therefore, an act appropriating money for its construction is not unconstitutional because not passed by a majority of two-thirds of both houses: Ark. Const. art. 5, § 31.

Murray v. Colgan, 94 Cal. 435. An appropriation of bounty moneys for the cultivation of ramie fiber held void because the act violates Const. art. 4, § 34, providing that "no bill making an appropriation of money, except the general appropriation bill, shall contain more than one item of appropriation."

Ingram v. Colgan, 106 Cal. 113, 28 L. R. A. 187; Henderson v. People, 17 Colo. 587. In the appropriation of moneys the expenses of the executive and judicial departments of the state government have priority over all other appropriations.

Sullivan v. City of Leadville, 11 Colo. 483, 18 Pac. 736; Henderson v. Collier & C. Lith. Co., 2 Colo. App. 251, 30 Pac. 40; In re Continuing Appropriations, 18 Colo. 192, 32 Pac. 272. A continuing appropriation authorized. Smith Canal or Ditch Co. v. City of Denver, 20 Colo. 84, 36 Pac. 844. Such appropriation held mandatory.

In re Advisory Opinion, 43 Fla. 305, 31 So. 348. A joint resolution without an enacting clause is not sufficient as an appropriation of public moneys under Fla. Const. art. 9, § 4. First Nat. Bank of Du Quoin v. Keith, 183 Ill. 475, 56 N. E. 179, affirming 84 Ill. App. 103.

People v. Needles, 96 Ill. 575; State v. Stover, 47 Kan. 119; Bishop v. Lambert, 114 Mich. 110, 72 N. W. 35; State v. Kansas City, 58 Mo. App. 124. The act of apportionment held not conclusive in this case. State v. City of Helena, 24 Mont. 521, 63 Pac. 99, 55 L. R. A. 336. An appropriation will not render a void contract valid. State v. Mason, 153 Mo. 23, citing Reynolds v. Taylor, 43 Ala. 420; Riggs v. Brewer, 64 Ala. 284; City & County of San Francisco v. Dunn, 69 Cal. 73; Gilbert v. Moody, 2 Idaho, 747, 25 Pac. 1092; Thomas v. Owens, 4 Md. 189; Opinion to Governor, 49 Mo. 216; State v. Hickman, 9 Mont. 370, 8 L. R. A. 403; State v. Weston, 4 Neb. 216, and Nichols v. Comptroller, 4 Stew. & P. (Ala.) 154.

McElhinney v. City of Superior, 32 Neb. 744, following City of Blair v. Lantry, 21 Neb. 247.

Inhabitants of Wayne Tp. v. Cahill, 49 N. J. Law, 144; Kirk v. McGuire, 32 Misc. 596, 67 N. Y. Supp. 315; Engstad v. Dinnie, 8 N. D. 1; Roberts v. City of Fargo, 10 N. D. 230, 86 N. W. 726; Johnson v. Cameron, 2 Okl. 266, 37 Pac. 1055. The failure to make an appropriation or the lack of funds will not, however, prevent the proper official from issuing a warrant for the payment of a just claim to the disbursing officer. But see, however, as holding to the contrary, the case of Collins v. State, 3 S. D. 18, 51 N. W. 776.

State v. Hipple, 7 S. D. 234, 64 N. W. 120; Allen v. Grimes, 9 Wash. 424; State v. Burdick, 4 Wyo. 340, 34 Pac. 1.

[762] Thompson v. Searcy County (C. C. A.) 57 Fed. 1030; Badger v. City of New Orleans, 49 La. Ann.

vented by a taxpayer. Where the manner of making such appropriation is prescribed by law, the provisions do not require generally more than a substantial compliance with their terms.[763]

§ 413. Agents of appropriation.

A public corporation, like all artificial persons, acts through its legally appointed or elected officers and agents each having certain prescribed duties and powers and not legally capable of exercising others. That a disbursing official be justified in the

804, 21 So. 870, 37 L. R. A. 540; State v. Frazee, 105 La. 250, 29 So. 478; May v. City of Gloucester, 174 Mass. 583; State v. Wallichs, 12 Neb. 407. The expenses of a sheriff in taking juvenile offenders to a reform school can be paid from an appropriation "for fugitives from justice, escaped convicts, sheriffs' fees for conveying convicts to penitentiary, etc."

Pope Mfg. Co. v. Granger, 21 R. I. 298, 43 Atl. 590. Authority to pay the bills follows the making of an appropriation. People v. Fielding, 36 App. Div. 401, 55 N. Y. Supp. 530. The public official making a disbursement without the proper appropriation may be indicted under N. Y. Pen. Code, § 165. People v. Schuyler, 79 N. Y. 189. A disbursing officer cannot refuse to apply moneys properly appropriated on the ground that originally the state was not legally bound to pay or that the legislature was not aware of all the material facts. Bragg v. State, 20 Nev. 443; Gamble v. City of Philadelphia, 14 Phila. (Pa.) 223.

[763] Hilliard v. Bunker, 68 Ark. 340, 58 S. W. 362. "The first questions raised by the allegations of the complaint and demurrer thereto is, does the record show that a majority of the justices of the peace were present on the second day of October, 1899? The roll was called and eleven answered to their names, and these names appear in the record of the call and these were declared to be a majority of the justices of the peace of the county; and the minutes of the proceedings of that day further show that each and every item of the general appropriations for the current year were taken up one by one, and voted upon and that each item was adopted by a unanimous vote; and that this was also true of the items of building the court house and jail and the appropriations therefor. The object of the minute record in such cases is to show that each item of appropriation received a majority vote of the members of the court present and participating, when these constitute a majority of the justices of the county. The record of the proceedings in this case shows a substantial compliance with the statute: the rule which requires the yeas and nays to be called and taken down is applicable solely to legislative bodies."

Vickery v. Hendricks County Com'rs, 134 Ind. 554, 32 N. E. 880. But a taxpayer may be estopped to object to an unauthorized expendi-

payment of public moneys for specific objects, there must have been not only an authorization for such expenditure but one by the proper legal body or bodies possessing the necessary powers as given by law.[764] An expenditure of public moneys under the direction of a body or official not possessing such power will be clearly illegal.[765]

§ 414. Investment of public moneys.

It may happen, though unfortunately not often, that a public corporation has surplus funds in its possession or those not presently needed. The care and investment of such funds is usually regulated by law and the officers having them in charge are strictly limited in their use or disbursement by special provisions.[766] A failure in this respect will make an official or his sureties personally responsible for a conversion of the funds, if, even without

ture. Townsend v. Manistee, 88 Mich. 408, 50 N. W. 321; City Pub. Co. v. Jersey City, 54 N. J. Law, 437, 24 Atl. 571; Dhrew v. City of Altoona, 121 Pa. 401, 15 Atl. 636.

[764] Blair v. Dubuque County, 27 Iowa, 181; Dotson v. Fitzpatrick, 23 Ky. L. R. 2042, 66 S. W. 403; Weston v. Dane, 51 Me. 461; Henley v. Clover, 6 Mo. App. 181; Board of Finance of Jersey City v. Street & Water Com'rs, 55 N. J. Law, 230, 26 Atl. 92; Keeney v. Jersey City, 47 N. J. Law, 449; Riley v. Oglevee, 36 Ohio St. 324; Comstock v. Village of Nelsonville, 61 Ohio St. 288, 56 N. E. 15.

[765] Posey v. Mobile County, 50 Ala. 6; Talbot County v. Mansfield, 115 Ga. 766, 42 S. E. 72.

[766] City of Tampa v. Salomonson, 35 Fla. 446; Park v. Candler, 113 Ga. 647, 39 S. E. 89; City of Du Quoin v. Kelly, 176 Ill. 218, 43 L. R. A. 644. A deposit in a private bank does not comply with the Ill. Rev. St. 1874, p. 228, § 9, requiring city funds to be deposited in a regularly organized bank. This proviso held to apply only to banks regularly incorporated under state laws or acts of Congress.

Halstead v. Lake County Com'rs, 56 Ind. 363; Mahaska County v. Searle, 44 Iowa, 492; Graham v. Horton, 6 Kan. 209; Interstate Nat. Bank v. Ferguson, 48 Kan. 732, 30 Pac. 237; State v. Stover, 47 Kan. 119; Dotson v. Fitzpatrick, 23 Ky. L. R. 2042, 66 S. W. 403; Kelly v. City of Minneapolis, 63 Minn. 125, 65 N. W. 115, 30 L. R. A. 281; Northern Cent. R. Co. v. Hering, 93 Md. 164, 48 Atl. 461; Pope v. Inhabitants of Halifax, 66 Mass. (12 Cush.) 410; Simmons v. Hanover, 40 Mass. (23 Pick.) 188.

City of Fergus Falls v. Fergus Falls Hotel Co., 80 Minn. 165, 83 N. W. 54, 50 L. R. A. 170. But where city officials illegally loan city money to a private individual taking as security a mortgage upon private property, this mortgage may be foreclosed. Walters v. Senf, 115 Mo. 524, 22 S. W. 511; Holt County v. Harmon, 59 Mo. 165; State v. Bartley, 39 Neb. 353, 23 L. R. A. 67; Id., 40 Neb. 298; King v. State, 50 Neb. 66; Gibson v. Knapp, 21

fault, public funds are lost through the failure of the depositaries.[767] Unless permitted by law,[768] it is not proper or legal for

Misc. 499, 47 N. Y. Supp. 446; City of New York v. Tenth Nat. Bank, 111 N. Y. 446; Markham v. Manning, 96 N. C. 132, 2 S. E. 40; Alter v. City of Cincinnati, 56 Ohio St. 47, 35 L. R. A. 737; School Dist. No. 5 v. Hopkins, 7 Okl. 154; Bryan v. Board of Education of Perry, 7 Okl. 160; Gilliford v. Allegheny School Dist., 165 Pa. 631; Mitchell v. Franklin & Columbia Turnpike Co., 22 Tenn. (3 Humph.) 456; Anderson County v. Hays, 99 Tenn. 542; Elser v. City of Ft. Worth (Tex. Civ. App.) 27 S. W. 739.

State v. Young, 21 Wash. 391, 58 Pac. 220. State warrants are not bonds for the investment of permanent school funds within the meaning of Wash. Const. art. 16, § 5, providing that the permanent school funds shall be invested in national, state, county, or municipal bonds. Single v. Marathon County Sup'rs, 38 Wis. 363; State v. McFetridge, 84 Wis. 473, 54 N. W. 1, 998, 20 L. R. A. 223. A checking deposit of public funds in a bank is not an investment within the meaning of the statute regulating the investment of public moneys.

See as to the manner of proceeding in the investigation of the financial affairs of a town under New York general municipal law, § 3, Laws 1892, c. 685. In re Town of Hempstead, 36 App. Div. 321, 55 N. Y. Supp. 345, and In re Taxpayers & Freeholders of Plattsburgh, 157 N. Y. 78.

[767] Walton v. McPhetridge, 120 Cal. 440; Ramsey's Estate v. Whitbeck, 81 Ill. App. 210; Dreyer v. People, 176 Ill. 590; Lowry v. Polk County, 51 Iowa, 50; State v. Bartley, 39 Neb. 353, 58 N. W. 172, 23 L. R. A. 67; Van Trees v. Ter., 7 Okl. 353, 54 Pac. 495, citing among other cases: United States v. Prescott, 3 How. (U. S.) 578. "The condition of the bond has been broken as the defendant Prescott failed to pay over the money received by him when required to do so; and the question is whether he shall be exonerated from the condition of his bond on the ground that the money had been stolen from him. The objection to this defense is that it is not within the condition of the bond and this would seem to be conclusive. The contract was entered into on his part, and there is no allegation of failure on the part of the government. How then can Prescott be discharged from his bond? He knew the extent of his obligation when he entered into it and he has realized the fruits of his obligation by the enjoyment of the office. Shall he be discharged from liability contrary to his own express understanding? There is no principle on which such a defense can be sustained. The obligation to keep safely the public money is absolute without any condition express or implied and nothing but the payment of it, when required can discharge the bond." United States v. Morgan, 11 How. (U. S.) 154; United States v. Dashiel, 71 U. S. (4 Wall.) 182; United States v. Keehler, 76 U. S. (9 Wall.) 83, and United States v. Thomas, 82 U. S. (15 Wall.) 337.

[768] Madison Tp. v. Dunkle, 114 Ind. 262; City of Syracuse v. Reed, 46 Kan. 520, 26 Pac. 1043.

officials to use public moneys for their own purposes,[769] or even appropriate the interest upon funds in their charge.[770]

§ 415. Public revenue; limitations of amount in its disbursement.

Aside from the limitation which involves a discussion of the purpose for which public funds may be used, and which will be considered in succeeding sections, is found that one based generally upon some charter or statutory provision limiting the right of a corporation to expend more than a specified amount in disbursements of a public character. Such limitations as to the amount may consist of a provision restricting the proper expenditure to a given gross sum of the public revenues, a certain per cent of either the assessable property or its total revenues,[771] or limiting the annual expenses for current purposes to the yearly revenues.[772]

Limitations of amount for particular purposes. As a further restriction of the power of public corporations to expend money freely and extravagantly is found a limitation of the amount properly disbursable within a particular year for designated pur-

[769] Prewett v. Marsh, 1 Stew. & P. (Ala.) 17; People v. Wilson, 117 Cal. 242, 49 Pac. 135; People v. Van Ness, 79 Cal. 84; Moulton v. McLean, 5 Colo. 454, 39 Pac. 78. But a statutory provision forbidding any public officer to loan with or without interest any money received by virtue of his office does not apply to a deposit in a bank by an officer of public funds repayable on demand and without interest. See, also, as holding the same, Allibone v. Ames, 9 S. D. 74, 68 N. W. 165, 33 L. R. A. 585.

Winchester Elec. Light Co. v. Veal, 145 Ind. 506, 41 N. E. 334, 44 N. E. 353; Henry v. State, 98 Ind. 381; Lee v. Marion Nat. Bank, 94 Ky. 41; Mott v. Pettit, 1 N. J. Law (Coxe) 298; Brownfield v. Houser, 30 Or. 534. A taxpayer cannot sue to recover misappropriated funds. State v. Boggs, 16 Wash. 143; Jones v. Reed, 3 Wash. 57, 27 Pac. 1067. A taxpayer has no right to prevent by injunction a city officer from misappropriating public funds.

[770] Ramsey's Estate v. Whitbeck, 81 Ill. App. 210; Spratley v. Leavenworth County Com'rs, 56 Kan. 272. Private moneys of a railroad company deposited with the county treasurer in condemnation proceedings are public funds within the meaning of Kan. Gen. St. 1889, par. 1716, and the interest thereon belongs to the county. State v. Green, 52 S. C. 520; State v. Boggs, 16 Wash. 143.

[771] See §§ 148 et seq., supra.

[772] San Francisco Gas Co. v. Brickwedel, 62 Cal. 641; Weaver v. City & County of San Francisco, 111 Cal. 319; Putnam v. City of Grand Rapids, 58 Mich. 416; Lamar Wa-

poses.[773] Such limitations are usually applied to disbursement for works of internal improvement, the construction of local improvements or expenditures made in connection with the construction of plants for furnishing a supply of water and light.

§ 416. Purposes for which public moneys may be used.

It is needless to repeat at this time the general principles of law and morals which control a public corporation in the expenditure of its funds raised by the imposition of taxes; these will be found clearly stated in other sections[774] of this work and the cases cited. A general limitation exists. Public moneys cannot be expended for other than public purposes,[775] and although legislative bodies are usually vested with a wide discretion in this respect,[776] if this principle is violated, although apparently author-

ter & Elec. Light Co. v. City of Lamar, 128 Mo. 188, 32 L. R. A. 157; Atlantic City Waterworks Co. v. Read, 50 N. J. Law, 665; Weston v. City of Syracuse, 17 N. Y. 110.

[773] Fitzgerald v. Walker, 55 Ark. 148; Nelson v. City of New York, 63 N. Y. 535; People v. Kelly, 76 N. Y. 475; Kingsley v. City of Brooklyn, 78 N. Y. 200; Hasbrouck v. City of Milwaukee, 13 Wis. 37; Howard v. City of Oshkosh, 33 Wis. 309.

But see Foote v. City of Salem, 96 Mass. (14 Allen) 87; Crawshaw v. City of Roxbury, 73 Mass. (7 Gray) 374; Dearborn v. Inhabitants of Brookline, 97 Mass. 466; Board of Finance of Jersey City v. Street & Water Com'rs, 55 N. J. Law, 230; Leonard v. Long Island City, 65 Hun (N. Y.) 621.

[774] See §§ 145 et seq., and §§ 172 et seq., supra.

[775] Jarvis v. Fleming, 27 Ont. 309; Town of Petersburg v. Mappin, 14 Ill. 193; Agnew v. Brall, 124 Ill. 312; City of Baltimore v. Gill, 31 Md. 375; Freeland v. Hastings, 92 Mass. (10 Allen) 570.

Matthews v. Inhabitants of Westborough, 134 Mass. 555. A town cannot lawfully vote money to be given in charity, but it can lawfully and properly provide by vote for the payment of its debts and for the settlement of claims against it.

Hitchcock v. City of St. Louis, 49 Mo. 484. "The diversion of the money of the taxpayers for any purpose other than that which is expressed in the charter is a perversion of the trust and an excess of authority. That there is no express power in the charter conferring authority to make donations, gifts or gratuities is too clear to require any argument." People v. Allen, 42 N. Y. 404; Brohead v. City of Milwaukee, 19 Wis. 624; State v. Tappan, 29 Wis. 664.

[776] Stockton & V. R. Co. v. City of Stockton, 41 Cal. 147; Talbot v. Hudson, 82 Mass. (16 Gray) 417; In re Opinion of Justices, 175 Mass. 599, 49 L. R. A. 564; Lommen v. Minneapolis Gaslight Co., 65 Minn. 196, 33 L. R. A. 437; State v. Polk County Com'rs, 87 Minn. 325, 92 N. W. 216, 60 L. R. A. 161; Town of

ized by direct legislation, the expenditure of public funds for a private purpose can be enjoined.[777] There is no controversy about the soundness of this principle; the dispute arises in its application. What is or is not a public purpose has been considered by the courts in many cases where there has been a questionable expenditure of public moneys for purposes which result indirectly to the good, benefit and advantage of the community, and yet, which should not be permitted because in violation of a broad and underlying principle that sufficient purposes can be found, in respect to which there is no doubt, for the use of all funds raised by taxation, without creating an excessive burden upon the taxpayer, applying public funds to purposes as to the character of which grave doubts arise. Economy is not a characteristic of public officials or public corporations. Without considering the possibility of a corrupt or dishonest administration of public affairs, it stands undenied as an author has said: "That private self-interest stimulated by the hope of gain no less than by the fear of loss will drive a sharper bargain than will public authorities who have nothing particular at stake." The restraining influences should be invoked of every principle which can be made available to prevent unwise and extravagant expenditure of public moneys. However desirable or just it may seem that a questionable, in this respect, use of moneys should be authorized, the safest, and in fact the only public policy to be pursued, is the one above indicated.

Limitations found in statutory or charter provisions. Independent of the principles stated, the uses to which public mon-

Guilford v. Chenango County Sup'rs, 13 N. Y. (3 Kern.) 143; Sun Printing & Pub. Ass'n v. City of New York, 8 App. Div. 230, 40 N. Y. Supp. 607.

Waterloo Woolen Mfg. Co. v. Shanahan, 128 N. Y. 345, 14 L. R. A. 481. The purpose for which moneys were appropriated by the legislature whether public or private in its character must be determined from the statute itself and from such considerations as the court can judicially notice. McCallie v. City of Chattanooga, 40 Tenn. (3 Head) 317. It is not necessary that the object for which a tax is imposed by the corporate authorities should be within the corporate limits to make it a corporate purpose. If it is a matter of vital importance to the permanent interest of the corporation, it is sufficient, though beyond the corporate limits. The construction of a public work beyond the limits of a state, held authorized.

[777] City of Frederick v. Groshon,

eys can be appropriated by a particular organization may be limited by statutory or charter provisions. Expenditures for such purposes only will be valid.[778]

§ 417. Same subject.

It is assumed in the discussion of the use of public moneys as found in the succeeding sections that it is not necessary for a corporation to incur an indebtedness either by borrowing money temporarily upon its credit or by the issue of negotiable bonds. These subjects have been elsewhere considered. The money disbursed is to be found in the public treasury as the result of an

30 Md. 436; Hitchcock v. City of St. Louis, 49 Mo. 484; Merrill v. Town of Plainfield, 45 N. H. 126.

[778] Kelso v. Teale, 106 Cal. 477, 39 Pac. 948. But where a certain discretion is vested in public officials, their action will not be interfered with unless there has been a gross abuse of such authority. The court say: "Appellant further contends that, under the provisions of the charter the directors of the library had no right to make such an appropriation from the library funds as that here in question. And it is said: 'The benefits to be derived by the taxpayers and patrons of the library from what might be learned by a delegate to a congress of librarians are too remote, too speculative, too chimerical to make the expenses of such a delegate a legal charge upon the public funds.' But the question of benefits to the library and its patrons from an expenditure like that here involved was one to be determined by the directors in the first instance; and, if there could be any state of circumstances under which an expenditure could be authorized it must be presumed that such a state was shown and was considered and acted upon by the directors when they made the appropriation. The board was authorized 'to control and order the expenditure of all moneys at any time in the library fund,' and 'generally to do all that may be necessary to carry out the spirit and intent of this charter in establishing a public library and reading room.' In view of the action of the board and of the court below, we cannot say that the appropriation, under the circumstances shown, was not justifiable and proper." Schofield v. Eighth School Dist., 27 Conn. 499; Crofut v. City of Danbury, 65 Conn. 294; Koger v. Hunter, 102 Ga. 76, 29 S. E. 141; Huesing v. City of Rock Island, 128 Ill. 465, 21 N. E. 558, reversing 25 Ill. App. 600. A taxpayer may enjoin a municipal corporation from appropriating money to an unauthorized purpose; neither his motives nor the amount his tax would be increased are pertinent to the inquiry. Harney v. Indianapolis, C. & D. R. Co., 32 Ind. 244. See note on Tax-payers' Actions, 22 Abb. N. C. (N. Y.) 86. Claflin v. Inhabitants of Hopkinton, 70 Mass. (4 Gray) 502; Knapp v. Kansas City, 48 Mo. App. 485.

exercise of a revenue producing power possessed by the public corporation.[779] There are some extraordinary uses which, courts have held, come within the character of a public purpose, namely, encampment expenses, the expenses of a delegate to a congress of librarians,[780] those connected with the administration of justice other than statutory costs,[781] the support of institutions for "public good,"[782] an appropriation for "the support and maintenance

[779] State v. Kenney, 10 Mont. 488, 26 Pac. 383. The revenue for a fiscal year includes all taxes levied for that year though some of them may be uncollected. "Taxes levied for a fiscal year must be treated as revenues for that year, though they may not be collected and reach the treasury before the commencement of the following fiscal year and are to be considered in determining whether the appropriations by the legislature provide for expenditures which exceed the 'total tax provided by law,' which is prohibited by Const. Mont. art. 12, § 12, citing Evans v. McCarthy, 42 Kan. 426."

[780] Kelso v. Teale, 106 Cal. 477, 39 Pac. 948.

[781] Bates v. Independence County, 23 Ark. 722. The board and lodging of jurors in a criminal case. The case of Van Eppes v. Commissioners Ct. of Mobile, 25 Ala. 460, holds that the hire of carriages for the convenience of the grand jurors to a county jail is not a proper charge against the county. But see to the contrary, the case of Justices of Richmond County v. State, 24 Ga. 82.

La Plata County Com'rs v. Hampson, 24 Colo. 127, 48 Pac. 1101; Talbot County v. Mansfield, 115 Ga. 766, 42 S. E. 72; Henderson v. Hovey, 46 Kan. 691, 27 Pac. 177. More than the amount appropriated cannot be disbursed. Tucker v. Common Council of Grand Rapids, 104 Mich. 631, 62 N. W. 1013; State v. Kenney, 9 Mont. 389.

State v. Wallichs, 15 Neb. 457, 609. In the absence of a special appropriation, the expenses of returning prisoners from the penitentiary to other counties for retrial cannot be paid by the state. Tompkins v. City of New York, 14 App. Div. 536, 43 N. Y. Supp. 878. The charges of an expert witness. Whittle v. Saluda County, 59 S. C. 554, 38 S. E. 168. The constitutional right that the accused in criminal prosecutions shall have the right of obtaining his witnesses does not make a county liable for serving subpœnas.

[782] Goodykoontz v. People, 20 Colo. 374. An appropriation for "the soldiers' and sailors' home" is authorized by the constitution. But see State v. City of New Orleans, 50 La. Ann. 880, as holding that appropriations to charitable institutions based solely upon the laudable objects for which they are established and maintained are illegal within the prohibitions of La. Const. art. 56, relative to the loaning or granting of public funds to any person or persons, association or corporation public or private. And see also Farmer v. City of St. Paul, 65 Minn. 176, 33 L. R. A. 199.

of a mining bureau,"[783] election costs and charges,[784] the defense of a state,[785] appropriations for making and maintaining state exhibits at fairs or expositions which have generally been sustained,[786] gratuities to men drafted into the military service of the

[783] Proll v. Dunn, 80 Cal. 220.

[784] Johnson v. Uba County, 103 Cal. 538; Mousseau v. Sioux City, 113 Iowa, 246, 84 N. W. 1027. But there may be no liability for the service of a special policeman appointed to serve at a general election. Citing Jefferson County v. Wollard, 1 G. Greene (Iowa) 432; Foster v. Clinton County, 51 Iowa, 541; Turner v. Woodbury County, 57 Iowa, 440; Howland v. Wright County, 82 Iowa, 165, and Guanella v. Pottawattamie County, 84 Iowa, 36.

Washington County Com'rs v. Nesbit, 7 Kan. App. 298, 53 Pac. 882; Esmeralda County v. State, 21 Nev. 195, 27 Pac. 869; Brown v. City of New York, 6 Daly (N. Y.) 497; Ladd v. Holmes, 40 Or. 167, 66 Pac. 714.

[785] Reis v. State, 133 Cal. 593, 65 Pac. 1102; Auditor General v. Bay County Sup'rs, 106 Mich. 662, 64 N. W. 570. The court say in part: "The duty of preserving the peace is one resting upon the state. * * * It has seen fit to confide the question of emergency to the locality instead of leaving it to the state officers, where it would otherwise naturally belong; and it has imposed the duty of compensation upon the county. It has not seen fit to leave the question of compensation open to the danger of repudiation by committing the question to boards of supervisors. The law fixes a compensation, and provides for payment by the state, upon allowance by the proper state officer. When paid, the liability of the county does not depend on the opinion of the board of supervisors, either as to the sufficiency of the requisition, the nature of the emergency or the amount to be paid to the state. All of these things are now definitely fixed by law. * * * The provision of article 10, § 10, by which the board of supervisors has 'exclusive power to prescribe and fix the compensation for all services rendered for the county,' * * * to the exclusion of appeal has no application to such claims. The service of the militia is the service of the state, * * * in the preservation of the peace of the state. * * * Their compensation is a claim against the state, allowed and paid as such and is a charge against certain revenues raised and disbursed in accordance to law in a certain locality."

[786] Daggett v. Colgan, 92 Cal. 53, 14 L. R. A. 474; Gross v. Kentucky Board of Managers, 20 Ky. L. R. 1418, 49 S. W. 458; Norman v. Kentucky Board of Managers, 93 Ky. 537, 18 L. R. A. 556; Flynn v. Truner, 99 Mich. 96, 57 N. W. 1092; City of Minneapolis v. Janney, 86 Minn. 111; Moore v. Garneau, 39 Neb. 511, 58 N. W. 179; State v. Cornell, 53 Neb. 556, 39 L. R. A. 513. Morton v. City of Philadelphia, 4 Pa. Dist. R. 523: The cost of sending to the Atlanta Exposition the Liberty Bell held a legal charge on public funds. Shelby County v. Tennessee Centennial

United States or bounties for volunteers,[787] the establishment and support of an agricultural experiment station,[788] inquest expenses,[789] an appropriation in aid of the Farmers Protective As-

Exposition Co., 96 Tenn. 653; State v. Tappan, 29 Wis. 664.

[787] Booth v. Town of Woodbury, 32 Conn. 118; Waldo v. Town of Portland, 33 Conn. 363; Usher v. Town of Colchester, 33 Conn. 567. But the right to recover such depends upon facts in individual cases. See Elrod v. Town of Bernadotte, 53 Ill. 368; Barker v. Inhabitants of Chesterfield, 102 Mass. 127; People v. Columbia County, 43 N. Y. 130; Hart v. Girard Borough, 63 Pa. 388; Johnson v. Town of Bolton, 43 Vt. 303; Cook v. Town of Winhall, 43 Vt. 434; Chase v. Town of Middlesex, 43 Vt. 679; and Bucklin v. Town of Sudbury, 43 Vt. 700.

Weir v. Leibert, 48 Ill. 458; Clark County Sup'rs v. Lawrence, 63 Ill. 32; Graham v. Daviess County Com'rs, 25 Ind. 333; Inhabitants of Veazie v. Inhabitants of China, 50 Me. 518; Ritchie v. Buchanan County, 60 Mo. 562; Shackford v. Town of Newington, 46 N. H. 415; Parker v. Saratoga County Sup'rs, 106 N. Y. 392; State v. City of Circleville, 20 Ohio St. 362; Speer v. School Directors, 50 Pa. 150; Hartmen v. Mt. Joy School Dist., 68 Pa. 441.

The right to pay such bounties, however, is usually dependent upon express legislative authority. See Booth v. Town of Woodbury, 32 Conn. 118; Barbour v. Inhabitants of Camden, 51 Me. 608; Sanborn v. Inhabitants of Machias Port, 53 Me. 82; Opinion of the Justices, 52 Me. 595; Stetsen v. Kempton, 13 Mass. 272; Comer v. Folsom, 13 Minn. 219 (Gil. 205).

Crowell v. Hopkinton, 45 N. H. 9. The court here said that "It forms no part of the ordinary duties of towns to encourage the enlistment of soldiers by bounty or otherwise." Fiske v. Hazard, 7 R. I. 438; State v. Tappan, 29 Wis. 664.

[788] Wasson v. Wayne County Com'rs, 49 Ohio St. 622, 17 L. R. A. 795, 32 N. E. 472. "A law which provides for the location and construction of an institution to be controlled wholly by a board appointed by the governor and for the furnishing of information to the people of the state at large as to the work of such institution, exclusively by the board and state officers at the expense of the state, is a law of a general and not a local character, notwithstanding incidental benefits may accrue to property near such institution by reason of its location; and money raised by taxation for the purchase of a site and the construction of buildings is general revenue for the state."

[789] Fairchild v. Ada County, 6 Idaho, 340, 55 Pac. 654. The syllabus by the court covering the point of the text is as follows: "When a physician or surgeon has been subpœnaed and ordered by a county coroner under the provisions of § 8379, Rev. St., to inspect the body of a deceased person, and to give to the coroner's jury his professional opinion as to the cause of death, the reasonable value of his services in making the inspection is a charge against the county under the provision of § 2161, Rev. St., and acts amendatory thereof,

sociation of Iowa,[790] expenses connected with the care of the indigent, defective or criminal classes,[791] the erection of soldier's and sailor's monuments,[792] the satisfaction of a claim based upon a moral consideration but which is not a legal demand,[793] the appropriation of moneys as a reward for conspicuous and valuable services of a civil or military nature,[794] the partial support of a textile school,[795] the celebration of holidays or the entertainment of distinguished guests when authorized by statute,[796] the care and

defining what claims are charges against a county. * * * A physician or surgeon is not entitled to the compensation aforesaid on the ground that he is an expert witness but for the work and labor necessary in the examination of the body in order to prepare himself to give an intelligent opinion to the jury of the cause of the death of the deceased. The coroner is not authorized to make a contract as to the sum the county shall pay in such cases and the board of county commissioners should only allow the reasonable value of such services." Moser v. Boon County, 91 Iowa, 359; Frank v. City of St. Louis, 145 Mo. 600; Polk County v. Phillips, 92 Tex. 630.

[790] Merchants' Union Barb Wire Co. v. Brown, 64 Iowa, 275.

[791] Morris v. State, 96 Ind. 597. See post, sections dealing with these subjects.

[792] Campbell v. Commissioners of State Soldiers' & Sailors' Monument, 115 Ind. 591, 18 N. E. 33.

[793] City of New Orleans v. Clark, 95 U. S. 644; United States v. Realty Company, 163 U. S. 427, citing Guthrie Nat. Bank v. City of Guthrie, 173 U. S. 528; Friend v. Gilbert, 108 Mass. 408; State v. Foley, 30 Minn. 357; State v. Bruce, 50 Minn. 491; Goulding v. Davidson, 26 N. Y. 604, and Bailey v. City of Philadelphia, 167 Pa. 573.

People v. Burr, 13 Cal. 343; Town of Guilford v. Chenango County Sup'rs, 13 N. Y. (3 Kern.) 143; Town of Guilford v. Cornell, 18 Barb (N. Y.) 615; City of New York v. Tenth Nat. Bank, 111 N. Y. 446; Thoreson v. State Board of Examiners, 21 Utah, 187; Civic Federation v. Salt Lake County, 22 Utah, 6, 61 Pac. 222; State v. Tappan, 29 Wis. 664.

[794] In re Opinion of the Justices, 175 Mass. 599, 49 L. R. A. 564; State v. Tappan, 29 Wis. 664.

[795] Hanscom v. City of Lowell, 165 Mass. 419, citing and following Merrick v. Inhabitants of Amherst, 94 Mass. (12 Allen) 500; Jenkins v. Inhabitants of Andover, 103 Mass. 94. The court say in part: "The establishment of a textile school in a large manufacturing city may be of such special and direct benefit to the city as to warrant the appropriation by it * * * of a sum of money in aid of the school, although persons from elsewhere may be members or trustees of the corporation or may be admitted to be taught therein. It is in aid of manufactures which the constitution enjoins the legislature to encourage."

[796] Hill v. Selectmen of Easthampton, 140 Mass. 381. Hubbard

preservation of public records and buildings,[797] the appropriation of moneys towards the payment of police pensions,[798] the payment of bounties for wolf scalps,[799] the reimbursement of owners of glandered horses killed under statutory authority,[800] the purchase of fire apparatus,[801] the expense of a lawsuit in which the corporation is interested;[802] and a recent case[803] discusses the ad-

v. City of Taunton, 140 Mass. 467. Public concerts by a band authorized under statutory authority for the "celebration of holidays, * * * and for other public purposes." Black v. Common Council of Detroit, 119 Mich. 571, 78 N. W. 660; Detwiller v. City of New York, 1 T. & C. (N. Y.) 657; Tatham v. City of Philadelphia, 11 Phila. (Pa.) 276; Austin v. Coggeshall, 12 R. I. 329. A city charter provided that nothing within should be construed "as giving power to vote money for any object except for the regular ordinary and usual expenses of the city." Under this provision it was held that the city treasurer can be enjoined from paying the expenses of a ball given to certain strangers under a resolution of a common council and the fact that a similar ball had been given in previous years without objection; that the parties objecting had waited until the expense had been incurred and that the caterers had acted in good faith could not be urged as a defense.

[797] Donahue v. Morgan, 24 Colo. 389; Spencer v. County of Sully, 4 Dak. 474; Potts v. Bennett, 140 Ind. 71, 39 N. E. 518. The cost of insuring public property held proper. City of Paterson v. Chosen Freeholders of Passaic County, 56 N. J. Law, 459; In re Kenna, 91 Hun, 178, 36 N. Y. Supp. 280; Worth v. City of Brooklyn, 34 App. Div. 223, 54 N. Y. Supp. 484.

[798] Com. v. Walton, 182 Pa. 373. "A judiciously administered pension fund is doubtless a potent agency in securing and retaining the services of the most faithful and efficient class of men connected with that arm of the municipal service in which every property owner and resident of the city is most vitally interested. Reasons in support of this proposition need not be stated in detail." Following Indiana County v. Agricultural Soc., 85 Pa. 357.

[799] Meade County Bank of Sturgis v. Reeves, 13 S. D. 193.

[800] Chambers v. Gilbert, 17 Tex. Civ. App. 106, 42 S. W. 630.

[801] Van Sicklen v. Town of Burlington, 27 Vt. 70; Hunneman v. Fire Dist. No. 1, 37 Vt. 40.

[802] Bradley v. Council of Hammonton, 38 N. J. Law, 430; 20 Am. Rep. 404; Briggs v. Whipple, 6 Vt. 95; Gregory v. City of Bridgeport, 41 Conn. 76, 19 Am. Rep. 485.

[803] City of Minneapolis v. Janney, 86 Minn. 111. The court in part say: "Expositions of this character are not inaugurated or carried forward with a view to pecuniary profit, but are promoted in the hope that they may at least be self-sustaining, and not result in pecuniary loss to the promoters. Profit is not anticipated, and, experience demonstrates, rarely results. The design and purpose is to promote the welfare of the people by bringing them in touch and to a more intimate re-

visability and legality of an appropriation of public moneys for the establishment and partial support of an industrial exposition and holds that such institutions are calculated to advance the material interests and general welfare of the people of the community in which they are held, and thus far are so public in their character as to justify public aid. There are also authorities which sustain the proposition that the development of the industrial resources of a state is a proper subject for the appropriation of public moneys.[804]

While expenditures for the following purposes have not been held authorized or warranted as being for a public purpose, the offer of a reward for the arrest and conviction of fugitives from justice,[805] a recompense to a citizen for false imprisonment for

lationship with many things which are ordinarily in reserve, and usually known or understood by connoisseurs, scientists, or experts only. Through these expositions the arts, the sciences and the great industries are brought closely to the homes of the common people, and their education advanced along the various lines in which the exhibitors are familiar. The advancement of the municipality in material wealth, and the education of the public, residents, as well as visitors, is the primary object, and there is no expectation of gain otherwise. * * * It was conceived, established, adapted, and conducted for the acceleration of the growth of the city, to advance its material interests, and to promote the general welfare and happiness of the people. Its object was to aid and benefit the public, and its purpose was a public one, not private."

[804] Hand Gold Min. Co. v. Parker, 39 Ga. 419; Talbot v. Hudson, 82 Mass. (16 Gray) 417; Lowell v. City of Boston, 111 Mass. 454; City of Minneapolis v. Janney, 86 Minn. 111; State v. Cornell, 53 Neb. 556, 39 L. R. A. 513; Dayton Gold & Silver Min. Co. v. Seawell, 11 Nev. 394; Com. v. City of Pittsburg, 183 Pa. 202. The expenses of a committee appointed by the Chamber of Commerce of the city of Pittsburg to determine the practicability of a ship canal between that city and Lake Erie was held in this case a proper subject of public aid. Town of Bennington v. Park, 50 Vt. 178; State v. City of Eau Claire, 40 Wis. 533; Cooley, Const. Lim. 654, quoting from Beekman v. Saratoga & S. R. Co., 3 Paige (N. Y.) 45, 73.

[805] Baker v. City of Washington, 7 D. C. 134. The offer of a reward by the city of Washington for the capture of the assassin of President Lincoln held void.

Morrell v. Quarles, 35 Ala. 544. But a reward can be offered for the performance of an act not within the ordinary duty of a public officer.

Crofut v. City of Danbury, 65 Conn. 294; Murphy v. City of Jacksonville, 18 Fla. 318; Hawk v. Marion County, 48 Iowa, 472; Hanger v. City of Des Moines, 52 Iowa, 193; Patton v. Stephens, 77 Ky. (14

crime,[806] the maintenance of a private free ferry,[807] a particular bounty law for the killing of wolves, planting trees, and destroy-

Bush) 324; Gale v. Inhabitants of South Berwick, 51 Me. 174; People v. Village of Holly, 119 Mich. 637, 78 N. W. 665, 44 L. R. A. 677; State v. Moore, 37 Neb. 229, 55 N. W. 635; Spafford v. Town of Norwich, 71 Vt. 78, 42 Atl. 970; City of Winchester v. Redmond, 93 Va. 711.

In some instances, however, express power is given to municipal councils to offer rewards for the apprehension and conviction of persons charged with committing certain offenses. New York Consol. Act, § 259; Biggar, Mun. Man. of Can. pp. 803 & 804, §§ 593-595; Crawshaw v. City of Roxbury, 73 Mass. (7 Gray) 374; Loveland v. City of Detroit, 41 Mich. 367; Janvrin v. Town of Exeter, 48 N. H. 83; Abel v. Pembroke, 61 N. H. 357.

See as holding that such a right exists on the part of the government of the state of Illinois, Crawford County v. Spenney, 21 Ill. 288.

It is also held by some courts that while subordinate public corporations such as counties, cities, etc., may have no power to offer such rewards for the arrest of violators of state laws, yet they have a limited authority to do this to secure the arrest of offenders against their local ordinances or by-laws. Huthsing v. Bousquet, 2 McCrary, 152, 7 Fed. 833; Butler v. McLean County, 32 Ill. App. 397; Ripley County Com'rs v. Ward, 69 Ind. 441; Grant County Com'rs v. Bradford, 72 Ind. 455; Butler v. City of Milwaukee, 15 Wis. 493.

[806] Allen v. Board of State Auditors, 122 Mich. 324, 81 N. W. 113, 47 L. R. A. 117. "The resolution authorizes the expenditure of the public moneys of the state for a purely private purpose. It is a mere gratuity for which the state received nothing, but on the contrary, incurred expense by reason of his arrest, trial and imprisonment. Section 45, art. 4 of the Constitution is as follows: 'The assent of two thirds of the members elected to each house of the legislature shall be requisite to every bill appropriating the public money or property for local or private purposes.' The resolution did not receive a two-thirds vote of the members of the senate. This provision is mandatory and cannot be evaded by calling a bill a 'joint resolution.' The above provision of the constitution is too clear and too valuable to be thus frittered away. * * * Section 4, art. 8 of the constitution provides that 'the secretary of state, state treasurer and commissioner of the state land office shall constitute a board of state auditors to examine and adjust all claims against the state not otherwise provided for by general law.' The jurisdiction conferred upon this board by this provision of the constitution clearly means claims resting upon some legal basis. 'Claim' is defined to be 'a demand of a right or alleged right; a calling on another for something due or asserted to be due. * * * The legislature can only authorize this board to pass upon claims such as are contemplated by the constitution. It cannot authorize the board to consider

[807] Town of Jacksonport v. Watson, 33 Ark. 704.

ing poisonous weeds held unconstitutional,[808] the expense of public guests at or the construction of buildings for the use of celebrations or encampments, public banquets,[809] the payment of pensions when not restricted to those performing services for the particular municipality providing the fund,[810] the appropriation of moneys for the celebration of holidays when not expressly authorized by law,[811] the purchase of vaccine points,[812] the reim-

requests, petitions or claims for appropriations which are merely gratuities or which may be based upon sentimental or moral grounds. It is conceded by counsel for petitioner that he has not the semblance of any legal claim. * * * The people through their constitution have committed to the courts the sole jurisdiction to try persons charged with crime, and have made their judgments final and have also prohibited their public funds to be squandered in mere gratuities of this character."

[808] Mute & Blind Inst. v. Henderson, 18 Colo. 98, 31 Pac. 714, 18 L. R. A. 398. But see Smith v. Nobles County, 37 Minn. 535, and Attorney General v. State Board of Judges, 38 Cal. 291.

[809] Hale v. People, 87 Ill. 72; Law v. People, 87 Ill. 385; Higginson v. Inhabitants of Nahant, 93 Mass. (11 Allen) 530; Kingman v. City of Brockton, 153 Mass. 255, 26 N. E. 998, 11 L. R. A. 123; Greenough v. Wakefield, 127 Mass. 275; Cornell v. Town of Guilford, 1 Denio (N. Y.) 510; Hodges v. City of Buffalo, 2 Denio (N. Y.) 110; Thrift v. Elizabeth City, 122 N. C. 31, 44 L. R. A. 427; Moore v. Hoffman, 2 Cin. R. (Ohio) 453; Stem v. City of Cincinnati, 6 Ohio N. P. 15; Com. v. City of Pittsburg, 183 Pa. 202; Austin v. Coggeshall, 12 R. I. 329.

[810] Taylor v. Mott, 123 Cal. 497, 56 Pac. 256, citing and following Bourn v. Hart, 93 Cal. 321, 15 L. R. A. 431; Patty v. Colgan, 97 Cal. 251, 18 L. R. A. 744; Conlin v. San Francisco City & County Sup'rs, 99 Cal. 17, 21 L. R. A. 474. Taylor v. Mott, 123 Cal. 497, 56 Pac. 256. Relative to the point of the text the court in this case holds "St. 1895, p. 107, which requires every municipal corporation in which an exempt fire company exists to annually set apart a sum to be devoted to the relief of disabled exempt firemen residing therein without restricting the benefits to such as have performed service in the particular municipality providing the fund, is contrary to Const. art. 4, §§ 31, 32, which prohibit the legislature from making or authorizing a gift of public moneys."

[811] City of New London v. Brainard, 22 Conn. 552. Fourth of July. Hood v. Town of Lynn, 83 Mass. (1 Allen) 103. Fourth of July. Gerry v. Inhabitants of Stoneham, 83 Mass. (1 Allen) 319; Tash v. Adams, 64 Mass. (10 Cush.) 252. Anniversary of the surrender of Cornwallis. Love v. City of Raleigh, 116 N. C. 296, 21 S. E. 503, 28 L. R. A. 192. Fourth of July. Hodges v. City of Buffalo, 2 Denio (N. Y.) 110; Austin v. Coggeshall, 12 R. I. 329.

[812] Daniel v. Putnam County, 113 Ga. 570, 38 S. E. 980, 54 L. R. A. 292.

bursement of private individuals for moneys expended in securing a decision holding certain county railroad bonds invalid,[813] the expenses attendant upon the passage of legislation,[814] the purchase of uniforms for an artillery company,[815] the expenses of a committee attending a convention of American municipalities,[816] the appropriation of moneys for the maintenance of the national guard,[817] the reimbusement of public officials losing public moneys through the failure, without their fault, of the depositary,[818] and appropriations for the relief of the destitute,[819] though the weight of authority is in favor of such action.[820]

[813] Frankln County v. Layman, 34 Ill. App. 606.

[814] Farrel v. Town of Derby, 58 Conn. 234, 7 L. R. A. 776, 34 Am. & Eng. Corp. Cas. 391, note, p. 397; Henderson v. City of Covington, 77 Ky. (14 Bush) 312; Inhabitants of Frankfort v. Inhabitants of Winterport, 54 Me. 250; Thompson v. Inhabitants of Pittston, 59 Me. 545; Inhabitants of Westbrook v. Inhabitants of Deering, 63 Me. 231.

In Mass. prior to the statute of 1889 this was the rule: See Minot v. Inhabitants of West Rocksbury, 112 Mass. 1; Coolidge v. Inhabitants of Brookline, 114 Mass. 592. But since that date and in Connecticut and New Hampshire under certain circumstances recoveries have been permitted for services rendered in opposing or securing legislation. Farrel v. Town of Derby, 58 Conn. 234, 7 L. R. A. 776, 34 Am. & Eng. Corp. Cas. 391, note, p. 397; Mead v. Inhabitants of Acton, 139 Mass. 341; Connolly v. Beverly, 151 Mass. 437. Bachelder v. Epping, 28 N. H. 354.

[815] Claflin v. Inhabitants of Hopkinton, 70 Mass. (4 Gray) 502.

[816] Waters v. Bonvouloir, 172 Mass. 286, 52 N. E. 500. "The appointment of a committee 'to represent the city of Holyoke at the Convention of American Muncipalities' does not seem to be for any distinct public purpose, wthin the meaning of the charter of the city or of the general laws. The purpose, apparently, is to educate the committee generally with reference to all questions pertaining to municipal administration anywhere. It is not confined to the ascertainment of facts for the information of the board of aldermen of the city of Holyoke concerning questions actually pending before the board. * * * The general education of the mayor and aldermen upon all matters relating to municipalities in the United States and Canada is not, we think, a public purpose and cannot be paid for out of the funds of the city."

[817] Knapp v. Kansas City, 48 Mo. App. 485.

[818] Mercer v. Floyd, 24 Misc. 164, 53 N. Y. Supp. 433, citing Sutherland-Innes Co. v. Village of Evart, 30 C. C.-A. 305; Dunham v. Inhab-

[819] In re Relief Bills, 21 Colo. 62, 39 Pac. 1089; Synod of Dakota v. State, 2 S. D. 366, 14 L. R. A. 418.

[820] See Chap. XI, subd. II, on this subject

§ 418. Same subject; necessary governmental expenses.

Certain disbursements are recognized as necessary for the maintenance of government or for the care and protection of its citizens. Election expenses,[821] the making and care of a system of public records available for general use,[822] the current expenses of government[823] including the salary or fees of officials,[824] the cost of legislative sessions,[825] the payment of rent or the expense of maintaining public buildings,[826] the care and lighting of streets,[827] the maintenance of a water system,[828] the purchase of

itants of Foxcroft, 91 Me. 367; Emerson v. Inhabitants of Foxcroft, 91 Me. 367.

State v. Pike County, 144 Mo. 275; State v. Ziegenhein, 144 Mo. 283; Wisconsin Keeley Inst. Co. v. Milwaukee County, 95 Wis. 153, 36 L. R. A. 55.

[821] Washington County Com'rs v. Menaugh, 13 Ind. App. 311; Marion County Com'rs v. Center Tp., 107 Ind. 584; Crawford County v. City of Meadville, 101 Pa. 573.

[822] Erskine v. Steele County, 87 Fed. 630; Atchison, T. & S. R. Co. v. Kearney County Com'rs, 58 Kan. 19, 48 Pac. 583; State v. Shawnee County Com'rs, 57 Kan. 267; Lancey v. King County, 15 Wash. 9, 34 L. R. A. 817; Lund v. Chippewa County, 93 Wis. 927.

[823] Foland v. Town of Frankton, 142 Ind. 546; Greer County Com'rs v. Watson, 7 Okl. 174; City of Wichita Falls v. Skeen, 18 Tex. Civ. App. 632, 45 S. W. 1037; Dwyer v. City of Brenham, 65 Tex. 526; Gladwin v. Ames, 30 Wash. 608, 71 Pac. 189. All expenses necessary to municipal existence are proper and valid although the city has reached the limit of its indebtedness.

[824] People v. Onahan, 170 Ill. 449; Lebanon L. & M. Water Co. v. City of Lebanon, 163 Mo. 246, 63 S. W. 809.

[825] Rice v. State, 95 Ind. 33

[826] City of Rome v. McWilliams, 67 Ga. 106; Potts v. Bennett, 140 Ind. 71, 39 N. E. 518. The insuring of a public building a proper charge. Adams v. Morrill, 166 Mass. 303, 44 N. E. 224. A county cannot be compelled to furnish Justices a place in which to hold their courts under Pub. St. c. 22, § 5, which provides that "each county, except S. shall provide suitable court houses." See, also, People v. Village of Nyack, 18 App. Div. 318, 46 N. Y. Supp. 218.

[827] White v. City of Decatur, 119 Ala. 476, 23 So. 999; Foland v. Town of Frankton, 142 Ind. 546; Mayo v. Town of Washington, 122 N. C. 5, 29 S. E. 343, 40 L. R. A. 163. This case holds that the erection of an electric light plant for lighting the streets of a city is not a necessary expense within the meaning of the constitutional provision. See, also, §§ 176 and 310, supra.

[828] Manley v. Emlen, 46 Kan. 665; Smith v. Inhabitants of Dedham, 144 Mass. 177; Hequembourg v. City of Dunkirk, 49 Hun, 550, 2 N. Y. Supp. 447; Comstock v. City of Syracuse, 5 N. Y. Supp. 874. See, also, §§ 177 and 310, supra.

ordinary supplies for office use,[829] and the expense of special departments or boards including fire, police, park, health and educational.[830] As a rule, all such expenses, as well as others of a similar character,[831] are held essential and necessary to the maintenance of corporate existence and the carrying out of the benificent purposes for which government is created. The payment

[829] Saylor v. Nodaway County, 159 Mo. 520, 60 S. W. 1057; Garfield County Com'rs v. Isenberg, 10 Okl. 378, 61 Pac. 1067.

[830] Montezuma County Com'rs v. San Miguel County Com'rs, 3 Colo. App. 137; Hover v. People, 17 Colo. App. 375, 68 Pac. 679; Hardy v. Inhabitants of Waltham, 44 Mass. (3 Metc.) 163; Allen v. Inhabitants of Taunton, 36 Mass. (19 Pick.) 485; Oktibbeha County Sup'rs v. Cottrell, 70 Miss. 117; East Tennessee University v. City of Knoxville, 65 Tenn. (6 Baxt.) 166; City of Denison v. Foster (Tex. Civ. App.) 37 S. W. 167; City of Sherman v. Smith, 12 Tex. Civ. App. 580, 35 S. W. 294.

[831] Board of Library Trustees v. Orange County Sup'rs, 99 Cal. 571; McBride v. Hardin County, 58 Iowa, 219; Wisconsin Industrial School for Girls v. Clark County, 103 Wis. 651, 79 N. W. 422, following Milwaukee Industrial School v. Milwaukee County Sup'rs, 40 Wis. 328. The court here say: "Now the persons liable to be placed under guardianship under the Statutes in question belong to the classes of helpless unfortunates that the state is in duty bound, through some proper agency, to protect and care for. * * * In recognition of that duty * * * the statutes as we find them were enacted. * * * To say that the legislative intent was to leave voluntary organizations of worthy ladies * * * taking upon themselves one of the most important duties the state owes to its people, to bear the expense of that part of their charitable work done in response to commitments * * * would convict the lawmaking power of placing upon the statute books a very absurd piece of legislation. Any such construction must be rejected as indicated by the most familiar rules of statutory construction if one that is reasonable can be found. * * * The idea advanced that a charitable corporation adopted by the state as an agency for the performance of public functions as to each child received, is left by the law to discover the particular subdivision of the county liable to compensate for its services and to contest the question of liability with such subdivision, is unreasonable in the extreme. * * * We reach the conclusions that the police regulations in regard to the commitment of children to industrial school corporations * * * fix the liability upon the counties from which the children are received in the absence of anything in the commitment to the contrary; that such is the meaning of the police regulations by necessary inference; that the language of the law admits of a construction in accordance therewith."

of adverse legal claims or of judgments rendered by a court or tribunal of competent jurisdiction, including statutory costs, is, without question, legal,[832] as well as of the payment of the debts of a public corporation.[833]

§ 419. Statutory costs.

In addition to the disbursements authorized by the court or a public policy, there are others of a public character which, by constitutional or statutory provision, are made a charge upon dif-

[732] In re Substitute for Senate Bill No. 83, 21 Colo. 69, 39 Pac. 1088; City of Edwardsville v. Barnsback, 66 Ill. App. 381; King v. Village of Randolph, 28 App. Div. 25, 50 N. Y. Supp. 902; Metschan v. Hyde, 36 Or. 117, 58 Pac. 80.

[833] State v. Dorland, 106 Iowa, 40. "Code 1897, § 5462, relating to criminal cases and providing that, in case of a reversal or modification in defendant's favor, of the judgment he shall be entitled to recover the costs of printing briefs on appeal, to be paid by the county from which the appeal was taken, applies to suits pending at its passage. Under Code 1897, § 5462, providing that a defendant in a criminal prosecution shall, when he receives a reversal or modification of the judgment in his favor on appeal, 'be entitled to recover the cost of printing abstracts and briefs,' to be paid by the county, such allowance is to be taxed as costs against the county." Bevington v. Woodbury County, 107 Iowa, 424, holds in this connection, "Acts 21st Gen. Assemb. c. 73, § 11, fixing the compensation of the county attorney; and section six prohibiting such officer from receiving 'any fee or reward from or on behalf of any prosecutor or other individuals for services in any prosecution or business to which it has been his official duty to attend, interposes no obstacle to the employment of the county attorney by the board of supervisors of the county in which certain criminal proceedings had been brought to attend to the prosecution of such causes in another county to which they had been taken on a change of venue, where such board had power to contract with any attorney for such services." City of Des Moines v. Polk County, 107 Iowa, 525. "Acts 17th Gen. Assemb. c. 56 provides, (§ 1) that all cities of the first class may provide by ordinance for the payment of salaries to officers and (§ 2) that all fees allowed by law for their services shall, by such officers, when collected, be paid into the city treasury. Held, that where a city has so prescribed, by ordinance, it may maintain an action against the county for fees earned by such officers in vagrancy cases, it being the party in interest, within Code 1873, §§ 2543, 2544."

Greer County Com'rs v. Watson, 7 Okl. 174, (syllabus by the court) "Costs are unknown to the common law, and the sovereignty neither

ferent organizations. Statutory costs or fees are those incurred, ordinarily, in what can be termed, "the administration of public justice;" this purpose, it is universally recognized, is not only a necessary object of government but one of the highest for which it is organized. The cost of maintaining places of imprisonment with the care and lodging of those confined,[834] the payment of the fees of jurors,[835] witnesses,[836] sheriffs, or officers of a similar character,[837] and other necessary fees or expenses in connection with holding terms of court or the trial of criminal

took nor paid costs and the territory or a county is only liable for costs when such liability is expressly created by statute. A county is not a party to a criminal prosecution and is not liable for fees of witnesses attending before the grand jury or a court in a criminal case, in the absence of a statute imposing such liability." Henderson v. Walker, 101 Tenn. 229. Costs are properly taxable to the county and a legitimate item of expense under the statutory provisions relating to the taxation of costs. Perkins v. Grafton County, 67 N. H. 282. "Gen. Laws, c. 285, § 4, prescribes that every jailer shall provide each prisoner in his custody with necessary medical attendance. § 11 that, when a prisoner is removed from one county to another, the expenses are chargeable to the county from which he is removed. Held, that a physician who attended a prisoner at the request of the jailer of the county to which he is removed has a cause of action therefor against the county from which he is removed." See, also, §§ 143 and 305, supra.

[834] Finney County Com'rs v. Gray County Com'rs, 8 Kan. App. 745, 54 Pac. 1100; Gates v. Johnson County, 36 Tex. 144.

[835] Greene County v. Hale County, 61 Ala. 72. But see Hilton v. Curry, 124 Cal. 84.

[836] Polk County v. Crocker, 112 Ga. 152, 37 S. E. 178. The fees of witnesses examined before a grand jury held not a public charge. People v. Hull, 23 Misc. 63, 50 N. Y. Supp. 463; People v. Jefferson County Sup'rs, 35 App. Div. 239, 54 N. Y. Supp. 782; Green County Com'rs v. Watson, 7 Okl. 174, 54 Pac. 441. In the absence of a law making a county liable for the fees of grand jury witnesses or those attending criminal cases for the prosecution, they cannot be a public charge. But see Salt Lake County v. Richards, 14 Utah, 142.

[837] Carlisle v. Tulare County (Cal.) 49 Pac. 3; Marion County v. Lear, 108 Ill. 343; Rawley v. Vigo County Com'rs, 2 Blackf. (Ind.) 355. No liability where the prosecution fails. Randolph County Com'rs v. Henry County Com'rs, 27 Ind. App. 378, 61 N. E. 612; Greenwood County Com'rs v. Elk County Com'rs, 63 Kan. 857, 66 Pac. 1018; Ford v. Howard County Circ. Ct., 2 Mo. 225; James v. Lincoln County, 5 Neb. 38; People v. Clinton, 28 App. Div. 478, 51 N. Y. Supp. 115; Lancaster County v. Brinthall, 29 Pa. 38.

causes,[838] and enforcing the laws of a state or community,[839] including attorneys fees.[840] The cost of summoning witnesses or other fees for defendants in criminal prosecutions are not usually a charge upon the public,[841] nor the fees of officers rendering services for private individuals.[842] But all statutory provisions in regard to the steps prescribing the manner in which or the various steps to be performed in the trial of the cause in which a public corporation may be interested should be strictly followed by public officials to acquire the right to collect their fees or expenses from the public authorities. As against the right to recover, such laws are strictly construed.[843]

[838] Branson v. Larimer County Com'rs, 5 Colo. App. 231; Clark School Tp. v. Grossius, 20 Ind. App. 322; Finney County Com'rs v. Gray County Com'rs, 8 Kan. App. 745; Lovejoy v. Inhabitants of Foxcroft, 91 Me. 367; Howard County Com'rs v. Frederick County Com'rs, 30 Md. 432; People v. Manistee County Sup'rs, 26 Mich. 422; Miner v. Shiawassee County Sup'rs, 49 Mich. 602; Washoe County v. Humboldt County, 14 Nev. 123; People v. Vanderpoel, 35 App. Div. 73, 54 N. Y. Supp. 436. The expenses of a public officer not required by law to defend a case brought against him in an official capacity cannot be recovered from the town. Pegram v. Guilford County Com'rs, 75 N. C. 120; Lycoming v. Union, 15 Pa. 166; State v. Evenson, 18 Wash. 609; Williams v. Dodge County, 95 Wis. 604.

[839] Independence County v. Duncan, 40 Ark. 329; People v. Washington County Sup'rs, 66 App. Div. 66, 72 N. Y. Supp. 568.

[840] Tatlock v. Louisa County, 46 Iowa, 138; Jordan v. Osceola County, 59 Iowa, 388; Bevington v. Woodbury County, 107 Iowa, 424, 78 N. W. 222, following Taylor County v. Standley, 79 Iowa, 666; Worcester County Com'rs v. Melvin, 89 Md. 37.

[841] Cohen v. Coleman, 71 Ala. 496; In re Straus, 44 App. Div. 425, 61 N. Y. Supp. 37. The expenses of a person indicted for a criminal offense in connection with his official duties cannot be a public charge and N. Y. Laws 1899, c. 700, § 1, et sequenter, are therefore unconstitutional. See, also, as construing the same laws, In re Labrake, 29 Misc. 87, 60 N. Y. Supp. 571.

Huntingdon County v. Com., 72 Pa. 80; Henderson v. Evans, 51 S. C. 331, 29 S. E. 5, 40 L. R. A. 426; Hutt v. Winnebago County Sup'rs, 19 Wis. 128.

[842] Kinney v. Kent County Sup'rs, 51 Mich. 620.

[843] Malone v. Escambia County, 116 Ala. 214; Powers v. Sullivan County, 63 N. H. 275; Clerk's Office v. Carteret County Com'rs, 121 N. C. 29, 27 S. E. 1003; Bunting v. Wake County Com'rs, 74 N. C. 633; Guilford v. Beaufort County Com'rs, 120 N. C. 23; York County Com'rs v. Jacobs, 3 Pen. & W. (Pa.) 365; Conley v. York County, 5 Pa. Dist. R. 748; Agnew v. Cumberland County Com'rs, 12 Serg. & R. (Pa.) 94;

§ 420. Public buildings.

The construction and maintenance of public buildings for the housing of public officials and protection of public records and the use of various classes over which public corporations are required to exercise restraint and provide protection are clearly legitimate purposes for the use of public moneys.[844] Questions only arise in connection with this subject concerning specific authority or lack of it.[845] The power as granted to state agencies, whether boards or officials, depends almost entirely upon the construction of local statutes or ordinances.[846] But it is quite true

Crawford County v. Barr, 92 Pa. 359; Randles v. Waukesha County, 96 Wis. 629.

[844] People v. Harris, 4 Cal. 9. But compare Vanover v. Davis, 27 Ga. 354.

Allen v. Lytle, 114 Ga. 275, 40 S. E. 238; Hall v. City of Virginia, 91 Ill. 535. A private subscription to aid in constructing a public building can be enforced. Trustees of House of Reform v. City of Lexington, 23 Ky. L. R. 1470, 65 S. W. 350; Spaulding v. City of Lowell, 40 Mass. (23 Pick.) 71; State v. McCardy, 62 Minn. 509; State v. Ehrmantraut, 63 Minn. 104; French v. City of Millville, 66 N. J. Law, 392, 49 Atl. 465. Where the authority to construct a public building exists, it carries with it the implied power to enforce it. Affirmed in 67 N. J. Law, 349, 51 Atl. 1109. Smith v. City of Newbern, 70 N. C. 14. The authority granted a town "to make all such necessary ordinances, rules and orders as may tend to the advantage, improvement and good government of the town," confers the discretionary power to erect a market house or to lease a building for such purpose. State v. Metschan, 32 Or. 372, 41 L. R. A. 692. Under Or. Const. art. 14, § 3, all state institutions must be located at the seat of government. Laws 1893, p. 136, authorizing the establishment and maintenance of a branch insane asylum elsewhere are, therefore, void. Cresswell Ranch & Cattle Co. v. Roberts County (Tex. Civ. App.) 27 S. W. 737. Where the authority exists, the question of the propriety of the construction of a building is usually within the discretion of the official charged with such duty. Hanley v. Randolph County Ct., 50 W. Va. 439, 40 S. E. 389; Mills v. Gleason, 11 Wis. 470.

[845] DeWitt v. City of San Francisco, 2 Cal. 289. The power to construct a public building conveys with it the implied power to purchase land upon which to erect it. See, also, Witter v. Polk County Sup'rs, 112 Iowa, 380, 83 N. W. 1041; Kepley v. Prather, 52 Kan. 9, and People v. City of Rochester, 50 N. Y. 525.

Wells v. Ragsdale, 102 Ga. 853, 29 S. E. 165; Hunnicutt v. City of Atlanta, 104 Ga. 1, 30 S. E. 500; Rothrock v. Carr, 55 Ind. 334; Louisville & N. W. R. Co. v. Police Jury of Bienville Parish, 48 La. Ann. 331; Thomas v. Adsit, 116 Mich. 106, 74 N. W. 381.

[846] Ex parte Buckner, 9 Ark. 73. Durrett v. Buxton, 63 Ark. 397.

that there should be special authority from the legislature for the construction of public buildings even where there are surplus funds to accomplish this without the levy of additional taxes or the incurring of indebtedness for such purpose.[847] The principle

The levy of a tax for the construction of a court house is equivalent to an "appropriation" within art. 16, § 12, of the constitution. See, also, Hilliard v. Bunker, 68 Ark. 340.

Babcock v. Goodrich, 47 Cal. 488; White v. Town of Stamford, 37 Conn. 578; Carruth v. Wagener, 114 Ga. 740, 40 S. E. 700; Rock v. Rinehart, 88 Iowa, 37, 55 N. W. 21, construing Iowa Laws 1876, c. 80, § 1, and Laws 1862, c. 77; Jones v. Pendleton County Ct. (Ky.) 19 S. W. 740, construing Ky. Gen. St. c. 86, § 4; Friend v. Gilbert, 108 Mass. 408; Foster v. City of Worcester, 164 Mass. 419, construing Mass. St. 1885, c. 139 and Pub. St. c. 54, § 16; Gaston v. Lamkin, 115 Mo. 20, 21 S. W. 1100, construing Mo. Rev. St. 1889, § 852; Drew v. West Orange Tp., 64 N. J. Law, 481, 45 Atl. 787; Lowthorp v. Inhabitants of Trenton, 62 N. J. Law, 795. Holding act of March 5, 1896, providing for the purchase of land and construction of school buildings unconstitutional as violating constitution, art. 4, § 7, pl. 11. Torreyson v. Board of Examiners, 7 Nev. 19, construing Nev. St. 1869, c. 73 and 1871, c. 154; Bradley v. Van Wyck, 65 App. Div. 293, 72 N. Y. Supp. 1034; Barker v. Town of Floyd, 61 App. Div. 92, 69 N. Y. Supp. 1109, affirming 32 Misc. 474, 66 N. Y. Supp. 216, and holding that N. Y. Laws 1890, c. 568, commonly known as the "Town Law" repealed by implication all prior legislation relating to the erection of town schools. Town Board of Jamaica v. Denton, 70 N. Y. Supp. 837; Jamaica Sav. Bank v. City of New York, 61 App. Div. 464, 70 N. Y. Supp. 967; Black v. Buncombe County Com'rs, 129 N. C. 121, 39 S. E. 818; Vaughn v. Forsyth County Com'rs, 117 N. C. 429, holding laws of 1889, c. 343, as superseded by laws of 1895, c. 135. Carter v. Thorson, 5 S. D. 474, 24 L. R. A. 734. Nichols v. State, 11 Tex. Civ. App. 327, 32 S. W. 452. The cost of construction is limited strictly to the amount authorized.

[847] Thompson v. Town of Luverne, 128 Ala. 567, 29 So. 326. It also follows that such statutory authority must be constitutional. Russell v. Tate, 52 Ark. 541, 7 L. R. A. 180. Under Ark. Const. 1874, art. 12, § 5, a town has no power to appropriate money to aid the building of a court house within its limits. Hilliard v. Bunker, 68 Ark. 340; Commissioners of Roads & Revenues v. Porter Mfg. Co., 103 Ga. 613, 30 S. E. 547.

Jackson County Com'rs v. State, 155 Ind. 604, 58 N. E. 1037. A tax levied for the construction of public buildings is invalid where it contravenes Ind. Const. art. 4, § 22. Hull v. Marshall County, 12 Iowa, 142.

Rock v. Rinehart, 88 Iowa, 37, 55 N. W. 21. Public buildings may be constructed from the proceeds of the sale of swamp and overflowed lands by a county. Queens County Sup'rs v. Phipps, 35 App. Div. 350,

also should not be forgotten that public officials are agents with restricted powers.[848] The tendency and policy of the courts in all directions is to restrain and restrict the action of a public corporation though this is not carried to the extent of hampering or preventing the accomplishment of those purposes for which such organizations are created.[849] Questions may also arise in connection with the grant of authority as to what constitutes a building. In the note will be cited cases upon this point.[850]

54 N. Y. Supp. 946; Bennett v. Norton, 171 Pa. 221.

[848] Cass County v. Gibson (C. C. A.) 107 Fed. 363. Where powers are granted to a board not involving judgment or discretion in their performance, they can be delegated to a subordinate committee of the board.

Laver v. Ellert, 110 Cal. 221. Discretionary powers may be granted to commissioners to change the plans and specifications of buildings authorized. Sexton v. Cook County, 114 Ill. 174. An architect cannot bind a county ordering work not authorized by a resolution of the county board having authority in such matters. Nill v. Jenkinson, 15 Ind. 425; Rothrock v. Carr, 55 Ind. 334; Campbell v. Commissioners of State Soldiers' & Sailors' Monument, 115 Ind. 591.

Miller v. Merriam, 94 Iowa, 126, 62 N. W. 689. Special authority to construct a court house is not necessary where there are funds on hand without the levy of special taxes for such purpose. Robling v. Pike County Com'rs, 141 Ind. 522, 40 N. E. 1079. A statute making it the duty of certain officials to construct public buildings vests them with discretion as to the propriety of the erection of such buildings which will not, ordinarily, be interfered with. Morse v. Norfolk County, 170 Mass. 555, 49 N. E. 925; Auditors of Wayne County v. Wayne Circ. Judge, 114 Mich. 44, 72 N. W. 19; State v. Seibert, 99 Mo. 122, 12 S. W. 348; Verdin v. City of St. Louis (Mo.) 27 S. W. 447; State v. Haynes, 72 Mo. 377; State v. Babcock, 24 Neb. 787.

People v. Baker, 29 Barb. (N. Y.) 81. Funds raised for the purpose of erecting a fire proof Surrogate's office may be appropriated for the erection of an addition to the county penitentiary. State v. Johnson, 42 Ohio St. 134; Mahon v. Luzerne County, 197 Pa. 1; State v. McGraw, 13 Wash. 311; Milwaukee County v. Paul, 59 Wis. 341; Koch v. City of Milwaukee, 89 Wis. 220.

[849] Field v. Stroube, 19 Ky. L. R. 1751, 44 S. W. 363; List v. City of Wheeling, 7 W. Va. 501.

[850] Ertle v. Leary, 114 Cal. 238. The cells of a jail held in this case to be a part of the building. Allgood v. Hill, 54 Miss. 666. The planting of trees around it may be ordered by county officials under the grant of authority to maintain a good and convenient court house. Brown v. Graham, 58 Tex. 254. The right to construct an addition to a building is included in a grant of the power to erect public buildings.

§ 421. The leasing, repair and furnishing of public buildings.

The power to construct a public building or supply public officers with necessary court rooms or offices includes usually the right, and implies the duty, to furnish for such purposes suitable accommodations,[851] and the right generally exists in public officials, without the grant of specific authority, to make ordinary repairs.[852] Extensive or extraordinary repairs may require a special grant of authority.[853] The furnishing of public buildings also requires as a rule such special authority.[854]

§ 422. Local or internal improvements.

A highway or street is one of the most familiar and frequently found examples of a "local improvement," and it is, unquestionably, the duty of a sovereign under modern theories of civilized government to construct and maintain highways, not only for defensive purposes with respect to the state itself, but also as a means for facilitating communication between the different parts

[851] Washington County v. Sallinger, 119 U. S. 176; Butler v. Neosho County Com'rs, 15 Kan. 178; Dean v. Saunders County, 55 Neb. 759, 76 N. W. 450. But see French v. City of Auburn, 62 Me. 452.

Owen v. Nye County, 10 Nev. 338; Barker v. Town of Floyd, 32 Misc. 474, 66 N. Y. Supp. 216. The power to construct a town hall does not authorize a town to purchase a building for such purpose. Wade v. City of New Bern, 77 N. C. 460; Ex parte Black, 1 Ohio St. 30; Trustees of New London Tp. v. Miner, 26 Ohio St. 452; Wright v. City of San Antonio (Tex. Civ. App.) 50 S. W. 406; Despard v. Pleasants County, 23 W. Va. 318; Town of Beaver Dam v. Frings, 17 Wis. 398.

[852] State v. Callehan, 1 Ind. 147; Cook v. Des Moines County, 70 Iowa, 171. The authority to repair a jail does not confer the right to erect movable iron cells. Woodbury v. Inhabitants of Hamilton, 23 Mass. (6 Pick.) 101; Willard v. Inhabitants of Newburyport, 29 Mass. (12 Pick.) 227. Power to repair a public clock.

[853] Albany City Nat. Bank v. City of Albany, 92 N. Y. 363.

[854] Gammon v. Lafayette County, 79 Mo. 223. The authority to order a desk for official use held included within the statutory provision "that the necessary expenses of said court shall be paid by the county." Kramrath v. City of Albany, 53 Hun, 206, 6 N. Y. Supp. 54. But see the case of Schenck v. City of New York, 67 N. Y. 44.

State v. Kiesewetter, 45 Ohio St. 524, 15 N. E. 208. The right to purchase a printing press for use in an orphans' home where the art of printing taught is conferred by statutory appropriation "for heating and furnishing new industrial buildings."

of the country in order to advance, promote and encourage its internal improvement and industries.[855] Without considering a technical definition of a highway as found in the various decisions of various state courts,[856] it is sufficient for our purpose to say that a highway is a generic term for a way, improved or unimproved, open to public use as a means of travel.[857] Ordinarily, as found in statutes or decisions, the term "highway" is used to define a country or suburban way,[858] and the term or word "street" is

[855] City of Santa Ana v. Harlin, 99 Cal. 538; Barber Asphalt Pav. Co. v. City of New Orleans, 43 La. Ann. 464, 9 So. 484; Gurnsey v. Edwards, 26 N. H. (6 Fost.) 224; People v. East Fishkill Highway Com'rs, 42 Hun (N. Y.) 463; In re Penn Tp. Road, 66 Pa. 461.

[856] Janvrin v. Poole, 181 Mass. 463, 63 N. E. 1066. The word "highway" as used in statutes of 1896, c. 417, includes an avenue in a town. Vantilburgh v. Shann, 24 N. J. Law (4 Zab.) 740; Witter v. Harvey, 1 McCord (S. C.) 67; Wolcott v. Whitcomb, 40 Vt. 40. See, also, those sections, post, treating of streets and highways.

[857] Morris v. Bowers, Wright (Ohio) 749; Washington Laws 1889-90, p. 733; Elliott, Roads & St. §§ 1, et seq. A highway includes township roads, streets, alleys, pikes, and plank roads, tramways, bridges, and ferries, public squares and boulevards, canals and navigable rivers. It also is fully established that every highway need not be a thoroughfare. It may be a cul-de-sac. Adams v. Harrington, 114 Ind. 66; Bartlett v. City of Bangor, 67 Me. 460; People v. Kingman, 24 N. Y. 559. "Highways and streets having no issue at one extremity are quite common and indeed indispensable in many parts of the country. Take the case of roads leading into the northern wilderness of this state. They extend as far as the country is settled, where they stop and remain in that condition until the progress of the settlements warrants their further extension. If it were held that they could not be laid out unless they should run quite across the mountains to the northern slope, it would be impossible that they should ever be established. The same remark is true of roads laid out in the newly settled portions of the state bordering upon original forests. * * * For similar reasons in many of the cities and villages there are short streets leading to ravines and to cliffs, whence there can be no outlet and where they must necessarily stop. * * * The same thing is true of streets running to unnavigable waters or to points on the sea shore where there cannot be a harbor or landing place." Saunders v. Townsend, 26 Hun (N. Y.) 308; Mahler v. Brumder, 92 Wis. 477, 31 L. R. A. 695.

[858] Clark v. Com., 77 Ky. (14 Bush) 166; Cleaves v. Jordan, 34 Me. 9; Yeomans v. Ridgewood Tp. Committee, 46 N. J. Law, 508; Town of Northumberland v. Atlantic & St. L. R. Co., 35 N. H. 574; State v. Davis, 68 N. C. 297; Ferris v. Bramble, 5 Ohio St. 109; State v. Harden, 11 S. C. 360.

used to define all ways of communication within the limits of a city, town or village.[859] As with the construction of public buildings, the question of the absolute right to construct or maintain a highway or street is not raised. There is no doubt but that the use of public moneys for such purposes is legitimate and constitutional.[860] A doubt or question only arises in specific instances of the extent of the authority conferred by a legislature or constitution to construct, maintain or improve the street or highway. The law then, affecting this particular use of public moneys, depends almost entirely upon the construction given by the courts to local statutes and as these vary in their language in the different states, no general rules can be given which will decide mooted questions.

§ 423. Public highways.

Public moneys can be appropriated ordinarily only for the construction or the improvement of a public highway, and to con-

[859] State v. Moriarty, 74 Ind. 103; Inhabitants of Waterford v. Oxford County Com'rs, 59 Me. 450; Foxworthy v. City of Hastings, 25 Neb. 133. "The sidewalk is shown to have been four feet and one inch in width, except immediately in front of the hotel, which stood back from the line of the lot six feet and nine inches: at this point the sidewalk extended to the hotel, being ten feet and ten inches in width. The testimony tends to show that the portion of the sidewalk between the hotel and the line of the lot had been constructed or paid for by the owner of the hotel but was under the direction or control of the city; that it was in fact, a part of the sidewalk and was used as such. The court instructed the jury: 'If you find the injury complained of occurred outside and off the streets and sidewalks of the city, you will find for the defendant.' In this we think the court erred. The entire sidewalk was a part of the street. The six feet nine inches within the line of the lot so far as appears, was dedicated to the public and accepted by the city in its behalf. A walk being laid there, was an invitation to every person passing along the street to use it at his pleasure. There were no distinguishing marks nor was there a dividing line between what is claimed to be the sidewalk proper and this portion that extended to the building. The whole therefore, is to be treated as a part of the sidewalk and it was the duty of the city to keep it in a safe condition."

Brace v. New York Cent. R. Co., 27 N. Y. 269; In re Woolsey, 95 N. Y. 135; Taylor v. Town of Philippi, 35 W. Va. 555. Century Dictionary. "A street is a public way or road whether paved or unpaved in a village, town or city ordinarily including a sidewalk or sidewalks and a road way and having houses or town lots on one or both sides."

[860] Ryerson v. State, 24 N. J. Law (4 Zab.) 622.

stitute such, a road or way must be laid out[861] and recorded, dedicated[862] to a public use or prescriptive rights acquired according to law.[863] The authorities quite generally hold that to create a

[861] United States v. King, 1 Cranch, C. C. 444, Fed. Cas. No. 15,534; United States v. Schwarz, 4 Cranch, C. C. 160, Fed. Cas. No. 16,237; Chamberland v. Fortier, 23 Can. Sup. Ct. 371. The mere expenditure of public moneys on a private road does not change its character as such. Louk v. Woods, 15 Ill. 256; McCearley v. Lemennier, 40 La. Ann. 253, 3 So. 649; Inhabitants of Blackstone v. Worcester County Com'rs, 108 Mass. 68; Geer v. Fleming, 110 Mass. 39; People v. Jackson, 7 Mich. 432; Flint & P. M. R. Co. v. Willey, 47 Mich. 88; State v. Auchard, 22 Mont. 14, 55 Pac. 361; State v. Marble, 26 N. C. (4 Ired.) 318; State v. Davis, 68 N. C. 297; Northern Cent. R. Co. v. Com., 90 Pa. 300; Pittsburgh, McK. & Y. R. v. Com., 104 Pa. 583; Phillips v. St. Clair Incline Plane Co., 153 Pa. 230; State v. Mobley, 1 McMul. (S. C.) 44.

Baker v. Hogaboom, 12 S. D. 405, 81 N. W. 730. To constitute a public highway it is not necessary that the road as laid out should be used by the public to its full width. State v. Paine Lumber Co., 84 Wis. 205, 54 N. W. 503; Hunter v. Chicago, St. P., M. & O. R. Co., 99 Wis. 613.

Elliott, Roads & St., § 3, "If a way is one over which the public have a general right of passage, it is, in legal contemplation, a highway whether it be one owned by a private corporation or one owned by the government or governmental corporation and whether it be situated in a town or in the country; no matter whether it be established by prescription or by dedication or under the right of eminent domain. It is a highway if there is a general right to use it for travel. The mode of its creation does not of itself invariably determine its character, for this in general is determined by the rights which the public have in it." Citing, among other cases, Washer v. Bullitt County, 110 U. S. 558; McDade v. State, 95 Ala. 28; Peck v. Smith, 1 Conn. 103; Stackpole v. Healy, 16 Mass. 33; Village of Granville v. Jenison, 84 Mich. 54; State v. Proctor, 90 Mo. 333; People v. Loehfelm, 102 N. Y. 1; Pittsburg & W. E. R. Co. v. Point Bridge Co., 165 Pa. 37, 26 L. R. A. 323.

[862] McDade v. State, 95 Ala. 28, 11 So. 375; Harper v. State, 109 Ala. 66, 19 So. 901; State v. Taff, 37 Conn. 392; Craig v. People, 47 Ill. 487; Oliver v. City of Worcester, 102 Mass. 489; Butchers' S. & M. Ass'n v. City of Boston, 139 Mass. 290; Buskirk v. Strickland, 47 Mich. 389. To constitute a public way, it must be accepted by the public authorities as such. State v. Nudd, 23 N. H. 327; Morgan v. Palmer, 48 N. H. 336; Mercer v. Pittsburg, Ft. W. & C. R. Co., 36 Pa. 99. See, also, post sections on acquirement of public property by prescription and dedication.

[863] Harper v. State, 109 Ala. 66, 19 So. 901. The use must be adverse to the owner of the soil and continue uninterrupted for the prescribed period. Debolt v. Carter, 31 Ind. 355; Smith v. Gorrell, 81 Iowa,

right of way by prescription, an adverse user must be shown for a required length of time, and to establish it by dedication, an acceptance by the proper public officials. The principles controlling the expenditure of public moneys upon highways and streets, as the division is commonly made, depends upon the fact of whether a certain way is either a street[864] or a highway[865] as coming within the classification and division either made by law or by court decision in a particular locality.

§ 424. Opening or construction of a highway or street.

The right to open or construct a public street or highway if belonging to public corporations of whatever grade will depend upon either a general or a specific grant of authority, a general grant of authority as found in the general laws of the state establishing the right and prescribing the manner in which such public ways shall be opened and used by the public[866] or a spe-

218, 46 N. W. 992; Louisville & N. R. Co. v. Survant, 96 Ky. 197; Reed v. Inhabitants of Northfield, 30 Mass. (13 Pick.) 94; Hobart v. Plymouth County, 100 Mass. 159; Mayberry v. Inhabitants of Standish, 56 Me. 342; Bice v. Town of Walcott, 64 Minn. 459, 67 N. W. 360; North Hempstead Highway Com'rs v. Queens County, 17 Wend. (N. Y.) 9; Smith v. Slemons, 78 Tenn. (10 Lea) 31. See post, sections on acquirement of public property by prescription.

[864] Brown v. Hines, 16 Ind. App. 1; McHenry v. Selvage, 18 Ky. L. R. 473, 35 S. W. 645; Board of Council of Danville v. Fiscal Ct., 21 Ky. L. R. 196, 51 S. W. 157, withdrawing opinion in 20 Ky. L. R. 1495, 49 S. W. 458; Cascade County v. City of Great Falls, 18 Mont. 537; Columbia & P. S. R. Co. v. City of Seattle, 6 Wash. 332; City of Milwaukee v. Davis, 6 Wis. 377.

[865] In re Woolsey, 95 N. Y. 135; Race v. State, 43 Tex. Cr. R. 438, 66 S. W. 560. See Town of Wardsboro v. Town of Jamaica, 59 Vt. 514, 9 Atl. 11, as to division of expenses and maintenance of a highway between two towns.

[866] People v. Lake County Sup'rs, 33 Cal. 487; Bequette v. Patterson, 104 Cal. 282; Salem & H. Turnpike Co. v. Lyme, 18 Conn. 451; Keech v. People, 22 Ill. 478; McClure v. Franklin County Com'rs, 124 Ind. 154, 24 N. E. 741; Gibbons v. Copper, 67 Ind. 81; Higham v. Warner, 69 Ind. 549; Johnson v. Wells County Com'rs, 107 Ind. 15; People v. Village of Brighton, 20 Mich. 57; Shue v. Highway Com'rs of Richmond, 41 Mich. 638. The opening of a highway should be determined on its own merits without reference to the opening or discontinuance of other roads.

De Lapp v. Beckwith, 114 Mich. 394, 72 N. W. 237; People v. Richmond County Sup'rs, 20 N. Y. 252; In re Central Park Com'rs, 51 Barb. (N. Y.) 277; In re Lexington Ave.,

cific grant of authority as found in a special law where such legislation is permitted or in the charter of a particular municipal organization.[867] Where the latter authority exists it does not partake of the nature of a contract but may be repealed or trans-

63 How. Pr. (N. Y.) 462; In re Board of St. Opening & Imp. of N. Y., 111 N. Y. 581; Foster v. Wood County Com'rs, 9 Ohio St. 540; Maxwell v. Tillamook County, 20 Or. 495, 26 Pac. 803. Special legislation relative to the construction of a wagon road when in violation of a constitutional provision is invalid. In re Road in Borough of Verona (Pa.) 12 Atl. 456; Millcreek Tp. v. Reed, 29 Pa. 195. The opening of a public highway considered a proceeding in rem. Smith v. Pennington County, 2 S. D. 14; Hydes Ferry Turnpike Co. v. Davidson County, 91 Tenn. 291, 18 S. W. 626; Painter v. St. Clair, 98 Va. 85, 34 S. E. 989; Lewis County v. Hays, 1 Wash. T. 109; State v. Hogue, 71 Wis. 384, 36 N. W. 860.

[867] City of Hannibal v. Campbell, 30 C. C. A. 63, 86 Fed. 297; Himmelmann v. Hoadley, 44 Cal. 213. The legislature may confirm an insufficient establishment of a highway by a board of supervisors. See, also, Fair v. Buss, 117 Iowa, 164, 90 N. W. 527; Onderdonk v. City & County of San Francisco, 75 Cal. 534; Cohen v. City of Alameda, 124 Cal. 504; Byrne v. Drain, 127 Cal. 663; Inhabitants of Berlin v. Inhabitants of New Britain, 9 Conn. 175; Banks v. Borough of Greenwich (Conn.) 15 Atl. 738; Hough v. City of Bridgeport, 57 Conn. 290; City Council of Augusta v. Murphey, 79 Ga. 101; Curry v. Town of Mt. Sterling, 15 Ill. 320; Dewey v. City of Des Moines, 101 Iowa, 416; City of Lowell v. Hadley, 49 Mass. (8 Metc.) 180; Bean v. Inhabitants of Hyde Park, 143 Mass. 245, 9 N. E. 638; Attorney General v. Old Colony & N. R. Co., 94 Mass. (12 Allen) 404; Butchers' Slaughtering & Melting Ass'n v. City of Boston, 139 Mass. 290; Dorman v. City Council of Lewiston, 81 Me. 411; In re Powers, 29 Mich. 504; Paul v. City of Detroit, 32 Mich. 108; White v. City of Saginaw, 67 Mich. 33; Scotten v. City of Detroit, 106 Mich. 564; In re Independence Ave. Boulevard, 128 Mo. 272, 30 S. W. 773; Town of Rye v. Rockingham County, 68 N. H. 268; Bowker v. Wright, 54 N. J. Law, 130, 23 Atl. 116; Lenly v. Inhabitants of West Hoboken, 54 N. J. Law, 508, 24 Atl. 477; Wirth v. Jersey City, 56 N. J. Law, 216, 27 Atl. 1065, construing Jersey City charter, § 41; Pancoast v. Troth, 34 N. J. Law, 377, construing charter provisions of the city of Bordentown; In re Public Road, 54 N. J. Law, 539; In re Fowler, 53 N. Y. 60; In re Gilroy, 43 App. Div. 359, 60 N. Y. Supp. 200, affirmed in 164 N. Y. 576, 58 N. E. 1087; Rider v. Stryker, 63 N. Y. 136; In re Common Council of Brooklyn, 73 N. Y. 179; In re East Grant St., 121 Pa. 596; In re Ruan St., 132 Pa. 257, 7 L. R. A. 193; Dorrance v. Dorranceton Borough, 181 Pa. 164; Borough of Verona v. Allegheny Valley R. Co., 187 Pa. 358; Town of Ilwaco v. Ilwaco R. & Nav. Co., 17 Wash. 652. See, also, subject fully treated in sections post, relating to the ac-

ferred by the legislature at pleasure.[868] In exercising the authority, whatever its source, the fundamental principle must not be forgotten that there is a taking of private property for public use.[869] That this be constitutional, compensation must be secured to the owner of the property taken,[870] and all provisions prescribing the manner of "taking" must be strictly followed.[871] Laws involving a "taking" of private property for public uses are not liberally construed.[872]

quirement of public property by eminent domain.

[868] Metropolitan Exhibition Co. v. Newton, 51 Hun, 639, 4 N. Y. Supp. 593; Keyport Com'rs v. Cherry, 51 N. J. Law, 417, 18 Otl. 299. "If power to lay streets is conferred by a special charter incorporating a town, the general authority of the court of common pleas for laying roads in the townships of the state is excluded." Wilson v. Inhabitants of Trenton, 55 N. J. Law, 220, 26 Atl. 83. In re South Chester Road, 80 Pa. 370. The question of repeal is one of fact.

[869] Ex parte Martin, 13 Ark. 198; Lake Merced Water Co. v. Cowles, 31 Cal. 215; Todd v. Austin, 34 Conn. 78; O'Hara v. Lexington & O. R. Co., 31 Ky. (1 Dana) 232; Spring v. Russell, 7 Me. (7 Greenl.) 273; Cooper v. Williams, 4 Ohio, 253. See, also, City of Waterbury v. Platt, 75 Conn. 387, 9 Mun. Corp. Cas. 536, and cases cited.

[870] Fulton County v. Amorous, 89 Ga. 614; Burcky v. Town of Lake, 30 Ill. App. 23; Culbertson & Blair Packing & Provision Co. v. City of Chicago, 111 Ill. 651; Kern v. Isgrigg, 132 Ind. 4, 31 N. E. 455.

Guckien v. Rothrock, 137 Ind. 355, 37 N. E. 17. A reassessment for a gravel road without notice to the land owners affected is void. Wallace v. Karlenowefski, 19 Barb. (N. Y.) 118; In re Town of East Hampton, 21 App. Div. 623, 47 N. Y. Supp. 269; Wagner v. Salzburg Tp., 132 Pa. 636; Seymour v. State, 19 Wis. 240.

Compensation necessary. McCann v. Sierra County, 7 Cal. 121; Colton v. Rossi, 9 Cal. 595; Powers v. Armstrong, 19 Ga. 427; Evansville & C. R. Co. v. Dick, 9 Ind. 433; Hamilton v. Annapolis & E. R. R. Co., 1 Md. Ch. 107; Connecticut River R. Co. v. Franklin County Com'rs, 127 Mass. 50; Donnaher v. State, 16 Miss. (8 Smedes & M.) 649; Ash v. Cummings, 50 N. H. 591; In re Hamilton Ave., 14 Barb. (N. Y.) 405; Sterling's Appeal, 111 Pa. 35; Norris v. City of Waco, 57 Tex. 635.

[871] Huey v. Richardson, 2 Har. (Del.) 206; Gillinwater v. Mississippi & A. R. Co., 13 Ill. 1; Green v. Green, 34 Ill. 320; Todemier v. Aspinwall, 43 Ill. 401; Whittaker v. Gutheridge, 52 Ill. App. 460.

Highway Com'rs v. People, 61 Ill. App. 634. A delay in filing for three years a final order on the laying out of a highway is fatal to its legality. Phipps v. State, 7 Blackf. (Ind.) 512; Neff v. Smith, 91 Iowa, 87, 58 N. W. 1072; Morris Canal & Banking Co. v. Central R. Co., 16 N. J. Eq. (1 C. E. Green) 419.

[872] Murphy v. De Groot, 44 Cal.

(a) **Cost of construction or opening.** The necessary funds for the opening or construction of a public highway are raised through the exercise of the taxing or revenue producing power of the state, and generally, in the case of a street, by a special assessment upon property benefited;[873] and, in the case of a highway, the levy of a general tax;[874] the raising and collection of the fund[875] and its disbursement[876] will be governed by the principles controlling the state in the exercise of this power.[877]

51; Southern Pac. R. Co. v. Wilson, 49 Cal. 396; Spring Valley Water Works v. San Mateo Water Works, 64 Cal. 123; Occum Co. v. A. & W. Sprague Mfg. Co., 35 Conn. 496; Chicago & N. W. R. Co. v. City of Chicago, 132 Ill. 372; Durant v. Jersey City, 25 N. J. Law (1 Dutch.) 309; New York & H. R. Co. v. Kip, 46 N. Y. 546, 7 Am. Rep. 385.

[873] Bauman v. Ross, 167 U. S. 548; Dougherty v. Miller, 36 Cal. 83; Goodwillie v. City of Lake View (Ill.) 21 N. E. 817; Goodrich v. Winchester & D. Turnpike Co., 26 Ind. 119; Manor v. Jay County Com'rs (Ind.) 34 N. E. 959; Broadway Baptist Church v. McAtee, 71 Ky. (8 Bush) 508.

Semel v. Gould, 12 La. Ann. 225. Property of the United States is held not subject to taxation for such purposes. Howe v. Aroostook County Com'rs, 46 Me. 332; Woodbridge v. City of Detroit, 8 Mich. 274; Clay v. City of Grand Rapids, 60 Mich. 451. The cost of constructing a main sewer cannot be assessed upon abutting property by calling the sewer a street, the expense of the construction of a street being so assessable but not a sewer. Brown v. City of Saginaw, 107 Mich. 643, 65 N. W. 601; Kansas City v. Baird, 98 Mo. 215; Foster v. Wood County Com'rs, 9 Ohio St. 540; City of Philadelphia v. Dibeler (Pa.) 23 Atl. 567. See Chap. VI, subd. II, on Special Assessments, §§ 337 et seq., ante.

[874] Nichols v. City of Bridgeport, 23 Conn. 189; Thorn v. Washington County Com'rs, 14 Minn. 233 (Gil. 171); Webster v. Alton, 29 N. H. (9 Fost.) 369; In re Twenty-Sixth St., 12 Wend. (N. Y.) 203; McMasters v. Com., 3 Watts (Pa.) 292; Town of Pomfret v. Town of Hartford, 42 Vt. 134. The liability of one town to contribute to the cost and maintenance of bridges in another depends entirely upon statutory provisions and can be imposed only in the manner and to the extent authorized.

[875] Tennant v. Crocker, 85 Mich. 328; Thornton v. City of Clinton, 148 Mo. 648.

[876] Dupont v. City of Pittsburgh, 69 Fed. 13; Wiegel v. Pulaski County, 61 Ark. 74. A contract for the construction of a public highway is void without an appropriation having been first made. Priet v. Reis, 93 Cal. 85; Manor v. Jay County Com'rs (Ind.) 34 N. E. 959; Lyon v. City of Grand Rapids, 30 Mich. 253; Michigan Land & Iron Co. v. L'Anse Tp., 63 Mich. 700; Lumber Tp. v. Cameron County, 134 Pa. 105, 19 Atl. 498; Childs v. Brown Tp., 40 Pa. 332.

[877] See §§ 302 et seq., and 338 et seq., supra.

(b) Time and manner of opening. The legislature in granting to a subordinate public corporation the power to establish and maintain highways exercises and delegates a governmental function;[878] a power which in its exercise is not ministerial or clerical in its character but which calls for the exercise of judgment and discretion, and therefore, when delegated to a particular municipal body, a reference or delegation by it to its own subordinate agencies is not authorized.[879] The other rule of law also holds that the original delegated body has full power to act within the authority as granted,[880] and this applies both to the

[878] City of Waterloo v. Union Mill Co., 72 Iowa, 437. "The city is but an instrument for the exercise of the authority of the state, and its municipal powers in establishing and maintaining a street are exercised in the discharge of governmental functions. The statute of limitations therefore will not run to defeat the exercise of its governmental authority." Brimmer v. City of Boston, 102 Mass. 19; Trustees of Belfast Academy v. Salmond, 11 Me. 109; Backus v. Lebanon, 11 N. H. 19.

[879] Gregory v. City of Bridgeport, 52 Conn. 40; Brown v. Robertson, 123 Ill. 631, affirming 23 Ill. App. 461. This rule will not compel the performance of each act necessary in the opening of a highway; the performance of mechanical duties may be properly delegated. But see Dorman v. City Council of Lewiston, 81 Me. 411, where it is held that a city council having the exclusive power and authority to lay out any new street or public highway can refer a petition for the establishment of a new street to a committee of its own body for investigation and report, such report being a matter of final consideration by the council. Hydes v. Joyes, 67 Ky. (4 Bush) 464; City of Monroe v. Johnson, 106 La. 350, 30 So. 840.

[880] Atwood v. Partree, 56 Conn. 80, 14 Atl. 85. The same rule applies also to discretionary authority for the repair of highways. Clark v. Town of Middlebury, 47 Conn. 331; Osborn v. Sutton, 108 Ind. 443, 9 N. E. 410; Stipp v. Claman, 123 Ind. 532, 24 N. E. 131; Switzerland County Com'rs v. Reeves, 148 Ind. 467, 46 N. E. 995. The rule applies in spite of mere irregularities and errors in the proceedings. Gold v. Pittsburgh, C., C. & St. L. R. Co., 153 Ind. 232; Strahan v. Town of Malvern, 77 Iowa, 454; In re Inhabitants of Belfast, 52 Me. 529; National Docks R. Co. v. Jersey City, 55 N. J. Law, 194, 26 Atl. 145; Matthiessen & Wiechers Sugar Refining Co. v. Jersey City, 26 N. J. Eq. (11 C. E. Green) 247; New Jersey Southern R. Co. v. Chandler, 65 N. J. Law, 173, 46 Atl. 732. The authority of officials to act is limited strictly to territory within their jurisdiction. Freeman v. Price, 63 N. J. Law, 151.

People v. Richmond County Sup'rs, 20 N. Y. 252; In re Department of Public Parks, 85 N. Y. 459. Officials must act strictly within their powers as granted. In re

manner,[881] the time[882] and the necessity[883] for opening or establishing a highway. The limitation stated above is strictly applied. The necessary acts must be performed within the time and manner as directed by law. A failure in this respect will deprive the delegated body of its authority to act.[884]

Road in Whiteley Tp. (Pa.) 15 Atl. 895; Keen v. Fairview Tp. Sup'rs, 8 S. D. 558, 67 N. W. 623.

[881] Metcalf v. City of Boston, 158 Mass. 284, 33 N. E. 586; Brown v. Greenfield Tp. Board, 109 Mich. 557; Rose v. Kansas City, 128 Mo. 135; Watson v. Town Council of South Kingstown, 5 R. I. 562; Bridgman v. Town of Hardwick, 67 Vt. 132.

[882] Miller v. Colonial Forestry Co., 73 Conn. 500, 48 Atl. 98; Ingram v. State Wagon Road Commission, 4 Idaho, 139, 36 Pac. 702. A portion of a road may be constructed when the appropriation is not sufficient to complete it, but Dunn v. Sharp, 4 Idaho, 98, 35 Pac. 842, holds that there must be a survey of the entire road before the authority exists for the construction of a section.

Green v. Green, 34 Ill. 320; Trotter v. Barrett, 164 Ill. 262; Combs v. Franklin County Com'rs, 71 Me. 239; Mason v. Town & Village of St. Albans, 68 Vt. 66, 33 Atl. 1068, following Landon v. Village of Rutland, 41 Vt. 681.

[883] Cotting v. Culpepper, 79 Ga. 792, 4 S. E. 388; Opp v. Timmons, 149 Ind. 236, 48 N. E. 1028. Existing highways, character and number of population, location of markets, and character of soil, are all proper subjects of consideration in passing upon the necessity for the opening of a highway. Fritch v. Patterson, 149 Ind. 455, 49 N. E. 380; Town of Cherokee v. Sioux City & I. F. T. L. Co., 52 Iowa, 279; Brown v. Barstow, 87 Iowa, 344, 54 N. W. 241; Strahan v. Town of Malvern, 77 Iowa, 454; Barry v. Deloughrey, 47 Neb. 354; State v. Shreeve, 15 N. J. Law (3 J. S. Green) 57. An official decision upon an application for the opening of a highway cannot be reconsidered. Noonan v. Board of Chosen Freeholders, 52 N. J. Law, 398; In re Board of St. Opening, 82 Hun, 580, 31 N. Y. Supp. 732; Robert v. Kings County Sup'rs, 3 App. Div. 366, 38 N. Y. Supp. 521; Elwood v. City of Rochester, 43 Hun (N. Y.) 102; In re Town of Whitestown, 24 Misc. 150, 53 N. Y. Supp. 397; Singleton v. Road Com'rs, 2 Nott & McC. (S. C.) 526. The question of the necessity of a road is for a jury. State v. Stackhouse, 14 S. C. 417; Decker v. Menard County (Tex. Civ. App.) 25 S. W. 728.

[884] Keech v. People, 22 Ill. 478; Highway Com'rs v. People, 61 Ill. App. 634; Lawndale Highway Com'rs v. Barry, 66 Ill. 496; People v. Finley, 97 Ill. App. 214; Badger v. Merry, 139 Ind. 631; Hentzler v. Bradbury, 5 Kan. App. 763, 47 Pac. 330. But mere irregularities will not deprive an official body of its jurisdiction. See, also, the case of Vanderbeck v. Blauvelt, 34 N. J. Law, 261, as holding that in the absence of evidence if any subsequent wrong had been done to the owners of the land taken in

(c) Location and construction of highways. The rule of strict construction in the opening of highways including both streets and country ways also applies to the location and construction. The highway as actually opened or established must conform strictly to the course laid down in the original order or authority,[885] which must not be insufficient, indefinite or uncertain;[886]

the opening of a highway, mere formal errors in the proceedings should not be allowed. Williams v. Lincoln County Com'rs, 35 Me. 345; Ware v. Penobscot County Com'rs, 38 Me. 492; Inhabitants of Pownal v. Cumberland County Com'rs, 63 Me. 102; Inhabitants of Boxford v. Essex County Com'rs, 24 Mass. (7 Pick.) 337; Belchertown v. Hampshire County Com'rs, 65 Mass. (11 Cush.) 189; Corey v. Inhabitants of Wrentham, 164 Mass. 18; People v. Springwells Tp. Board, 12 Mich. 434; Pagel v. Fergus County Com'rs, 17 Mont. 586. An order for the opening of a road as required by Comp. St. 1887, div. 5, § 1818, should be specific in its details. See, also, as holding the same principle, Oyler v. Ross, 48 Neb. 211, 66 N. W. 1099, where it was held that an order for survey of a highway was not sufficient as an order for its opening. State v. Newmarket, 20 N. H. 519; Vanderbeck v. Blauvelt, 34 N. J. Law, 261; Grant v. Cassedy, 33 N. J. Law, 179; Peckham v. Henderson, 27 Barb. (N. Y.) 207; Copcutt v. City of Yonkers, 83 Hun, 178, 31 N. Y. Supp. 659; Schafhaus v. City of New York, 159 N. Y. 557; Ladd v. City of East Portland, 18 Or. 87, 22 Pac. 533; Councils of Pittsburg v. Cluley, 74 Pa. 262. But errors not based upon jurisdictional conditions cannot be inquired into collaterally. Clarke v. Council of South Kingstown, 18 R. I. 283.

[885] Clark v. Town of Middlebury, 47 Conn. 331. A substantial compliance is all that is necessary. Seisler v. Smith, 150 Ind. 88, 46 N. E. 993; Shaffer v. Weech, 34 Kan. 595; Lewis v. Smith, 8 Ky. (1 A. K. Marsh.) 158. And the same principle applies as affecting the interests of a third person donating land for a highway.

Woodman v. Somerset County, 25 Me. 300. The decision of the county commissioners, under the general statutes upon the location of a highway is conclusive until vacated by some legal process or proceedings. Stone v. City of Cambridge, 60 Mass. (6 Cush.) 270; Davis v. Hampshire County Com'rs, 153 Mass. 218, 26 N. E. 848, 11 L. R. A. 750. County commissioners have the authority under Mass. St. 1874, c. 305, § 1, to change the course of a highway from its original location at a railway crossing and in such a manner as to avoid a grade crossing. Woodmere

[886] Carlton v. State, 8 Blackf. (Ind.) 208. But see Sidener v. Essex, 22 Ind. 201; Carey v. Weitgenant, 52 Iowa, 660. Page, Petitioner, 37 Me. 553. The construction of a highway becomes a duty after the making of an order directing its establishment. Thompson v. Emmons, 24 N. J. Law (4 Zab.) 45; People v. Nash, 60 Hun, 582, 15 N. Y. Supp. 29.

and the width,[887] the materials of which constructed and the manner of construction[888] must also follow, with reasonable certainty, such authority.

(d) Change, alteration or extension of highway. The same rules of law which control the original opening or construction of a highway apply to its change or alteration either in course, width or character, of construction. Authority should exist for any substantial change in these respects but within such authority discretionary powers are ample.[889]

§ 425. Agency of construction.

The old familiar rule that public officials are agents of limited powers applies to public bodies or officials vested with the power of opening, altering, changing, improving or regulating public highways. Action by them to be legal should be strictly within the limits of their authority including both its extent, manner and degree of exercise.[890] Only the body or official expressly author-

Cemetery v. Roulo, 104 Mich. 595; Bice v. Town of Walcott, 64 Minn. 459; Butler v. Barr, 18 Mo. 357; Barry v. Deloughrey, 47 Neb. 354.

Stevens v. Goffstown, 21 N. H. 454. But the road as located need not necessarily follow the course as indicated in the petition for its establishment. Lathrop v. Town of Morristown, 67 N. J. Law, 247, 51 Atl. 852; Mowbray v. Allen, 58 N. J. Law, 315; People v. Diver, 19 Hun (N. Y.) 263; McMurtrie v. Stewart, 21 Pa. 322; Dowdle v. Cornue, 9 S. D. 126, 68 N. W. 194; Payssoux v. Kendall County (Tex. Civ. App.) 55 S. W. 583; Skinner v. State (Tex. Cr. App.) 65 S. W. 1073.

[887] Beardslee v. French, 7 Conn. 125; Hentzler v. Bradbury, 5 Kan. App. 1, 47 Pac. 330; Furniss v. Furniss, 29 Pa. 15; In re West Pikeland Road, 63 Pa. 471; Hancock v. Borough of Wyoming, 148 Pa. 635; Town of Sumner v. Peebles, 5 Wash. 471.

[888] Harvey v. Town of Wayne, 72 Me. 430.

[889] Chicago & N. W. R. Co. v. Town of Cicero, 154 Ill. 656; Jackson v. Smiley, 18 Ind. 247; McClure v. Franklin County Com'rs, 124 Ind. 154, 24 N. E. 741; Gipsom v. Heath, 98 Ind. 100; Warren County Com'rs v. Mankey (Ind. App.) 63 N. E. 864; Stahr v. Carter, 116 Iowa, 380, 90 N. W. 64; Metcalf v. City of Boston, 158 Mass. 284, 33 N. E. 586; New York & N. E. R. Co. v. City of Boston, 127 Mass. 229; In re City of Yonkers, 117 N. Y. 564; Closson v. Hamblet, 27 Vt. 728.

[890] People v. Chicago & N. W. R. Co., 118 Ill. 520; Barrow v. Hepler, 34 La. Ann. 362; Keyes v. Inhabitants of Westford, 34 Mass. (17 Pick.) 273; Davis v. Ontonagon County, 64 Mich. 404, 31 N. W. 405. Where the cost of the construction of a public road is fixed by the act of the legislature authorizing its establishment, a contract for a bonus in excess of this sum is void.

ized by law can exercise such powers.[891] The decisions do not countenance unwarranted or doubtful assumption of authority by public officials[892] even if this rule results temporarily in public inconvenience. Where different public organizations are included within the same geographical limits, as, for example, an incorporated city or village within the limits of a township or county organization, questions arise frequently of the relative authority of officials over the same objects of government, and it can be said that the subsequent organization of a public corporation within the limits of one already existing deprives the officials of the old organization of any power or authority to control or regulate their departments or work within the limits of the new. The officials duly elected or appointed to perform such duties by the new corporation and representing it are vested with such power and authority.[893]

§ 426. The power to grade highways.

Where the authority exists to establish and construct a highway, using the term in its comprehensive sense, the implied power also exists to put and maintain it in a condition fit for public use. Grading is necessary work of this character.[894] The power to

Madison County v. Stewart, 74 Miss. 160, 20 So. 857; Amerman v. Briggs, 50 N. J. Law, 114, 11 Atl. 423.

[891] State v. Shawnee County Com'rs, 28 Kan. 431. The legislature has ample power to order the construction of such a road and distribute its cost between the several counties through which it runs. New Haven & N. C. R. Co. v. Hampshire County Com'rs, 173 Mass. 12, 52 N. E. 1076; Paxton v. Arthur, 60 Miss. 832; Dunker v. Stiefel, 57 Mo. App. 379; Kolkmeyer v. City of Jefferson, 75 Mo. App. 678; Clement v. Burns, 43 N. H. 609; Boston & M. R. Co. v. Folsom, 46 N. H. 64; Stearns v. Hinsdale, 61 N. H. 433; Warner v. Hoagland, 51 N. J. Law, 62, 16 Atl. 166; In re Board of Public Works of Watertown, 144 N. Y. 440; Burgett v. Norris, 25 Ohio St. 308.

[892] People v. Village of Haverstraw, 47 N. Y. State Rep. 891, 20 N. Y. Supp. 7; Mechem on Public Officers, §§ 511 et seq.

[893] People v. Chicago & N. W. R. Co., 118 Ill. 520; Cassidy v. City of Covington, 12 Ky. L. R. 980, 16 S. W. 93; following Maddux v. City of Newport, 12 Ky. L. R. 657, 14 S. W. 957; King v. City of Lewiston, 70 Me. 406; Eaton v. Middlesex County Com'rs, 73 Mass. (7 Gray) 109; Kansas City v. Marsh Oil Co., 140 Mo. 458, 41 S. W. 943; Bisher v. Richards, 9 Ohio St. 495.

[894] Emery v. San Francisco Gas Co., 28 Cal. 345; Thompson v. Hoge, 30 Cal. 179; Meuser v. Risdon, 36 Cal. 239; Chase v. Sheerer, 136 Cal.

grade a street is generally held a continuing one[895] although there are authorities to the contrary.[896] This principle will not affect the discussion of the subject in this section of the right of a property owner abutting upon the highway to recover damages in case of the re-exercise of the power. In jurisdictions where the power is not held a continuing one, the establishment and making of a grade as between the corporation and the abutting property owner partakes of the nature of a contract and if the grade is substantially changed, or re-established to his damage, this can be recov-

248, 68 Pac. 768; Spaulding v. North San Francisco H. & R. Ass'n, 87 Cal. 40. The power, however, can only be exercised under the conditions provided by law.

Spaulding v. Wesson, 84 Cal. 141; City of Norwich v. Story, 25 Conn. 44; City of Leavenworth v. Casey McCahon (Kan.) 124; Inhabitants of Acton v. York County Com'rs, 77 Me. 128; Burns v. City of Baltimore, 48 Md. 198. The grant of a general power to grade and pave streets for the public convenience and the benefit of the whole city does not convey the power to improve a street where such improvement will not result in a special benefit to property in the immediate locality.

Althen v. Kelly, 32 Minn. 280; Yanish v. City of St. Paul, 50 Minn. 518, 52 N. W. 925. The power to establish the grade of streets is of a discretionary character and in its exercise under peculiar conditions the grade on one side may be on a materially different level from that on the other. Bergen Neck R. Co. v. City of Bayonne, 54 N. J. Law, 474, 24 Atl. 448. But the municipality can only proceed in the manner required by its charter. Malone v. Jersey City, 28 N. J. Law (4 Dutch.) 500. The terms "grading and paving" include the incidental details of the work. Latta v. City of Hoboken, 48 N. J. Law, 63; Borough of Steelton v. Booser, 162 Pa. 630, 29 Atl. 654; White v. Borough of McKeesport, 101 Pa. 394.

[895] Smith v. City of Washington, 20 How. (U. S.) 135; City of New Haven v. Sargent, 38 Conn. 50; Markham v. City of Atlanta 23 Ga. 402; Dunham v. Village of Hyde Park, 75 Ill. 371; Macy v. City of Indianapolis, 17 Ind. 267; Kemper v. Campbell, 45 Kan. 529, 26 Pac. 53; Karst v. St. Paul, S. & T. F. R. Co., 22 Minn. 118. "The right to establish a grade in the sense of determining what the grade shall be is clearly implied and included in the general authority to make, grade, repair and improve streets. Upon the exercise of this power the charter imposes no limitation and there is, therefore, no reason why it should not be regarded as a continuing power—that is to say, a power which is not exhausted—with reference to a particular street or portion thereof, by its first exercise in establishing the grade of such street or portion, but notwithstanding such first exercise, may again and as often as the public good requires, be exercised anew, though the result be to change a previously established grade."

[896] Oakley v. Trustees of Williamsburgh, 6 Paige (N. Y.) 262.

ered of the corporation in the proper proceedings.[897] On the contrary, where the power is held a continuing one, the public authorities acting under the provisions of law can change and reestablish the grade of a highway within their jurisdiction whenever the public convenience and advantage demands without entailing upon the corporation any liability for damages sustained by the abutting property owner from their action.[898] The question of the damages recoverable by the property owner will be considered in a later section. The liability of specific property for the expense of grading depends upon the character of the way, whether a street, as commonly understood, or a country way. If the former, property benefited must bear the burden,[899] if the latter,

[897] Coster v. City of Albany, 43 N. Y. 399; City of Akron v. Chamberlain, 34 Ohio St. 328; Crossett v. Jaynesville, 28 Wis. 420; Church v. City of Milwaukee, 34 Wis. 66; Stadler v. City of Milwaukee, 34 Wis. 98. "The point to be resolved is, whether the damages sustained by the owner or occupant of the adjoining tenement by reason of inconvenience in the transaction of his business, or the interruption or total suspension of it, or of the loss of his trade, custom or profits necessarily caused by the making and carrying on of the work of public improvement and while it progresses and until completion or so caused by the work of restoring the adjacent premises to the same relative position or condition as before the change of grade, are such as the statute contemplates and for which compensation must be made by the city. The authorities * * * are quite clear and decisive that such damages are not recoverable and such is and was the opinion of this court in the present case." And cases therein cited. See, also, post, sections on public control of streets.

[898] Goszler v. Corporation of Georgetown, 6 Wheat. (U. S.) 593; Shaw v. Crocker, 42 Cal. 435; Murphy v. City of Chicago, 29 Ill. 279; Nevins v. City of Peoria, 41 Ill. 502; Snyder v. Town of Rockport, 6 Ind. 237; City of Terre Haute v. Turner, 36 Ind. 522; City of Aurora v. Fox, 78 Ind. 1; Creal v. City of Keokuk, 4 G. Greene (Iowa) 47; Ross v. City of Clinton, 46 Iowa, 606. But special damages caused by regrading a street may be recovered by a property owner. McVerry v. Boyd, 89 Cal. 304, 26 Pac. 885; Radcliff's Ex'rs v. City of Brooklyn, 4 N. Y. (4 Comst.) 195; Charlton v. Allegheny City, 1 Grant Cas. (Pa.) 208; Carr v. Northern Liberties, 35 Pa. 324; Humes v. City of Knoxville, 20 Tenn. (1 Humph.) 403.

[899] Hillhouse v. City of New Haven, 62 Conn. 344, 26 Atl. 393; McLauren v. City of Grand Forks, 6 Dak. 397, 43 N. W. 710; Hayden v. City of Atlanta, 70 Ga. 817; Morrison v. King, 100 Ga. 357. The legislature may, however, provide for the payment by a municipality of the cost of grading or improving a street from its general funds. City of Leavenworth v. Laing, 6 Kan. 274. But before a property

the cost is usually paid from the general revenues raised for that purpose. The expense of regrading where the power to grade is held a continuing one can be charged against property liable although it may have already borne the cost of a former grading.[900] Where the other rule obtains the expense of regrading must be paid from the general revenues.[901]

§ 427. To pave streets.

The right to pave a street will be found as coming within the power of public authorities to construct and maintain public highways. This particular improvement is generally applied to the streets of a town or village where more than an ordinary im-

owner can be liable, the street must have been established as a legal one. Fox v. Middlesborough Town Co., 96 Ky. 262, 28 S. W. 766; Beidler Mfg. Co. v. City of Muskegon, 63 Mich. 44; Kansas City Grading Co. v. Holden, 32 Mo. App. 490. Where a street was filled by the dirt taken from another street cut down to grade, the expense being charged entirely upon the abutting property owners on the latter street, the contract for grading and tax bills issued in connection with it are void.

Little v. City of Newark, 36 N. J. Law, 170; In re New York Inst. for Deaf & Dumb, 121 N. Y. 234, 24 N. E. 378; Darlington v. Com., 41 Pa. 68; Reed v. City of Erie, 79 Pa. 346. A private way cannot be graded and paved and charged to the public expense. Findley v. Hull, 13 Wash. 236; McNair v. Ostrander, 1 Wash. St. 110, 23 Pac. 414; Blount v. City of Janesville, 31 Wis. 648. See §§ 337 et seq., on Local Assessments.

[900] McVerry v. Boyd, 89 Cal. 304, 26 Pac. 885. "The objection by the appellant to the jurisdiction of the supervisors to order the work done, upon the ground that the street had been previously graded is untenable. The statute in question (section three) gives to the board of supervisors the same authority for regrading as for grading a street. There is no limitation upon its powers in this respect. It is left to the discretion of the board to determine what work it will order done in any particular instance. Section fourteen of the act does not in terms purport to give to the superintendent exclusive or any jurisdiction to order the regrading of a street; but is limited to the improvement of a street in front of individual lots. Whenever the condition of a street is such as, in the estimation of the board of supervisors, it is proper that the burden of regrading the same should be borne by the entire block, it has authority to order such improvement even though a similar expense has previously been borne by the property owners." See, also, authorities cited under §§ 337-8, supra.

[901] Harmon v. City of Omaha, 17 Neb. 548.

provement and one of a greater or less degree of permanency is required and desired.[902] It comes within the term "a local improvement" and its cost, therefore, is met by the levying and collection of a special assessment upon property benefited; this liability being determined according to the various methods suggested in previous sections.[903] In common with other local or special improvements, it should be executed in the manner,[904] at the

[902] Burnham v. City of Chicago, 24 Ill. 496; Lightner v. City of Peoria, 150 Ill. 80; English v. City of Danville, 150 Ill. 92; Warren v. Henly, 31 Iowa, 31; In re Phillips, 60 N. Y. 16. The court in this case say that "to pave is to cover with stones or brick or other suitable material so as to make a level or convenient surface for horses, carriages or foot passengers." Schenley v. Com., 36 Pa. 29; City of Philadelphia v. Hill, 166 Pa. 211. Where a city council authorizes upon a public street repairs to be made of a reasonably permanent character at the expense of the city, it is not an original paving. Dick v. City of Philadelphia, 197 Pa. 467.

[903] Bacon v. City of Savannah, 86 Ga. 301; Shank v. Smith, 157 Ind. 401, 61 N. E. 932, 55 L. R. A. 564; Warren v. Henly, 31 Iowa, 31; Trustees of Paris v. Berry, 25 Ky. (2 J. J. Marsh.) 483; McGuinn v. Peri, 16 La. Ann. 326; City of New Orleans v. Stewart, 18 La. Ann. 710; Goodwillie v. City of Detroit, 103 Mich. 283, 61 N. W. 526, construing Detroit city charter relative to the liability of property owners for the cost of repaving streets. Dickinson v. City of Detroit, 111 Mich. 480, 69 N. W. 728, construing charter provisions of City of Detroit relative to liability of abutting owners for cost or repaving. Traders' Bank v. Payne, 31 Mo. App. 512; Jelliff v. City of Newark, 49 N. J. Law, 239, 12 Atl. 770; Tappan v. Long Branch Police Sanitary & Imp. Commission, 59 N. J. Law, 371, 35 Atl. 1070.

O'Reilly v. City of Kingston, 39 Hun (N. Y.) 285; In re Grube, 81 N. Y. 139, defining a "repavement" within New York laws 1874, c. 476. See, also, In re Brady, 85 N. Y. 268, as defining what constitutes a "prior pavement," and In re Fulton St. 29 How. Pr. (N. Y.) 429, as distinguishing between a "repaving" and the "repair" of a street.

City of Schenectady v. Trustees of Union College, 144 N. Y. 241, 26 L. R. A. 614; City of Philadelphia v. Dibeler, 147 Pa. 261, 23 Atl. 567, defining "original paving."

City of Harrisburg v. Baptist, 156 Pa. 526; City of Philadelphia v. Bowman, 166 Pa. 393; Reuting v. City of Titusville, 175 Pa. 512; Adams v. Fisher, 75 Tex. 657, 6 S. W. 772. The determination of a city council having the power to order a pavement of a street, that such an improvement is necessary and beneficial is conclusive. Sands v. City of Richmond, 31 Grat. (Va.) 571; City of Parkersburg v. Tavenner, 42 W. Va. 486. See §§, supra, 337 et seq.

[904] City of Springfield v. Green, 120 Ill. 269, 11 N. E. 261; Adams County v. City of Quincy, 130 Ill. 566, 22 N. E. 624. Where the power to direct the paving of a street is

time and place,[905] and according to,[906] in all respects, the terms of the authority necessary[907] and under which it is done, whether

conferred, an ordinance providing for the paving of a particular street need not state its width. Schmitt v. City of New Orleans, 48 La. Ann. 1440; Common Council of Grand Rapids v. Public Works of Grand Rapids, 99 Mich. 392, 58 N. W. 335; City of Harrisburg v. Segelbaum, 151 Pa. 172, 20 L. R. A. 834, and Boyer v. City of Reading, 151 Pa. 185, hold that "macadamizing" is a species of paving coming within the rule that streets after having been paved cannot be repaved at the expense of abutting property owners. See, also, as holding the same principle, Hammett v. City of Philadelphia, 65 Pa. 146, and City of Philadelphia v. Ehret, 153 Pa. 1.

[905] Johnson v. District of Columbia, 6 Mackey (D. C.) 21; Winfrey v. Linger, 89 Mo. App. 159; In re Murphy, 20 Hun (N. Y.) 346; City of Philadelphia v. Ball, 147 Pa. 243, 23 Atl. 564. A street not legally laid out or dedicated to public use cannot be paved by the public authorities. The court says: "The said street from Main street to the end of defendant's property is laid down on the authorized city plans as a street thirty feet wide. The ordinance of October 12, 1885, under the provisions of which the said paving was alleged to have been done provided that the said Center street should be first dedicated or properly opened. This is the precise language of the ordinance. It does not appear that the said street from Main street to the end of the defendant's property has ever been opened. The ordinance of May 3rd, 1855, provides 'that hereafter no street shall be accepted for public use of a less width than thirty feet.' We do not understand this ordinance to have been repealed. Center street where it touches defendant's property is of a less width than thirty feet, and does not appear to have been accepted for public use by the city of Philadelphia. The city ordinance only authorized the paving of the street after it should have been dedicated or properly opened. These prerequisites not having been complied with we are unable to see any authority for paving it at the expense of the abutting property owners." City of Philadelphia v. Evans, 139 Pa. 483.

[906] Olsson v. City of Topeka, 42 Kan. 709, 21 Pac. 219, following Blair v. City of Atchison, 40 Kan. 353, 19 Pac. 815.

Barber Asphalt Pav. Co. v. Gogreve, 41 La. Ann. 251; Galbreath v. Newton, 30 Mo. App. 380; Saxton v. Beach, 50 Mo. 488; In re Sharp, 56 N. Y. 257; McAllister v. City of Tacoma, 9 Wash. 272.

[907] State v. Ramsey County Dist. Ct., 33 Minn. 164. "Under the provisions of the charter of the City of St. Paul regulating proceedings for improving streets after the matter of a proposed improvement has been referred by the council to the board of public works, and the board have reported, recommending the improvement, sending with their report a plan or profile of the work to be done, the report, plan or profile and the order of the council to the board to do the work must ordinarily be construed together to determine whether the work done is authorized by the order."

the authority be special or general in its application and terms. The extent of discretion vested in public officials with respect to the manner of executing this particular power depends upon the language of the grant,[908] and such authority must necessarily be constitutional and otherwise legal.[909]

[908] Alameda Macadamizing Co. v. Williams, 70 Cal. 534; Cram v. City of Chicago, 138 Ill. 506; Gunning Gravel & Pav. Co. v. City of New Orleans, 45 La. Ann. 911, 13 So. 182; Moale v. City of Baltimore, 61 Md. 224; Alberger v. City of Baltimore, 64 Md. 1. A city having been granted the power in general terms to provide for paving and repaving its streets, a determination of the necessity for paving a particular street will not be reviewed by the courts.

City of Detroit v. Michigan Pav. Co., 36 Mich. 335; Shimmons v. City of Saginaw, 104 Mich. 511, 62 N. W. 725. The question of the necessity for repaving a street is with the city council and not open to review or collateral attack except in cases of fraud. Fuller v. City of Grand Rapids, 105 Mich. 529, 63 N. W. 530.

Ruggles v. Collier, 43 Mo. 353. The power to determine the manner of paving and repaving streets requires the city council of St. Louis to act in its legislative capacity. The rule holds that a power to act in such a capacity cannot be delegated. McCormack v. Patchin, 53 Mo. 33, construing the provisions of the St. Louis charter of 1867.

Ritterskamp v. Stifel, 59 Mo. App. 510. Under the power as granted a state to reconstruct its streets and alleys and also repair them, the determination of the character of a particular work, whether to repair a street or its reconstruction, is not conclusive. An arbitrary decision in this respect cannot establish the character of the work as that of a particular kind.

Shoenberg v. Field, 95 Mo. App. 241, 68 S. W. 945. Where a city charter provides that the right shall be let to the lowest bidder, the board of public works have no power to limit paving material to that manufactured by only a single company.

Verdin v. City of St. Louis (Mo.) 27 S. W. 447. A paving material in the sale of which there is a monopoly may be selected by the board of public works having the exclusive right to select the material for street improvements. In such event they are also vested with the power to reject an exorbitant bid by the firm controlling the sale of the material.

City of Schenectady v. Trustees of Union College, 66 Hun, 179, 21 N. Y. Supp. 147; Kittinger v. City of Buffalo, 148 N. Y. 332; Beaumont v. City of Wilkes-Barre, 142 Pa. 198, 21 Atl. 888; Pepper v. City of Philadelphia, 114 Pa. 96. A contract for paving within the powers of the city council though injudiciously made can be enforced. City of Philadelphia v. Evans, 139 Pa. 483; City of Philadelphia v. Baker, 140 Pa. 11.

Roundtree v. City of Galveston, 42 Tex. 612, construing charter provisions of the city of Galveston relative to the power of the city council to pave streets. See, also, Wood v. City of Galveston, 76 Tex. 126.

[909] Tuttle v. Polk, 92 Iowa, 433, 60

§ 428. The repair of highways.

As a general rule, it can be stated that special authority is necessary to enable a public corporation other than the sovereign itself to pave a highway or make upon it improvements of an unusual character;[910] this rule, however, does not apply to what can be termed ordinary repairs assuming the authority for the opening of the highway and placing it in its present existing condition. From this time there exists the implied authority and duty of maintenance.[911] The method of making such repairs depends upon local statutes and ordinances applicable.[912]

§ 429. The general improvement of highways.

The grant of authority or the existence of the power to open or establish highways, as repeatedly held, carries with it the im-

N. W. 733; Coggeshall v. City of Des Moines, 78 Iowa, 236; Gilmore v. Norton, 10 Kan. 491; Murnane v. City of St. Louis, 123 Mo. 479.

[910] City of New Haven v. Whitney, 36 Conn. 373. In this case it is held that macadamizing a street is "maintaining" it rather than constructing a public improvement. State v. Corrigan Consol. St. R. Co., 85 Mo. 263; City of Philadelphia v. Dibeler, 147 Pa. 261, 23 Atl. 567.

[911] Hart v. Gaven, 12 Cal. 476. By law, the duty of repairing a street may rest upon the abutter. Barton v. McDonald, 81 Cal. 265; Jones v. Town of Marlborough, 70 Conn. 583; Klein v. People, 31 Ill. App. 302. The performance of the duty may be enforced by mandamus and where a discretionary power is given the manner of making the repair cannot be prescribed.

State v. Kamman, 151 Ind. 407; City of Covington v. Bishop, 10 Ky. L. R. 939, 11 S. W. 199; Bembe v. Anne Arundel County Com'rs, 94 Md. 330, 51 Atl. 179, 57 L. R. A. 279; Inhabitants of Brookfield v. Reed, 152 Mass. 568. A contract by town authorities for the perpetual repair of a road held good. Inhabitants of Middlefield v. Church Mills Knitting Co., 160 Mass. 267; State v. Vice, 71 Miss. 912, 15 So. 129.

McDonough v. Virginia City, 6 Nev. 90. The grant of the power to open streets, improve them and keep sidewalks in repair does not impose upon the municipal authorities the duty of keeping the streets in repair.

Inhabitants of Lodi v. State, 53 N. J. Law, 259, 21 Atl. 457; People v. City of Brooklyn, 21 Barb. (N. Y.) 484; Garlinghouse v. Jacobs, 29 N. Y. 297. No duty attaches for the repair of highways until funds have been provided for that purpose by the public authorities. Ivory v. Town of Deerpark, 116 N. Y. 476; In re Lehigh Valley Coal Co., 164 Pa. 44; Shoolbred v. Corporation of Charleston, 2 Bay (S. C.) 63; Howell v. State, 29 Tex. App. 592, 16 S. W. 533; Western Wheeled Scraper Co. v. Chippewa County, 102 Wis. 614, 78 N. W. 764. Under the grant of a power to keep in repair a highway, the purchase of a rock crusher for such purpose is authorized.

[912] City of Baltimore v. Scharf, 54

plied power to make such ordinary repairs and improvements as are necessary to maintain them in that condition necessary to effect the original purpose of their establishment.[913] This does not, however, carry with it the implied power of making extraordinary repairs or those of a great degree of permanence.[914] The

Md. 499; Borough of McKeesport v. McKeesport Pass R. Co., 158 Pa. 447.

[913] Allen County Com'rs v. Silvers, 22 Ind. 491; State v. City of Neodesha, 3 Kan. App. 319, 45 Pac. 122. "In accordance with the provisions of the statute relating to cities of the third class the mayor and council passed an ordinance providing for the construction of sidewalks and street crossings along and over certain streets in the city giving the dimensions of the walks, the material that the same were to be composed of, and defining the duties of the street commissioner in relation to the building the same, and requiring him to notify the owners or occupants of abutting lots of the provisions of the ordinance, and to notify them to build the same within a certain period and in case the owners or occupants of abutting lots neglected or refused to construct the walks within twenty days after the notice, then the street commissioner to build said walk or cause the same to be built and report the cost thereof to the council for assessment. The mayor and council also passed an ordinance ordering the building of certain sidewalks and street crossings in accordance with the former ordinances relating to the construction of walks and crossings. It is not claimed by the plaintiff that the mayor and council were not authorized to build sidewalks and street crossings in the city, but that the indebtedness of the city had already reached the limits to which the mayor and council could contract and they were not authorized to build sidewalks and street crossings and issue the warrants of the city to pay for the same out of the current fund of the city. * * * The mayor and council are the only competent authority to determine what sidewalks, street crossings, bridges, and other street improvements are necessary for the safety, security and convenience of the public and, when they have determined what improvements are necessary, their determination is final and cannot be inquired into in a proceeding to enjoin the construction of the same. It is not necessary for them to submit the question of street improvements to a vote of the people of the city, but they are authorized to make the improvements and create the indebtedness of the city for the payment of the same." Wabash R. Co. v. City of Defiance, 52 Ohio St. 262, 40 N. E. 89; Withers v. Road Com'rs of Claremont County, 3 Brev. (S. C.) 83. Public authorities have no power to improve or repair highways not legally laid out.

[914] Demartini v. City & County of San Francisco, 107 Cal. 402; People v. Fort St. & E. R. Co., 41 Mich. 413; State v. Ramsey County Dist. Ct., 44 Minn. 244; State v. Judges of Dist. Ct., 51 Minn. 539, 53 N. W. 800, 55 N. W. 122. The permanent grade of a street should be established before permanent improvements which are a charge against property owners can be constructed.

cost of these improvements is usually paid not from the general revenues but by the making of a local assessment upon property specially benefited without regard to the measure for such benefit in determining the liability of the property.[915]

The power to make extraordinary or unusual improvements, as they may be termed, aside from those already considered, must be specially given[916] and exercised only by the authority possess-

"We are satisfied that it was the intention of the legislature to require the permanent grade to be established before any proceedings for the permanent improvement of a street at the expense of the real property shall be begun. * * * It would be strange if the city could prosecute a vastly expensive permanent grading of a street, as this was, charging the cost to the property and leave the permanent grade of the street to be at any time in the future established by a mere majority vote to be established either above or below or upon the grade of the improvement as the majority of the council might determine. The profile of the proposed improvement prepared by the city engineer though approved by the board of public works and common council did not establish the street grade within the meaning of the charter for the reason that it was not prepared nor approved as such, but only as the profile of the proposed work; and it is apparent that in approving it the mind neither of the board nor council was directed to the matter of establishing a permanent grade for the street under the charter. * * * For the reason that there was no established grade * * * the proceeding was void." Nugent v. City of Jackson, 72 Miss. 1040.

[915] Onderdonk v. City & County of San Francisco, 75 Cal. 534, 17 Pac. 678. Property of the Federal government may be exempted from special assessment. English v. City of Danville, 150 Ill. 92, 36 N. E. 994; Halsey v. Town of Lake View, 188 Ill. 540.

Thompson v. City of Highland Park, 187 Ill. 265. Under grant of a general power, a street may be improved by a "parking" down its center to be seeded with grass and planted with trees. Gibson v. O'Brien, 9 Ky. L. R. 639, 6 S. W. 28; O'Brien v. Markland, 9 Ky. L. R. 773, 6 S. W. 713; Fox v. Middlesborough Town Co., 16 Ky. L. R. 455, 28 S. W. 776; Huelfeld v. City of Covington, 22 Ky. L. R. 1188, 60 S. W. 296.

City of Springfield v. Harris, 107 Mass. 532. A special contract with property owners for the payment of a portion of the cost of a local improvement held enforceable. Second Nat. Bank v. City of Lansing, 25 Mich. 207; Lincoln St. R. Co. v. City of Lincoln (Neb.) 84 N. W. 802; State v. City of Newark, 49 N. J. Law, 239, 12 Atl. 770; Borough of Greensburg v. Young, 53 Pa. 280; Green v. Ward, 82 Va. 324.

[916] Blanchard v. Beideman, 18 Cal. 261; Banaz v. Smith, 133 Cal. 102, 65 Pac. 309; Murphy v. City of Peoria, 119 Ill. 509, 9 N. E. 895. The grading, draining and sodding of a street may be authorized under the

ing it,[917] and in the precise manner indicated by its terms.[918] A general grant of power, however, always carries with it the

same ordinance. Starr v. City of Burlington, 45 Iowa, 87; Gilmore v. Norton, 10 Kan. 491. Such legislation must not conflict with any provisions of the state constitution.

Dobbins v. Long Branch Police Com'rs, 59 N. J. Law, 146, 36 Atl. 482. Public Laws, 1892, p. 146, held a special law and therefore, in contravention of constitution, art. 4, § 7, and also as holding acts of N. J. March 30th, 1887, violative of the same section, see Township of Lodi v. State, 51 N. J. Law, 402, 18 Atl. 749, 6 L. R. A. 56; In re Petition of Lehigh Val. Coal Co., 14 Pa. Co. Ct. R. 621; City of Reading v. Keppleman, 61 Pa. 233, construing charter provisions of the City of Reading; Wilson v. Allegheny City, 79 Pa. 272.

[917] McCain v. State, 62 Ala. 138; Santa Cruz Rock Pavement Co. v. Heaton, 105 Cal. 162; Bolton v. Gilleran, 105 Cal. 244; Bloomington Cemetery Ass'n v. People, 139 Ill. 16, 28 N. E. 1076; Ralston v. Beall (Ind.) 30 N. E. 1095; Millisor v. Wagner, 133 Ind. 400, 32 N. E. 927; Lewis v. Albertson, 23 Ind. App. 147, 53 N. E. 1071. It is not necessary that a city council should act in regard to the improvement of a street at a regular meeting.

Inhabitants of Melpomene v. City of New Orleans, 14 La. Ann. 452. A city as a municipal corporation has exclusive control over the public places and highways within its boundaries and has, therefore, the power to determine the necessity for and the kind of street improvements. Howard v. First Independent Church, 18 Md. 451; Common Council of Grand Rapids v. Board of Public Works, 99 Mich. 392; McNeal Pipe & Foundry Co. v. Lippincott, 57 N. J. Law, 540, 31 Atl. 399; Union Tp. Committee v. Rader, 41 N. J. Law, 618; Matawan Tp. Com'rs v. Horner, 48 N. J. Law, 441. See People v. Queens County Sup'rs, 62 Hun, 620, 16 N. Y. Supp. 705, in respect to the right of county supervisors to direct the improvement of highways located within the limits of an incorporated village and forming some of its streets. Lewis v. Laylin, 46 Ohio St. 663; City of Waco v. Prather, 90 Tex. 80, 37 S. W. 312.

[918] Irwin v. City of Mobile, 57 Ala. 6; San Jose Imp. Co. v. Auzerais, 106 Cal. 498, 39 Pac. 859; Harney v. Heller, 47 Cal. 15. The proceedings for the improvement of a street need not be more certain or precise than the law authorizing such improvement.

People v. McCain, 50 Cal. 210; City of Stockton v. Whitmore, 50 Cal. 554; Spaulding v. North San Francisco H. & R. Ass'n, 87 Cal. 40. A property owner may be estopped by his conduct to oppose the making of a public improvement when the provisions of law have not been strictly followed. City of Indianapolis v. Imberry, 17 Ind. 175.

City of Delphi v. Evans, 36 Ind. 90, construing charter provisions of the city of Delphi, Ind., relative to street improvements.

Anderson v. Bement, 13 Ind. App. 248, 41 N. E. 547. A road may be improved by the removal of gravel from one place to another if for the making of an ordinary repair.

Warren County Com'rs v. Mankey, 29 Ind. App. 55, 63 N. E. 864;

right of exercise within certain discretionary limits.[919] The cost of general improvement or maintenance may be contributed by different towns and cities in such proportion as may be determined upon either by agreement or law,[920] when used for the ac-

City of New Albany v. Endres, 143 Ind. 192. A nunc pro tunc entry correcting proceedings may be made which will bind a subsequent purchaser of property.

Joyes v. Shadburn, 11 Ky. L. R. 892, 13 S. W. 361; Sullivan v. City of Fall River, 144 Mass. 579; Hoyt v. City of East Saginaw, 19 Mich. 39; Sheehan v. Gleeson, 46 Mo. 100. In an ordinance providing for the improvement of a street, a substantial compliance with the requirements of law is sufficient although it may lack precision.

Leach v. Cargill, 60 Mo. 316. Where the law requires that the abutting property owner shall be given an opportunity to construct the work, a failure to do this will defeat an action on a special tax bill where the improvement was constructed by the city authorities. Village of Tonawanda v. Price, 171 N. Y. 415, reversing 57 App. Div. 635, 68 N. Y. Supp. 1150; Welker v. Potter, 18 Ohio St. 85; Clinton v. City of Portland, 26 Or. 410, 38 Pac. 407.

[919] Bacon v. City of Savannah, 86 Ga. 301. Different provisions under the same statute under the grant of a general power to improve may be construed in a different manner.

Murphy v. City of Peoria, 119 Ill. 509. A portion of a street may be sodded and a portion graded under the grant of a general power to improve. Cason v. City of Lebanon, 153 Ind. 567. Where a general power of control, regulation and improvement is given to municipal corporations over streets and alleys within their limits, this partakes of a discretionary nature and in its exercise, the corporate authorities cannot be controlled by the courts. The determination of the necessity, kind or manner of making a particular improvement by such authorities is conclusive.

City of Augusta v. Taylor, 23 Ky. L. R. 1647, 65 S. W. 837; Shimmons v. City of Saginaw, 104 Mich. 511, 62 N. W. 725; Seaboard Nat. Bank v. Woesten, 147 Mo. 467, 48 S. W. 939, 48 L. R. A. 279; Mendham v. Losey, 2 N. J. Law (1 Pen.) 327; Day v. Public Road Board, 49 N. J. Law, 180; In re Dugro, 50 N. Y. 513. Such discretionary powers will not be revoked by implication or legislation containing words of doubtful inference.

Leverich v. City of New York, 66 Barb. (N. Y.) 623; Wabash R. Co. v. City of Defiance, 52 Ohio St. 262, 40 N. E. 89. In the absence of fraud or abuse of discretion, the determination of a municipality of the necessity for a certain street improvement is not subject to review by the courts.

Ripka's Appeal, 21 Pa. 55; Hutcheson v. Storrie (Tex. Civ. App.) 48 S. W. 785. The determination in the affirmative that a public necessity exists for the improvement of a street is not subject to judicial review where a general grant of power exists in the city council to improve streets. Buckley v. City of Tacoma, 9 Wash. 253.

[920] Langley v. Barnstead, 63 N. H. 246; People v. Flagg, 46 N. Y. 401;

commodation of the inhabitants of each and payment enforced under statutory authority.[921] A highway fund established by law for the repair and improvement of highways cannot be used for any other purpose.[922]

Protest by property owners. The rights of property owners to authorize upon petition or to protest against the making of a public improvement will depend upon the language of a particular statute or ordinance and the construction given.[923] They can only be exercised in strict accordance with such provisions.[924]

People v. Queens County Sup'rs, 112 N. Y. 585.

[921] Dewhurst v. Allegheny City, 95 Pa. 437; Town of Jamaica v. Town of Wardsboro, 45 Vt. 416.

[922] Higgins v. City of San Diego, 131 Cal. 294, 63 Pac. 470; Bean v. Inhabitants of Hyde Park, 143 Mass. 245, 9 N. E. 638. Moneys appropriated for the repair of highways cannot be used for laying out new roads. Hennessey v. City of New Bedford, 153 Mass. 260, 26 N. E. 999; Clay v. Postal Telegraph-Cable Co., 70 Miss. 406; City of Paterson v. Chosen Freeholders of Passaic County, 56 N. J. Law, 459, 29 Atl. 331. And the converse rule also applies that moneys from funds raised for other purposes cannot be used for this particular one. Watson v. City of Passaic, 46 N. J. Law, 124; Hurley v. City of Trenton, 67 N. J. Law, 350, 51 Atl. 1109; People v. Wilson, 46 Hun (N. Y.) 134; Stephens v. City of Spokane, 14 Wash. 298, 44 Pac. 541, 45 Pac. 31.

[923] McEneney v. Town of Sullivan, 125 Ind. 407. The determination of a board of town trustees that a petition for the making of a street improvement has been signed by the requisite number of property owners cannot be collaterally attacked, and is conclusive in an action testing the validity of the assessment. Marshall v. City of Leavenworth, 44 Kan. 459; Barber Asphalt Pav. Co. v. Gogreve, 41 La. Ann. 251; City of Baltimore v. Boyd, 64 Md. 10; Aplin v. Fisher, 84 Mich. 128. The question of whether a majority of property owners have signed the petition for the improvement of a street may be inquired into in a collateral proceeding although a township board has previously decided that a sufficient number have signed. Kountze v. City of Omaha, 63 Neb. 52, 88 N. W. 117; Chalmers v. Town of Andover, 63 N. H. 3. See People v. City of Utica, 65 Barb. (N. Y.) 1, as to what constitutes an estoppel on the part of property owners to protest against the making of a street improvement.

[924] Kirkland v. Public Works of Indianapolis, 142 Ind. 123. The term "resident freeholders" as found in Rev. St. 1894, § 3844, applies only to such persons residing on a particular street upon which the improvement is contemplated.

Barker v. Wyandotte County Com'rs, 45 Kan. 681, 26 Pac. 585. A property owner is not estopped where he has no knowledge of a jurisdictional defect in the proceedings either at the time they were instituted or contemplated. Forbis v. Bradbury, 58 Mo. App. 506; Clinton v. City of Portland, 26 Or. 410;

§ 430. Canals.

A canal constructed and operated by the state for the purpose of transporting, either free or for compensation, freight or passengers, is considered a public highway, and the expenditure of public moneys under such conditions will be justified.[925]

§ 431. Construction of bridges.

A bridge, from a legal standpoint, is considered a highway.[926] The state has the right to erect or authorize the erection of bridges whenever and wherever it may deem them necessary for the convenience of the public as a part of its system or means of communication.[927] Having this right, it may authorize the con-

Armstrong v. Ogden City, 12 Utah, 476, 43 Pac. 119.

[925] New York & B. Saw-mill & Lumber Co. v. City of Brooklyn, 71 N. Y. 580, following Russell v. City of New York, 2 Denio (N. Y.) 461, and Martin v. City of Brooklyn, 1 Hill (N. Y.) 545. Hubbard v. City of Toledo, 21 Ohio St. 379; Nelson v. Fleming, 56 Ind. 310.

[926] San Luis Obispo County v. White, 91 Cal. 432, 24 Pac. 864, 27 Pac. 756. Cal. Pol. Code, § 2618, defines a bridge to be a highway. Parke County Com'rs v. Wagner, 138 Ind. 609, 38 N. E. 171. In construing a statute authorizing the construction and repair of bridges over water courses, the latter are defined as consisting of "bed, banks and water" "a running stream confined in a channel but not necessarily flowing all the time."

Carroll County Com'rs v. Bailey, 122 Ind. 46. A culvert or arched passage way constructed for the purpose of draining surface water, not a bridge. The court defines the latter to be "A structure erected over a river, creek, pond, lake or stream of water flowing in a channel between banks more or less defined, although such channel may be occasionally dry, in order to facilitate public passage over the same." State v. Morris, 43 Iowa, 192. Oliff v. City of Shreveport, 52 La. Ann. 1203. Although a railroad is a public highway in a restricted sense, a railroad bridge is not open to travel by the general public free of charge. State v. Town of Canterbury, 28 N. H. (8 Fost.) 195; Crosby v. Town of Hanover, 36 N. H. 404; Huggans v. Riley, 125 N. Y. 88; Pittsburg & W. E. Pass. R. Co. v. Point Bridge Co., 165 Pa. 37, 26 L. R. A. 323; Westfield Borough v. Tioga County, 150 Pa. 152.

[927] Gilman v. Contra Costa County, 5 Cal. 426; Fall v. Sutter County, 21 Cal. 237; Toll Bridge Co. v. Osborn, 35 Conn. 7. The right to build around wharves will not be included in the grant of a power to erect a toll bridge.

Brown v. Towns of Preston & Ledyard, 38 Conn. 219; Young v. Harrison, 6 Ga. 130; St. Clair County v. People, 85 Ill. 396; Shelby County Com'rs v. Blair, 8 Ind. App. 574, 36 N E. 216. A mill race held a water

struction of free bridges from the public revenues,[928] or where the cost of such construction is unusually large, it may charge a toll

course in this case over which county commissioners are authorized to construct a bridge.

Wrought Iron Bridge Co. v. Hendricks County Com'rs, 19 Ind. App. 672, 48 N. E. 1050. The power to construct bridges does not accompany the power to establish highways. Special statutory provisions control.

Bingham v. Marion County Com'rs, 55 Ind. 113. Under Ind. Laws the county commissioners are vested with the discretionary power of passing upon the question of the necessity for the construction of a bridge. Berube v. Wheeler, 128 Mich. 32, 87 N. W. 50.

Naegely v. City of Saginaw, 101 Mich. 532, defining a stream as "navigable for boats or vessels of fifteen tons burden" within the meaning of How. St. § 495.

State v. Gilmanton, 14 N. H. 467. Statutes prohibiting the obstruction of navigable streams necessarily limit the right to authorize the construction of a bridge.

State v. Freeholders of Essex, 23 N. J. Law (3 Zab.) 214. The building of bridges under the N. J. Laws is a discretionary power intrusted to the boards of chosen freeholders of the counties to be exercised by them in all respects at their discretion.

Bergen County Chosen Freeholders v. State, 42 N. J. Law, 263. But if a board of chosen freeholders wilfully refuse to build a bridge or repair a bridge where it is necessary for the public use and convenience they may be indicted and convicted for maintaining a nuisance. Spencer v. Chosen Freeholders of Hudson County, 66 N. J. Law, 301, 49 Atl. 483.

In re Freeholders of Irondequoit, 68 N. Y. 376. The statutory authority for the construction of a bridge over "streams" does not authorize bridging bays, marshes or other bodies of water which are not streams.

[928] Washer v. Bullitt County, 110 U. S. 558; Garland v. Board of Revenue, 87 Ala. 223. An act will be held invalid if it authorizes the expenditure of such an amount of public moneys as will cause a county to run in debt in excess of a constitutional limit.

Fones Hardware Co. v. Erb, 54 Ark. 645, 13 L. R. A. 353. The construction of a bridge must conform to existing statutes requiring an appropriation by the proper authorities before there can be a legal expenditure of public moneys.

Andrews v. Ada County Com'rs, 7 Idaho, 453, 63 Pac. 592. The expenditure of such moneys must necessarily be according to the statutory provisions regulating the disbursement of public moneys.

Shaw v. Dennis, 10 Ill. 405; Smith v. Miami County Com'rs, 6 Ind. App. 153, 33 N. E. 243; Barrett v. Brooks, 21 Iowa, 144. The cost may be partially assumed.

Oliff v. City of Shreveport, 52 La. Ann. 1203; City of Baltimore v. Stoll, 52 Md. 435; Schneider v. City of Detroit, 72 Mich. 240, 40 N. W. 329, 2 L. R. A. 54; State v. Renville County Com'rs, 83 Minn. 65, 85 N. W. 830. Holding Laws of 1889, c. 271, valid as not contravening the

for their use.[929] The construction of bridges by private individuals may be also authorized.[930] This power of the state, however, is always subject to the paramount right or power of the Federal government granted by the constitution to control and regulate the use of navigable waters used or capable of being used for interstate commerce. It is necessary, therefore, that, in the manner prescribed by Congress, permission be secured for the erection of either a public or private bridge over navigable waters,[931] and

constitutional provision that an act should not contain more than is expressed in its title. Kelley v. Kennard, 60 N. H. 1. Private aid may be accepted.

Platt v. Craig, 66 Ohio St. 75, 63 N. E. 594. 94 Ohio Laws, p. 175, providing for the building of bridges over navigable streams held unconstitutional as being special legislation violating constitution, art. 13, § 1. In re Pequea Creek Bridge, 68 Pa. 427. Officers intrusted by law with the power to erect a bridge must act. In re City Ave. & Germantown Bridge, 164 Pa. 394.

[929] Young v. Buckingham, 5 Ohio, 485; Pittsburg & W. E. Pass. R. Co. v. Point Bridge Co., 165 Pa. 37, 26 L. R. A. 323.

[930] Stanislaus Bridge Co. v. Horsley, 46 Cal. 108; McCartney v. Chicago & E. R. Co., 112 Ill. 611. A municipal corporation having the power to build a bridge may authorize this to be done by a private corporation.

Maxwell v. Bay City Bridge Co., 46 Mich. 278; Attorney General v. Stevens, 1 N. J. Eq. (Saxt.) 369; Lister v. Newark Plank Road Co., 36 N. J. Eq. (9 Stew.) 477; In re East River Bridge, 75 Hun, 119, 27 N. Y. Supp. 145. A grant of power includes necessarily a control of the manner in which the bridge shall be constructed.

Gordon v. Strong, 3 App. Div. 395, 38 N. Y. Supp. 922; Freeholders & Commonalty of Southampton v. Jessup, 162 N. Y. 122; Schuylkill Bridge Co. v. Frailey, 13 Serg. & R. (Pa.) 422, construing the right of a county to tax a bridge erected under Pa. St. April 11, 1799.

Oliver v. Thompson's Run Bridge Co., 197 Pa. 344; Jones v. Keith, 37 Tex. 394; Hudson v. Cuero Land & Emigration Co., 47 Tex. 56; Plecker v. Rhodes, 30 Grat. (Va.) 795; Town of Grand Isle v. Kinney, 70 Vt. 381, 41 Atl. 130.

[931] Cox v. State, 3 Blackf. (Ind.) 193; Perley v. Chandler, 6 Mass. 454; Inhabitants of Arundel v. McCulloch, 10 Mass. 70; Smith v. Omaha & C. B. R. & Bridge Co., 97 Iowa, 545, 66 N. W. 1041; Lincks v. Amend (N. J. Eq.) 32 Atl. 755; People v. Kelly, 76 N. Y. 475; Covington & C. Bridge Co. v. Magruder, 63 Ohio St. 455, 59 N. E. 216; Works v. Junction Railroad, 5 McLean, 426, Fed. Cas. No. 18,046; Cardwell v. American Bridge Co., 113 U. S. 205; Stone v. Farmers' Loan & Trust Co., 116 U. S. 307; Hamilton v. Vicksburg, S. & P. R. Co., 119 U. S. 280; Rhea v. Newport News & M. V. R. Co., 50 Fed. 16.

Where a navigable stream is entirely within the limits of a state and therefore not capable of being used for interstate commerce, the

the manner in which constructed or mode of construction may be regulated and prescribed by the proper Federal authorities.[932] The principle usually obtains in this respect, however, that until Congress has acted, the state may authorize the construction of bridges over navigable waters, although later, if Congress should act, a bridge constructed under state authority may be condemned and destroyed or its reconstruction directed because of its being an obstruction to navigation.[933]

§ 432. Cost.

Where a bridge lies entirely within the limits of one corporation, there is no difficulty in determining the responsibility for its cost and maintenance.[934]

provisions of the Federal Constitution will not apply. Sands v. Manistee River Imp. Co., 123 U. S. 288. "The internal commerce of a state, that is, the commerce which is wholly confined within its limits, is as much under its control as foreign or interstate commerce is under the control of the national government."

Lake Shore & M. S. R. Co. v. Ohio, 165 U. S. 365. "That full power resides in the states as to the erection of bridges and other works in navigable streams wholly within their jurisdiction in the absence of the exercise by Congress of authority to the contrary is conclusively determined."

[932] United States v. Pittsburgh & L. E. R. Co., 26 Fed. 113; Newport & C. Bridge Co. v. United States, 105 U. S. 470; Missouri River Packet Co. v. Hannibal & St. J. R. Co., 1 McCrary, 281, 2 Fed. 285.

[933] Newport & C. Bridge Co. v. United States, 105 U. S. 470; Lake Shore & M. S. R. Co. v. Ohio, 165 U. S. 365; United States v. Keokuk & H. Bridge Co., 45 Fed. 182.

[934] Logan County Sup'rs v. People, 116 Ill. 466, construing Ill. Road & Bridge Law of 1883, with regard to the speedy rebuilding of a bridge in case of an emergency. Kansas City Bridge & Iron Co. v. Wyandotte County Com'rs, 35 Kan. 557; State v. Proprietors of Norridgewock Falls Bridge, 65 Me. 514; Inhabitants of Westbrook v. Inhabitants of Deering, 63 Me. 231. A new town formed by the division of territory is not liable for any portion of the cost of a bridge located entirely within the limits of the other town, although the vote authorizing its construction was taken before the division.

Montague Paper Co. v. Burrows, 121 Mass. 88. The cost of construction includes damages to owners of adjoining lands caused by the erection of the bridge.

Wrought Iron Bridge Co. v. Jasper Tp., 68 Mich. 441, 36 N. W. 213; Frenchtown Tp. v. Monroe County Sup'rs, 89 Mich. 204. County supervisors have no power to require a contribution from a township in which no part of a bridge is located although such township may have a special interest and receive an advantage from its construction.

In re Saw-Mill Run Bridge, 85 Pa.

Where, however, the bridge is partially within the limits of different corporations, the apportionment of such expense is a matter for previous determination, either by act of the legislature authorizing the bridge[935] or by contract between the organizations

163. The cost of a public bridge cannot be assessed upon abutting property but must be paid from the general revenues.

[935] Insley v. Shepard, 31 Fed. 869, construing Ill. act of March 29th, 1883, amendatory to the act of May 28th, 1879, § 107; Phillips v. Town of East Haven, 44 Conn. 25; State v. Williams, 68 Conn. 131, 48 L. R. A. 465; Kendall County Sup'rs v. People, 12 Ill. App. 210; Logan County Sup'rs v. People, 17 Ill. App. 49; People v. Madison County Sup'rs, 125 Ill. 9, 17 N. E. 147; Kankakee County Sup'rs v. People, 24 Ill. App. 410; Du Page County v. Martin, 39 Ill. App. 298; Lancaster Highway Com'rs v. Baumgarten, 41 Ill. 255.

People v. Dover Highway Com'rs, 53 Ill. App. 442. Ill. Road and Bridge Law provides that a contract of construction shall be entered into by the towns liable for the cost of a bridge before an action can be maintained by one town to compel another to pay its proportion as fixed by law. See, also, as holding that such a contract is not an essential prerequisite to joint building, the case of Deer Park Highway Com'rs v. Wrought Iron Bridge Co., 3 Ill. App. 570.

Commissioners of Union Drainage Dist. v. Highway Com'rs, 87 Ill. App. 93. In the absence of statutes or contractual liability, a town cannot be required to contribute to the cost of a bridge erected by a drainage commission on a town and county line between two towns.

People v. Iroquois County Sup'rs, 100 Ill. 640. When town commissioners have decided that the expense of a necessary bridge over a stream on a highway is too great for the town, the obligation under the statute rests upon the county board of supervisors to pay unconditionally one-half of such cost; it is not a discretionary matter with them.

People v. McHenry County Sup'rs, 110 Ill. 93; People v. Shelby County Sup'rs, 168 Ill. 351, construing act of July 1st, 1883, as amended by act of July 1st, 1889, authorizing the county to aid a town in the construction of a bridge under certain conditions.

Martin County Com'rs v. Mitcheltree Tp., 4 Ind. App. 424, 30 N. E. 937; City of New Albany v. Iron Substructure Co., 141 Ind. 500, 40 N. E. 44; Jackson County Com'rs v. Washington County Com'rs, 146 Ind. 138, 45 N. E. 60. The requirement of the law in respect to concurrent resolution, survey and estimate must be complied with before there exists a joint liability for the cost of constructing the bridge on the boundary line between two counties. See, also, as holding the same, Wrought Iron Bridge Co. v. Hendricks County Com'rs, 19 Ind. App. 672, 48 N. E. 1050.

Garrard County Ct. v. Boyle County Ct., 73 Ky. (10 Bush) 208; Nelson County Ct. v. Washington County Ct., 53 Ky. (14 B. Mon.) 74; City of Cambridge v. Railroad Com'rs, 153 Mass. 161, 26 N. E. 241; Brayton v. City of Fall River, 124 Mass. 95;

that may avail themselves of its use.[936] In some cases it has been held that the legislature having the right in the first instance may provide that a bridge shall be constructed and maintained at the expense of towns specially benefited although the structure is entirely without their territory.[937] The embankments or ap-

Cass County v. Sarpy County, 63 Neb. 813, 89 N. W. 291; Somerset County Chosen Freeholders v. Hunterdon County Chosen Freeholders (N. J. Law) 19 Atl. 972; People v. Queens County Sup'rs, 71 Hun, 97, 24 N. Y. Supp. 563. But the construction of a bridge at joint expense is discretionary with each organization.

Town of Candor v. Town of Tioga, 11 App. Div. 502, 42 N. Y. Supp. 911. The provisions of Laws 1890, c. 568, § 145, requiring certificate by city engineer and surveyor of the completion of a bridge must be complied with before a contribution provided by law can be enforced.

Beckwith v. Whalen, 65 N. Y. 322; Town of Lysander v. Syracuse, L. & B. R. Co., 51 App. Div. 617, 66 N. Y. Supp. 1146; Day v. Day, 94 N. Y. 153; People v. Steuben County Sup'rs, 146 N. Y. 107; Id., 81 Hun, 216, 30 N. Y. Supp. 729; People v. Queens County Sup'rs, 151 N. Y. 190. Before a joint bridge can be constructed there must exist a legal highway connecting with such bridge at both ends. See, also, the case of Beckwith v. Whalen, 70 N. Y. 430, holding that there must exist an actual legal highway; one opened and possible for public travel.

Stone v. Broome County Sup'rs, 166 N. Y. 85; McPeeters v. Blankenship, 123 N. C. 651; Gouldsboro v. Coolbaugh Tp., 87 Pa. 48. Authority must be first obtained from the courts of quarter sessions before a bridge over a stream can be built at their expense. Sheridan v. Palmyra Tp., 180 Pa. 439; In re Youghiogheny Bridge, 182 Pa. 618; In re Red Bridge, 20 R. I. 407, 39 Atl. 757; Town of Rockingham v. Town of Westminster, 24 Vt. 288; Johnson v. Buffalo County, 111 Wis. 265, 87 N. W. 240.

[936] Wyandotte & D. R. R. Co. v. King Bridge Co. (C. C. A.) 100 Fed. 197. Townships liable for the cost of construction will also be liable in the same proportion for the cost of extra work caused by an error of their agents in locating the abutments of a bridge.

Croley v. California Pac. R. Co., 134 Cal. 557, 66 Pac. 860; Forsyth County v. Gwinnett County, 108 Ga. 510. A contract for the construction of a bridge should be made in the manner required by law before contributions from another county can be exacted. People v. Moultrie County Sup'rs, 71 Ill. App. 348; Board of Sup'rs v. People, 80 Ill. App. 682; Commissioners of Union Drainage Dist. v. Highway Com'rs, 87 Ill. App. 93; Dimmick Highway Com'rs v. Waltham Highway Com'rs, 100 Ill. 631; Uhl v. Douglass Tp., 27 Kan. 80; Township Board of Ecorse v. Wayne County Sup'rs, 75 Mich. 264, 42 N. W. 831; Dietrich v. Schremms, 117 Mich. 298, 75 N. W. 618; Bascom v. Oconee County, 48 S. C. 55, 25 S. E. 984.

[937] Town of Granby v. Thurston, 23 Conn. 416; State v. Williams, 68 Conn. 131, 35 Atl. 24, 421, 48 L. R. A. 465; Inhabitants of Brunswick v.

proaches to the bridge, when such are necessary, are usually considered a part of the bridge itself,[938] and questions relating to them are determined in the same manner or under the same authority. Public corporations control and regulate the public affairs only within the geographical limits of their organization, and it necessarily follows that public officials have the right to construct bridges at places only within the limits of their jurisdiction[939] unless by law a joint supervision is given to them with

City of Bath, 90 Me. 479; Inhabitants of Norwich v. Hampshire County Com'rs, 30 Mass. (13 Pick.) 60; Com. v. City of Newburyport, 103 Mass. 129; Carter v. Cambridge & B. Bridge Proprietors, 104 Mass. 236. The legislature has a full and discretionary power over the matter of apportionment of the cost of a bridge between counties benefited by its construction.

Guilder v. Town of Dayton, 22 Minn. 366. "Towns and counties are political subdivisions of the state, the purpose of whose creation is solely governmental. They are agencies through which the functions of government are, to a greater or less extent, exercised within their territorial limits—agencies created by and subject to the state and, therefore, under the absolute control of the legislature within constitutional limits. In the exercise of this legislative control we can conceive of no reason why it is not entirely competent for the legislature, as an exercise of purely legislative power to determine and enact (as in the case of the special act under consideration) that a particular bridge, a part of a public highway, shall be constructed in a prescribed manner, and within a fixed expense by towns and counties within whose territorial limits it will lie when completed and to determine in what proportion these several towns and counties shall contribute to defray the cost of its construction." Town of Brookline v. Town of Westminster, 4 Vt. 224; Town of Underhill v. Town of Essex, 64 Vt. 28, 23 Atl. 617.

[938] Phillips v. Town of East Haven, 44 Conn. 25. Where the cost of approaches or embankments are to be paid by the towns in which they were respectively situated, each can be required to construct its own embankment, though one was much longer than the other. Gillette-Herzog Mfg. Co. v. Aitkin County Com'rs, 69 Minn. 297, 72 N. W. 123; Com. v. Loomis, 128 Pa. 174, 18 Atl. 335; Com. v. Pittston Ferry Bridge Co., 148 Pa. 621, 24 Atl. 87; Penn Tp. v. Perry County, 78 Pa. 457; Gloucester County Ct. v. Middlesex County Ct., 79 Va. 15; Tinkham v. Town of Stockbridge, 64 Vt. 480; Home Bldg. & Conveyance Co. v. City of Roanoke, 91 Va. 52, 20 S. E. 895, 27 L. R. A. 551.

[939] Nelson v. Garfield County Com'rs, 6 Colo. App. 279, 40 Pac. 474; Mercer County Sup'rs v. Town of New Boston, 13 Ill. App. 274; People v. La Salle County Sup'rs, 111 Ill. 527; State v. Martin County Com'rs, 125 Ind. 247. Under Rev. St. Ind. 1881, county commissioners are vested with a discretionary pow-

other officials when joint action is then necessary.[940] The rules that govern the expenditure of public moneys and require a strict compliance with the provisions of law authorizing a specific distribution apply to the construction of bridges. That legal authority exist, requirements that contracts must be advertised or let to the lowest bidder,[941] that public appropriations should first

er in regard to the construction of bridges, both as to the time, place and manner of their construction. See, also, as to construction of same section with its amended provisions, Daviess County Com'rs v. State, 141 Ind. 187, 40 N. E. 686.

State v. Morris, 43 Iowa, 192. Under Iowa Stats., the board of supervisors are vested with discretionary power in regard to the construction of bridges and their action is not subject to judicial review; neither can they be compelled by mandamus to act other than they have decided.

Snyder v. Foster, 77 Iowa, 638; Maxwell v. Bay City Bridge Co., 41 Mich. 453. The authority vested by statute in boards of supervisors with reference to the construction of bridges cannot be delegated by them.

Greenman v. Mower County Com'rs, 62 Minn. 397, 64 N. W. 1142. Where the cost of a public bridge exceeds $100, the county commissioners of Mower Co. are authorized under Special Laws, 1885, c. 175, to pay its cost out of county funds.

People v. Public Park Com'rs, 97 N. Y. 37. The determination of the necessity for the construction of a bridge is the exercise of a judicial function on the part of a board of park commissioners and not subject to judicial review. Broomall's Appeal, 75 Pa. 173; Seabolt v. Northumberland County Com'rs, 187 Pa. 318. Such power is a discretionary one.

[940] Skinner v. Henderson, 26 Fla. 121, 7 So. 464, 8 L. R. A. 55; Barrett v. Brooks, 21 Iowa, 144; Oskaloosa Steam-Engine Works v. Pottawattamie County, 72 Iowa, 134, 33 N. W. 605; Dietrich v. Schremms, 117 Mich. 298, 75 N. W. 618; Brophy v. Schindler, 126 Mich. 341, 85 N. W. 1114; Town of Kirkwood v. Newbury, 122 N. Y. 571; McPhail v. Cumberland County Com'rs, 119 N. C. 330; Everett v. Bailey, 150 Pa. 152.

[941] Pacific Bridge Co. v. Clackamas County, 45 Fed. 217; Deweese v. Hutton, 144 Ind. 114, 43 N. E. 13; Owen County Com'rs v. Washington Tp., 121 Ind. 379; Chandler v. Fremont County, 42 Iowa, 58; Gillette-Herzog Mfg. Co. v. Aitkin County Com'rs, 69 Minn. 297, 72 N. W. 123. General St. 1894, §§ 1894-1902, do not require the letting of a contract for the construction of a bridge to the lowest bidder. "The next point made is that the contract was not legally entered into because no bids for the construction of the bridge were advertised for. This defense was set up in the answer together with charges of fraud upon the county and collusion between plaintiff and defendant board whereby the contract in question was entered into for the purpose of cheating and defrauding the county out of about $3,000. On the trial it did not appear whether bids were advertised for or received prior to the letting of the contract, and no attempt was made to establish the allegations of its own bad conduct and fraudulent acts which the defendant board in-

be made,[942] that the cost should come within the amount authorized to be expended or within the indebtedness permitted by law,[943] that preliminary investigations be made of the necessity for or the manner of construction of the bridge,[944] and the plan, place or conditions under or material of which erected,[945] should be followed.

serted in its answer. On the argument here its counsel seems to assume, first, that the board was imperatively required to advertise for bids and then to award the contract to the lowest bidder; and second, that it was incumbent upon the plaintiff to show compliance with the requirement in respect to advertising, and, further, that it was such lowest bidder. We have not been cited to any law which requires that bids be called for when road work is to be done except the act of 1867 (Gen. St. 1894, §§ 1894-1902, inclusive). A glance at that statute will show that it is not in point here. And even if it were incumbent upon the board to advertise for bids when a road or bridge contract is to be let, and then to enter into a contract with the lowest bidder, the presumption would be that the law had been complied with by the board; not that its members had violated the statutory provisions." Heidelberg v. St. Francois County, 100 Mo. 69; State v. Canterbury, 28 N. H. (8 Fost.) 195.

[942] Skinner v. Henderson, 26 Fla. 121, 8 L. R. A. 55; Smith v. Omaha & C. B. R. & Bridge Co., 97 Iowa, 545; Kansas City Bridge & I. Co. v. Wyandotte County Com'rs, 35 Kan. 557; Birge v. Berlin Iron Bridge Co., 133 N. Y. 477; People v. Chautauqua County Com'rs, 43 N. Y. 10. Legal authority for the construction of a bridge cannot be embraced in an act under the title "an act making appropriations for expenses of the government." Mathewson v. Hawkins, 19 R. I. 16, 31 Atl. 430.

[943] Kinsey v. Pulaski County, 2 Dill. 253, Fed. Cas. No. 7,830; San Luis Obispo County v. White, 91 Cal. 432, 24 Pac. 864, 27 Pac. 756; Bell v. Foutch, 21 Iowa, 119; Valley Tp. v. King Iron Bridge & Mfg. Co., 4 Kan. App. 622, 45 Pac. 660; Chicago Lumber & Coal Co. v. Sugar Loaf Tp., 64 Kan. 163, 67 Pac. 630; Berude v. Wheeler, 128 Mich. 32, 87 N. W. 50; Hosier v. Higgins Tp. Board, 45 Mich. 340; Monroe County v. Strong, 78 Miss. 565, 29 So. 530; Howard v. City of Oshkosh, 33 Wis. 309.

[944] Caldwell v. Harrison, 11 Ala. 755. Patterson v. Taylor, 98 Ga. 646. Ga. Code, § 337, invests an ordinary with discretionary power in passing upon the necessity for the construction of a bridge of which he is not deprived, although two grand juries recommend that the bridge should be built. People v. Madison County Sup'rs, 125 Ill. 334, 17 N. E. 802; Shelby County Sup'rs v. People, 65 Ill. App. 410; Bingham v. Marion County Com'rs, 55 Ind. 113.

[945] Smith v. Omaha & C. B. R. & Bridge Co., 97 Iowa, 545, 66 N. W. 1041; Gould v. Schermer (Iowa) 70 N. W. 697; Agne v. Seitsinger, 104 Iowa, 482; Adams v. Ulmer, 91 Me. 47, 39 Atl. 347. A slight change from the location authorized will not relieve a town from liability for

§ 433. Bridges; their regulation and control.

Somewhat the same decisions and principles apply to the regulation and control of bridges as in respect to the cost of their construction, where they are erected within the limits of two or more political organizations of whatever character, whether towns, cities, counties or states. The sovereignty and, therefore, the jurisdiction of an organization extends over all persons, property and territory within its geographical limits.[946] Unless there is a surrender of their rights, a bridge may be under the joint control of as many public corporations as within the borders of which it lies. The mutual adjustment of the location and control depends upon agreement[947] or statutory provision and these will, therefore, govern.[948] The right of control or regulation, where a bridge is within the limits of one organization only is found in the statutes or ordinances authorizing its contruction,[949]

the cost of construction. St. Louis County v. Cleland, 4 Mo. 84; Town of Saranac v. Groton Bridge & Mfg. Co., 55 App. Div. 134, 67 N. Y. Supp. 118; In re New York & Brooklyn Bridge, 72 N. Y. 527; Huggans v. Riley, 125 N. Y. 88; In re County Bridge (Pa.) 24 Atl. 695. Matters outside the record cannot be considered. Seabolt v. Northumberland County Com'rs, 187 Pa. 318. The construction in substantially the place authorized is sufficient. Pittsburg & L. E. R. Co. v. Lawrence County, 198 Pa. 1; Mathewson v. Hawkins, 19 R. I. 16, 31 Atl. 430. A contract for the construction of a bridge is not binding on the town unless made by one having authority to bind it. Maddox v. Ware, 2 Bailey (S. C.) 314. Commissioners of roads are vested with a certain discretionary power as to the place where a bridge shall be located and constructed. State v. Wood County Ct., 33 W. Va. 589.

[946] Martin County Com'rs v. Mitcheltree Tp., 4 Ind. App. 424; Town of Waterville v. Kennebec County Com'rs, 59 Me. 80.

[947] Wrought Iron Bridge Co. v. Jasper Tp., 68 Mich. 441; Stitt v. Casterline, 89 Mich. 239.

[948] City of Columbus v. Rodgers, 10 Ala. 37; Kankakee County Sup'rs v. People, 24 Ill. App. 410; Carroll County Com'rs v. O'Connor, 137 Ind. 622, 35 N. E. 1006, 37 N. E. 16; Carter v. Cambridge & B. Bridge Proprietors, 104 Mass. 237.

[949] Chidsey v. Canton, 17 Conn. 478; State v. Williams, 68 Conn. 131, 35 Atl. 24, 421, 48 L. R. A. 465; Burritt v. City of New Haven, 42 Conn. 174; City of Chicago v. Norton Milling Co., 196 Ill. 580. "The city had power to construct bridges; to deepen, widen, dock, alter or change the channels of water courses; to erect and keep in repair, regulate and control, docks. Rev. St. 1874, c. 24, par. 62. It also had the power to acquire by purchase, lease or gift, not to exceed four acres of land for bridge purposes. Laws 1877, p. 61. Starr & C. Ann. St. c. 24, par. 284.

or in general laws applicable to the control and regulation of highways.[950]

§ 434. Their maintenance and repair.

The burden of maintaining and repairing a bridge considered as a highway will depend largely upon the fact of its joint or sole ownership and control either by law, agreement or location. This may be assumed by one corporation,[951] and on the other

The city instead of acquiring all the land at first sought to be condemned * * * took a smaller portion. This necessitated acquiring the right to swing the end of the new Madison street bridge over a portion of appellee's premises. Its officers then entered into a contract with appellee by which the city acquired this right and in consideration therefor agreed to construct the vault under Madison street, and give the use of it, rent free, to appellee, for as long a time as it had power to do so. * * * That the city might make such an arrangement * * * when sanctioned by the city council is undoubted. The city having power to do so the acts of its officers * * * could be ratified by the city; and the city might be estopped to deny the validity of their acts."

[950] Union Pac. R. Co. v. Colfax County Com'rs, 4 Neb. 450.

[951] Inhabitants of Waterbury v. Clark, 4 Day (Conn.) 198; Town of Granby v. Thurston, 23 Conn. 416; Abendroth v. Town of Greenwich, 29 Conn. 356. It is the duty of the state alone to construct the necessary bridges over streams that form a part of the boundary line between Connecticut and adjoining states.

Polk County Com'rs v. City of Cedartown, 110 Ga. 824; Common Council of Indianapolis v. McClure, 2 Ind. 147. The cost of maintaining cannot be arbitrarily thrown upon a town. Union Tp. v. Anthony, 26 Ind. 487. The cost may be charged upon the private individual whose acts have rendered necessary the construction of the bridge. See, also, as holding to the same effect, Highway Com'rs of Richmond Tp. v. Martin, 88 Mich. 115, and Town of Clay v. Hart, 25 Misc. 110, 55 N. Y. Supp. 43.

Shelby County Com'rs v. Blair, 8 Ind. App. 574, 36 N. E. 216. When a bridge over a mill race, although built by a private individual, by adoption of the proper officials becomes a part of the highway, the expense of its repair rests upon them.

Boone County Com'rs v. Mutchler, 137 Ind. 140, 36 N. E. 534. The duty to keep in repair applies to all public bridges. Bonebrake v. Huntington County Com'rs, 141 Ind. 62, 40 N. E. 141; Roby v. Appanoose County, 63 Iowa, 113; State v. Gibson County Com'rs, 80 Ind. 478. A private bridge upon its adoption by a county becomes a charge upon the public funds. See, also, Hord v. Village of Montgomery, 26 Ill. App. 41.

Vaught v. Johnson County Com'rs, 101 Ind. 123; Wyandotte County Com'rs v. City of Wyandotte, 29 Kan. 431; City of Lowell v. Proprietors of Locks & Canals, 104 Mass. 18. By agreement a private individual

hand, depending upon the same causes, the burden of its repair and maintenance may be charged upon the corporate authorities of two or more organizations.[952] In either case the power and

may be partially charged with the cost of maintaining a bridge.

Delta Lumber Co. v. Board of Auditors, 71 Mich. 572, 40 N. W. 1. Under How. Ann. St. § 1445, the burden of repair and maintaining bridges is upon the township in which it is situated. Moore v. City of St. Paul, 82 Minn. 494, 85 N. W. 163. Upon the extension of city limits, all bridges within the territory annexed become a charge upon the city. Dutton v. State, 42 Neb. 804. The duty to maintain a bridge rests upon a county although a precinct may have voted aid for its construction.

State v. Town of Campton, 2 N. H. 513. The duty to maintain and repair a public bridge though constructed by private individuals rests upon the public. Beatty v. Titus, 47 N. J. Law, 89. A county is charged with the burden of maintaining bridges and public highways within its limits. Bush v. Delaware, L. & W. R. Co., 166 N. Y. 210. A railroad company charged with the duty of maintaining a highway crossing its road in its original condition is under the duty of maintaining an overhead bridge constructed by it as a part of the highway.

City of Piqua v. Geist, 59 Ohio St. 163. Under Ohio Rev. St. § 860, a city is responsible for the maintenance of bridges within its limits. Everett v. Bailey, 150 Pa. 152; Battles v. Doll, 113 Wis. 357, 89 N. W. 187. Under Wis. St. villages are charged with maintaining bridges within their limits.

[952] State v. Williams, 68 Conn. 131, 35 Atl. 24, 421, 48 L. R. A. 465. Legislation providing that the cost of the construction and maintenance of a certain bridge shall be paid by the state does not partake of the nature of a contract. A statute may be subsequently passed providing for the apportionment of the cost of maintenance and repair between the towns specially benefited by the construction of the bridge.

Daniels v. Intendent & Wardens of Athens, 55 Ga. 609; Highway Com'rs of Rutland v. Highway Com'rs of Dayton, 60 Ill. 58. A joint liability for the cost of repairing and maintaining a bridge may be shown by acts of possession and control by record of official acts or by the reclamation and use of the easement.

People v. Highway Com'rs of Dover, 158 Ill. 197; Hamilton County Com'rs v. Noblesville Tp., 4 Ind. App. 145, 30 N. E. 155. A payment of damages resulting from negligence in failing to keep a bridge in repair is not a part of the cost of construction or repair of a bridge as provided for in Elliott's Supp. § 1585. Fountain County Com'rs v. Warren County Com'rs, 128 Ind. 295. The place of responsibility may be dependent upon the extent of cost of necessary repairs. See, also, as holding the same, Owen County Com'rs v. Washington Tp., 121 Ind. 379, and Sullivan County Com'rs v. Arnett, 116 Ind. 438.

City of Wabash v. Carver, 129 Ind. 552, 13 L. R. A. 851; Shawnee County v. City of Topeka, 39 Kan. 197, 18 Pac. 161. The voluntary as-

duty to maintain and repair as devolving upon certain officials is not entirely of a ministerial character but contains a large element of discretion. The necessity for the extent and manner of repair is determined by officials having charge.[953] Ordinarily the exercise of such discretionary power is not subject to judicial

sistance by a county in maintaining a bridge located within the city limits does not create an obligation to continue such aid indefinitely.

Nand v. City of Newton, 58 Kan. 229, 48 Pac. 852; Town of Waterville v. Kennebec County Com'rs, 59 Me. 80. The expense of maintaining a bridge may be apportioned between towns in proportion to their respective state values of taxable property.

Attorney General v. City of Cambridge, 82 Mass. (16 Gray) 247; Inhabitants of Swanzey v. Inhabitants of Somerset, 132 Mass. 312. In apportioning the liability of two towns required by statute to keep a bridge in repair, the causeway built from one end is not included in the bridge. Inhabitants of Provincetown v. Inhabitants of Truro, 135 Mass. 263. Where a highway is substituted for a bridge, the joint obligation imposed by the statute between two towns to maintain such bridge in repair does not follow and include such highway.

City of Haverhill v. Inhabitants of Groveland, 152 Mass. 510; Bigelow v. Brooks, 119 Mich. 208, 77 N. W. 810; Cass County v. Sarpy County, 63 Neb. 813, 89 N. W. 291. Where a joint duty exists by statute, one town making necessary repairs can compel a contribution from those upon whom the duty rests.

Town of Hudson v. Town of Nashua, 62 N. H. 591; People v. Queens County Sup'rs, 142 N. Y. 271, reversing 71 Hun, 97, 24 N. Y. Supp. 563.

Keiser v. Union County Com'rs, 156 Pa. 315. Under Pa. Bridge Laws, although the boundary between two counties may be the bank of a stream, the cost of a bridge is properly apportioned between the two counties. Shoolbred v. Corporation of Charleston, 2 Day (S. C.) 65; Town of Glover v. Carpenter, 70 Vt. 278, 40 Atl. 730; Town of Sharon v. Town of Strafford, 56 Vt. 421. The report of commissioners appointed under Vt. acts, 1882, No. 16, to apportion the expense of rebuilding a bridge among towns benefited can be reviewed by the county court.

Gloucester County v. Middlesex County, 88 Va. 843. The cost of maintaining approaches to a bridge maintained at the joint expense of two counties must be paid by the counties in which the respective approaches are located. State v. Wood County, 72 Wis. 629, 40 N. W. 381; Town of Waupun v. Town of Chester, 61 Wis. 401. But see the case of Fountain County Com'rs v. Warren County Com'rs, 128 Ind. 295, 27 N. E. 133.

[953] Highway Com'rs v. People, 69 Ill. App. 326. Such discretionary power cannot, however, be arbitrarily exercised. Hamilton County Com'rs v. State, 113 Ind. 179, 15 N. E. 258; State v. Greene County Com'rs, 119 Ind. 444; Bembe v. Anne Arundel County Com'rs, 94 Md. 330, 51 Atl. 183, 57 L. R. A. 279.

review.[954] There is this limitation, however, upon this doctrine, that after the original construction of a bridge, it should be maintained in a condition safe for travel.[955] The extent and manner of repair may be restricted by the amount of funds in hand applicable to such purpose or the levy of taxes as authorized.[956] In case of a joint control, the actual maintenance may be directed jointly, or solely, by one of the organizations; if the latter, such corporation then has the right to charge the others responsible with their proper proportion.[957] The details as to main-

[954] Batty v. Duxbury, 24 Vt. 155.

[955] Shelby County Com'rs v. Blair, 8 Ind. App. 574, 36 N. E. 216. The liability to keep in safe condition extends to necessary approaches and railings. See, also, as holding the same, Johnson County Com'rs v. Hemphill (Ind. App.) 41 N. E. 965.

Travis v. Skinner, 72 Mich. 152, 40 N. W. 234. Before the duty can be enforced by mandamus or otherwise, it must be shown that the bridge is a public one. Town of Clay v. Hart, 25 Misc. 110, 55 N. Y. Supp. 43; State v. Selby, 83 N. C. 617. Defiance County Com'rs v. Croweg, 24 Ohio St. 492. But the rebuilding of a bridge must be distinguished from the repair of the old one. Shadler v. Blair County, 136 Pa. 488; Francis v. Franklin Tp., 179 Pa. 195. The duty to repair a bridge includes the approaches as well. Briggs v. Guilford, 8 Vt. 267.

[956] People v. Highway Com'rs, 32 Ill. App. 164; City of Boston v. Middlesex County Com'rs, 111 Mass. 313; Loomis v. Rogers Tp. Board, 53 Mich. 135; Jefferson County v. St. Louis County, 113 Mo. 619, 21 S. W. 217; Boots v. Washburn, 79 N. Y. 207. Money may be borrowed on the credit of the town to pay the cost of rebuilding a bridge. Rigony v. Schuylkill County, 103 Pa. 382; State v. Racine County, 70 Wis. 543, 36 N. W. 399; State v. St. Croix County Com'rs, 83 Wis. 340.

[957] Rowe v. Smith, 51 Conn. 266; Dunlieth & D. Bridge Co. v. Dubuque County, 55 Iowa, 558; Flynn v. City of Boston, 153 Mass. 372, 26 N. E. 868; State v. Cass County Com'rs, 58 Neb. 244, 78 N. W. 494. The duty to maintain a joint bridge is apportioned upon the extent on either side of the middle of the stream irrespective of the volume of water. Following Dutton v. State, 42 Neb. 804. "The final contention of counsel for the plaintiffs in error is that the bridge in question is not and never was the property of Cass County but that the bridge belongs to 'Louisville precinct,' a political subdivision of said county. It appears that in 1890 'Louisville precinct' voted $10,000 in bonds to aid in the construction of a free wagon bridge across the Platte river. The county authorities of Cass County issued these bonds, sold them, and with the proceeds constructed the bridge in question and accepted it from the contractors. That the bridge since that time has been used by the traveling public and though it was not constructed im-

tenance and repair are seldom fixed by statute, but a general power is granted,[958] as already suggested, of a large discretionary character. Officers charged by law with the duty of maintaining and repairing bridges must themselves[959] act in this respect; the power and duty not being capable of delegation[960] or of exercise by officials not charged with the performance of such public duties.

mediately upon a public highway then existing, that it was, as already stated, soon after its construction, connected with public highways on either side of the Platte river by certain citizens purchasing the strips of land lying between the approaches of the bridge and the public highways and laying out or dedicating to the public roads across such strips of land. This bridge is not the property of 'Louisville precinct.' The bridge is the property of the public. 'Louisville precinct' simply donated its bonds to aid in the construction of this bridge and the county authorities of Cass County built the bridge using the donation of the precinct in aid thereof. And in so doing we must presume that the county authorities of Cass County were acting for and on behalf of that county. They were not compellable by law to construct this bridge even though its construction was desired by 'Louisville precinct' and it voted its bonds in aid thereof. We hold, therefore, that since the law makes the middle of the main channel of the Platte river the boundary line between the counties of Cass and Sarpy, the presumption is that the south half of this bridge is in Cass County and that it is the duty of the authorities of that county to at all times keep and maintain the south half of said bridge in a safe condition for travel." In re Spier, 50 Hun, 607, 3 N. Y. Supp. 438.

[958] Goodwin v. Town of East Hartford, 70 Conn. 18; Miller v. Smith, 7 Idaho, 204, 61 Pac. 824; Highway Com'rs v. People, 69 Ill. App. 326; Deweese v. Hutton, 144 Ind. 114, 43 N. E. 13. Statutory agreements in respect to surveys must be complied with. Daviess County Com'rs v. State, 141 Ind. 187; Denison v. Watts, 97 Iowa, 633, 66 N. W. 886; City of Haverhill v. Inhabitants of Groveland, 152 Mass. 510, 25 N. E. 976; Bryson v. Johnson County, 100 Mo. 76. That public officials perform their duty will be presumed until the contrary is shown. Whitall v. Freeholders of Gloucester County, 40 N. J. Law, 302; In re Spier, 50 Hun, 607, 3 N. Y. Supp. 438; Oakland Tp. v. Martin, 104 Pa. 303.

[959] McCaffrey v. Cavanac, 30 La. Ann. 882.

[960] Miller v. Smith, 7 Idaho, 204, 61 Pac. 824; State v. White, 16 R. I. 591, 18 Atl. 179, 1038. But town councils can authorize others than the commissioners of highways to rebuild a bridge or keep it available for public use as a part of the public highway.

§ 435. The construction and repair of sidewalks.

A portion of that particular highway known as a street or town way may be constructed and maintained especially for the use of foot passengers, as necessary for their safety, convenience or comfort. This power is naturally included within the grant of the greater use, namely, the construction and maintenance of highways, and the authorities and principles given in connection with that subject are applicable, so far as pertinent, to the matter of this section.[961] The distinction appears that the right exists, without being granted in precise and express terms, to construct and maintain the roadway of a street in more permanent form than that portion devoted to the use of pedestrians; this limitation based upon the difference in the character of the use to which such portions are respectively put.[962] The extent and

[961] Wilson v. Chilcott, 12 Colo. 600. A legitimate exercise of the police power does not include the construction of curb stones separate from sidewalks. Manchester v. City of Hartford, 30 Conn. 118; City of Bloomington v. Bay, 42 Ill. 503; Taber v. Grafmiller, 109 Ind. 206, 9 N. E. 721. "Where the ordinance or resolution specifies that the pavement shall be of brick, it is sufficiently certain, for the just and reasonable implication is, that the brick shall be paving brick of the kind ordinarily used. It would serve no useful purpose, nor benefit the propertyowners, to specify in detail the size and quality of the brick and it would impose a needless burden upon the municipal corporation, and invite profitless litigation. The word 'street' is a generic one and embraces sidewalks. Under an authority to improve streets a municipal corporation may improve sidewalks."

State v. Berdetta, 73 Ind. 185; City of Kokomo v. Mahan, 100 Ind. 242; Keith v. Wilson, 145 Ind. 149; Challiss v. Parker, 11 Kan. 384. In this case a sidewalk is defined as "A raised footway for passengers at the side of the street or road; a foot pavement." Clark v. Com., 77 Ky (14 Bush) 166; Knapp, Stout & Co. v. St. Louis Transfer R. Co., 126 Mo. 26; Pomfrey v. Village of Saratoga Springs, 104 N. Y. 459. See, also, 38 Am. Rep. 113. A distinction between a sidewalk and a cross walk is noted in City of Detroit v. Putnam, 45 Mich. 263; O'Neil v. City of Detroit, 50 Mich. 133, 38 Am. Rep. 113.

[962] City of Little Rock v. Fitzgerald, 59 Ark. 494; Hartrick v. Town of Farmington, 108 Iowa, 31, 78 N. W. 794. "Devesting the case of any question as to the authority of the council to depart from the natural surface of the ground in such cases * * * and looking alone to the authority of the council to go above or below the natural surface to conform the grade of the walk to other improvements made, so as to meet public or private convenience, we have the real

manner of the exercise of the power depends largely upon the terms of the grant,[963] or where this exists in general words, of restrictions upon municipal legislation.[964] Municipal action of a legislative character is controlled by rules governing the passage of legislation and the legality of its results tested in the same

question for our consideration. * * * There is no established grade of the street, with reference to which improvements can be made. Grades are established that all may conform thereto, and not be subjected to the inconvenience of being undesirably above or below walks made at grade. It is well understood that streets in our municipalities will sooner or later be permanently improved upon established grades, and improvements prior to the establishment of grades are not called permanent; they are deemed temporary; and during that period the use of abutting lots on streets can best be by treating the natural surface as the grade so that these temporary walks may not be above one man's door and below another and to the exact convenience of another." Bradley v. Village of West Duluth, 45 Minn. 4.

[963] Gage v. City of Chicago, 196 Ill. 512; Challiss v. Parker, 11 Kan. 384; City of Louisville v. Tyler, 23 Ky. L. R. 827, 64 S. W. 415; Bowers v. Barrett, 85 Me. 382. The failure to exercise a granted power will not result in its loss or impairment.

Attorney General v. City of Boston, 142 Mass. 200; Huling v. Bandera Flag Stone Co., 87 Mo. App. 349. The charter of Kansas City gives the plenary power to the common council to provide by ordinance for the construction of sidewalks. City of Lincoln v. Janesch, 63 Neb. 707, 89 N. W. 280, 56 L. R. A. 762. To require of property owners the duty of keeping in repair abutting sidewalks is a lawful exercise of the police power.

Suburban Land & Imp. Co. v. Borough of Vailsburg, 67 N. J. Law, 461, 51 Atl. 469. So long as the municipal council acts honestly and within the limits of its power in regard to the construction of sidewalks, its action in this respect will not be interfered with by the courts.

Costello v. Village of Wyoming, 49 Ohio St. 202, 30 N. E. 613; Langdon v. Chartiers Tp., 131 Pa. 77; Benson v. Village of Waukesha, 74 Wis. 31. The courts will not interfere with the action of a village board in regard to the construction of sidewalks either as to material, the width or the manner of construction when such action was taken under a general grant of power unless the power has been oppressively and unreasonably exercised.

Woodward v. City of Boscobel, 84 Wis. 226. Where a charter provides that a city itself shall build sidewalks and keep them in repair, an ordinance imposing on lot owners this duty is void.

[964] City of Emporia v. Gilchrist, 37 Kan. 532; Irving v. Ford, 65 Mich. 241.

manner.[965] Unreasonable or indefinite requirements cannot, therefore, be made directly or indirectly of the lot owner in regard to the construction and maintenance of sidewalks adjoining property,[966] and in determining these questions, the character, size and location of a community must be considered, as differences in these respects will affect the exercise of the power. It is quite customary, before a municipality can exercise the right to arbitrarily construct a sidewalk and charge its cost against abutting property owners, to give the owners of such property the opportunity of constructing the same improvement[967] frequently upon more favorable terms, though under the direction of officers charged with the duty of the care of streets.[968] The construction

[965] Cross v. City of Morristown, 18 N. J. Eq. (3 C. E. Green) 305. See, also, the sections, post, discussing generally municipal ordinances.

[966] State v. Richards, 74 Conn. 57, 49 Atl. 858; Hawes v. City of Chicago, 158 Ill. 653, 30 L. R. A. 225. An ordinance providing for the construction of a cement sidewalk to replace one of plank constructed less than six months before and still in good repair is unreasonable, unjust and oppressive, and, therefore, void.

Barrett v. Falls City Artificial Stone Co., 21 Ky. L. R. 669, 52 S. W. 947; Dumesnil v. Louisville Artificial Stone Co., 22 Ky. L. R. 503, 58 S. W. 371. The action of a city council under a general grant of power will not be interfered with directing the reconstruction of a sidewalk that had been in place twenty-two years although not in bad condition.

In re O'Brien, 119 Mich. 540, 79 N. W. 1070. An ordinance is not unreasonable that requires a property owner to construct a sidewalk in the street adjoining his property. Cronin v. Village of Delavan, 50 Wis. 375.

[967] Yale College v. City of New Haven, 57 Conn. 1; State v. Richards, 74 Conn. 57, 49 Atl. 858; Drew v. Town of Geneva, 150 Ind. 662, 50 N. E. 871, 42 L. R. A. 814; Shrum v. Town of Salem, 13 Ind. App. 115; Town of Marion v. Skillman, 127 Ind. 130, 11 L. R. A. 55; Auditor General v. Hoffman, 129 Mich. 541, 89 N. W. 348. An ordinance which gives a lot owner but five days in which to construct a sidewalk after notice is void for unreasonableness.

Ayres v. Schmohl, 86 Mo. App. 349; City of Lincoln v. Janesch, 63 Neb. 707, 89 N. W. 280, 56 L. R. A. 762; Carroll v. Village of Irvington, 50 N. J. Law, 361, 12 Atl. 712; Borough of Mt. Pleasant v. Baltimore & O. R. Co., 138 Pa. 365, 11 L. R. A. 520; Highland v. City of Galveston, 54 Tex. 527. Notice to the owner is unnecessary, the passage of an ordinance being sufficient. City of Dallas v. Lentz (Tex. Civ. App.) 69 S. W. 166; City of Northport v. Northport Town Site Co., 27 Wash. 543, 68 Pac. 204.

[968] Nute v. Boston Co-op. Bldg. Co., 149 Mass. 465; City of Louisiana v. Miller, 66 Mo. 467. But such officers have no power of

and repair of sidewalks is considered a "local improvement" within the meaning of statutes authorizing them and providing for the payment of their cost in some arbitrary manner.[969] The legality of such legislation has been discussed in preceding sections.[970]

§ 436. Public parks and boulevards.

The expenditure of public moneys for objects having for their purpose the protection and betterment of the good morals and health of the people has always been regarded not only legitimate but praiseworthy. The opportunity for diversion and amusement in the open air is an object of such character and may be effected through the establishment and maintenance of public parks and boulevards.[971] The same principle also has been held to justify

themselves to direct the construction of a sidewalk; see, however, the case of Colby v. City of Beaver Dam, 34 Wis. 285.

State v. Bell, 34 Ohio St. 194; Birdsall v. Clark, 73 N. Y. 73.

[969] Walker v. District of Columbia, 6 Mackey (D. C.) 352; Mix v. People, 106 Ill. 426; Kilmer v. People, 106 Ill. 529; Potwin v. Johnson, 108 Ill. 70; Job v. City of Alton, 189 Ill. 256; Gage v. City of Chicago, 192 Ill. 586. The cost of the sidewalk at street intersections may be included in assessment on abutting property under local improvement act of 1897. City of Des Moines v. Casady, 21 Iowa, 570; Attorney General v. City of Boston, 142 Mass. 200; Steffen v. City of St. Louis, 135 Mo. 44, 36 S. W. 31; Adkins v. Chicago, B. & Q. R. Co., 36 Mo. App. 652; Smith v. Borough of Kingston, 120 Pa. 357, 14 Atl. 170. See, also, § 340, supra.

[970] See sections 337 et seq., supra, on "Local Assessments and Improvements."

[971] Shoemaker v. United States, 147 U. S. 282; United States v. Cooper, 20 D. C. 104; Cook v. South Park Com'rs, 61 Ill. 115; Winn v. Board of Park Com'rs, 12 Ky. L. R. 339, 14 S. W. 421; Leftwich v. Town of Plaquemine, 14 La. Ann. 152; City of Baltimore v. Reitz, 50 Md. 574; Holt v. Somerville, 127 Mass. 408; Foster v. Boston Park Com'rs, 131 Mass. 225; Id., 133 Mass. 321; Steele v. City of Boston, 128 Mass. 584; In re Adams, 165 Mass. 497; Abrey v. Livingstone, 95 Mich. 181; State v. Leffingwell, 54 Mo. 458. Under a constitutional power to create "corporations for municipal purposes," a corporation cannot be created for the purpose of maintaining a public park in a city.

St. Louis County Ct. v. Griswold, 58 Mo. 175; Owners of Ground v. City of Albany, 15 Wend. (N. Y.) 374; Brooklyn Park Com'rs v. Armstrong, 45 N. Y. 234; In re Bushwick Ave., 48 Barb. (N. Y.) 9. Land may be condemned on each side of a highway for court yards and ornament.

In re Central Park Com'rs, 63

the acquirement of large tracts or limited areas of land to which is attached some event of historic nature for the purpose of converting them into public grounds.[972] These come within the defi-

Barb. (N. Y.) 282; People v. Adirondack R. Co., 160 N. Y. 225. The acquirement of large tracts of land by the state in the Adirondack mountains for a public reserve or park authorized as being for a public use or purpose.

Baird v. Rice, 63 Pa. 489; Seguin Corp. v. Ireland, 58 Tex. 183. See, also, the following cases sustaining the proposition that highways may be laid out for the purpose of accommodating pleasure travel or affording fine views: Higginson v. Inhabitants of Nahant, 93 Mass. (11 Allen) 530; In re Mt. Washington Road Co., 35 N. H. 134. But see Bryan v. Town of Branford, 50 Conn. 246, and Town of Woodstock v. Gallup, 28 Vt. 587.

[972] United States v. Gettysburg Electric R. Co., 160 U. S. 668, reversing 67 Fed. 869. "The end to be attained by this proposed use, as provided for by the act of Congress, is legitimate, and lies within the scope of the Constitution. The battle of Gettysburg was one of the great battles of the world. The numbers contained in the opposing armies were great; the sacrifice of life was dreadful; while the bravery, and indeed, heroism, displayed by both the contending forces, rank with the highest exhibition of those qualities ever made by man. The importance of the issue involved in the contest of which this great battle was a part cannot be over estimated. The existence of the government itself, and the perpetuity of our institutions, depended upon the result. Valuable lessons in the art of war can now be learned from an examination of this great battlefield, in connection with the history of the events which there took place. Can it be that the government is without power to preserve the land, and properly mark out the various sites upon which this struggle took place? Can it not erect the monuments provided for by these acts of Congress, or even take possession of the field of battle, in the name and for the benefit of all the citizens of the country, for the present and for the future? Such a use seems necessarily not only a public use, but one so closely connected with the welfare of the republic itself as to be within the powers granted Congress by the constitution for the purpose of protecting and preserving the whole country. It would be a great object lesson to all who looked upon the land thus cared for, and it would show a proper recognition of the great things that were done tnere on those momentous days. By this use the government manifests for the benefit of all its citizens the value put upon the services and exertions of the citizen soldiers of that period. Their successful effort to preserve the integrity and solidarity of the great republic of modern times is forcibly impressed upon every one who looks over the field. The value of the sacrifices then freely made is rendered plainer and more durable by the fact that the government of the United States, through its rep-

nition of "local improvements" and their cost and maintenance is often met by its arbitrary assessment upon benefited, adjoining or abutting property. Local parks, parkways or boulevards, are usually paid for in this way while those including large areas and intended for the use and benefit of the entire community are established and maintained from general revenues.[973] The legality of assessments based upon one or more of these methods is

recognition. Such action on the resentatives in Congress assembled, appreciates and endeavors to perpetuate it by this most suitable part of Congress touches the heart, and comes home to the imagination of every citizen, and greatly tends to enhance his love and respect for those institutions for which these heroic sacrifices were made. The greater the love of the citizen for the institutions of his country, the greater is the dependence properly to be placed upon him for their defense in time of necessity, and it is to such men that the country must look for its safety. The institutions of our country, which were saved at this enormous expenditure of life and property, ought to and will be regarded with proportionate affection. Here upon this battlefield is one of the proofs of that expenditure, and the sacrifices are rendered more obvious and more easily appreciated when such a battlefield is preserved by the government at the public expense. The right to take land for cemeteries for the burial of the deceased soldiers of the country rests on the same footing, and is connected with, and springs from, the same powers of the Constitution. It seems very clear that the government has the right to bury its own soldiers, and to see to it that their graves shall not remain unknown or unhonored. No narrow view of the character of this proposed use should be taken. Its national character and importance, we think, are plain. The power to condemn for this purpose need not be plainly and unmistakably deduced from any one of the particularly specified powers. Any number of those powers may be grouped together, and an inference from them all may be drawn that the power claimed has been conferred. It is needless to enlarge upon the subject, and the determination is arrived at without hesitation that the use intended, as set forth in the petition in this proceeding, is of that public nature which comes within the constitutional power of Congress to provide for by the condemnation of land."

[973] Woodward v. Reynolds, 58 Conn. 486, 19 Atl. 511. Under the authority of the legislature, bonds may be issued by a town for park purposes. People v. Ennis, 188 Ill. 530; In re Adams, 165 Mass. 497; In re De las Casas, 180 Mass. 471, 62 N. E. 738. The report of commissioners appointed under an act of legislature to apportion the expenses of certain metropolitan parks in the different towns in a park district will not be set aside as unjust without evidence to this effect. Foster v. Boston Park Com'rs, 131 Mass. 225. See, also, § 340, supra.

well established, the only restrictions being the levy of the assessment and its collection in a uniform and reasonable method and according to the provisions of law governing the levy and collection of special assessments.[974] In common with other local improvements, special authority is usually necessary for the establishment of parks and parkways,[975] although a general grant of power to public corporations may be so broad and comprehensive in its terms as to include this.[976] In either case the power as granted is one of a discretionary character in its exercise,[977] and, ordinarily, courts will not interfere with action or inaction in this respect unless unjust or oppressive.[978]

§ 437. Construction of sewers.

The police power of the state as exercised by itself or any of its delegated or subordinate agencies includes as one of the objects of its legitimate exercise the preservation of the health of the people. Under congested municipal conditions this is especially true. The establishment and maintenance of a sewerage system ample in size and perfect in its workings has been considered both essential and necessary by municipal authorities to the preservation of the public health in both ancient and modern times.[979]

[974] Matthews v. Kimball, 70 Ark. 451, 66 S. W. 651, 69 S. W. 547. One who petitions for the organization of a park improvement district is estopped thereafter from questioning the validity of its organization or of a resulting assessment. Merrick v. Inhabitants of Amherst, 94 Mass. (12 Allen) 500; In re Kingman, 153 Mass. 566, 12 L. R. A. 417; In re Livingston, 51 Hun, 640, 4 N. Y. Supp. 56; City of Springfield v. Gay, 94 Mass. (12 Allen) 612. See §§ 337 et seq., supra.

[975] West Chicago Park Com'rs v. McMullen, 134 Ill. 170, 25 N. E. 676, 10 L. R. A. 215. Chapter 105, § 50, of Ill. Rev. St. 1889, is not local or special legislation although it applies to but one city in the state. People v. Ennis, 188 Ill. 530; City of St. Louis v. Dorr, 145 Mo. 466, 41 S. W. 1094, 46 S. W. 976, 42 L. R. A. 686; Baker v. Vanderburg, 99 Mo. 378; Holtz v. Diehl, 26 Misc. 224, 56 N. Y. Supp. 841. Under a grant of the power to control parks, park commissioners may construct a speed way.

[976] Doe d Stump v. Town of Attica, 7 Ind. 641; Price v. Inhabitants of Breckenridge, 77 Mo. 447; Carter v. City of Portland, 4 Or. 340.

[977] Reid v. Board of Education of Edina, 73 Mo. 295.

[978] In re Kingman, 153 Mass. 566, 12 L. R. A. 417; In re Adams, 165 Mass. 497.

[979] Park Ecclesiastical Soc. v. City of Hartford, 47 Conn. 89; Rich v. City of Chicago, 152 Ill. 18; O'Reiley v. Kankakee Valley Drain-

In Rome, that wonderfully constructed and managed city in its public works and appointments of former centuries, is found even today the remains of a comprehensive and effective sewerage system, this being neccessary, not only then, but under all similar conditions, for carrying off the accumulating refuse and filth of a city and the drainage of surplus waters.

§ 438. The authority.

A sewerage system is a "local improvement" within the meaning of that term as ordinarily employed in public statutes and the rule holds in respect to this particular one that before the power for its construction can be legally exercised, it must have been

age Co., 32 Ind. 169; In re Kingman, 153 Mass. 566, 27 N. E. 778, 12 L. R. A. 417. "It is contended that a statute for providing a system for the disposal of sewage * * * cannot be considered as providing for an object of general public utility but that the benefits to be derived from it are essentially local in their operation and do not in any sense include the whole people; and therefore that the public money of the commonwealth ought not to be expended for it. Assuming that the respondents may so far represent the general public as to be entitled to raise this question, it is plain that the objection can hardly be considered as of great weight. * * * It (the statute) has for its purpose to promote the public health, to avert disease and to prevent nuisances. The territory to be benefited, according to the report of the state board of health to which we are referred includes an area of one hundred and thirty square miles and contains one-sixth of the population of the state. The legislature has declared that a system of sewerage to accommodate this territory and this portion of the people of the state is an object of public utility such as warrants the expenditure or the advancement for the time being of money from the treasury of the commonwealth. It is impossible for us to say to the contrary. The argument is made to us that if such an expenditure of public money is warranted, the legislature might authorize an appropriation for the benefit of a single town and construct and maintain forever a local improvement for such town. But in determining the power of the legislature in a case like this, little assistance is obtained by imagining extreme instances of possible abuse of the power."

Carr v. Dooley, 122 Mass. 255; City of Detroit v. Corey, 9 Mich. 165. The power of a city to construct sewers is not given for governmental purposes and their construction and maintenance is not a public municipal duty. City of St. Louis v. Oeters, 36 Mo. 456; Brewster v. City of Syracuse, 19 N. Y. 116; In re Fowler, 53 N. Y. 60; City of Philadelphia v. Tryon, 35 Pa. 401; Wood v. McGrath, 150 Pa. 451, 16 L. R. A. 715. See,

specially granted by the sovereign.[980] All public corporations are mere agents of the state, the sovereign or central power, whatever its form. As such, they possess few, what might be termed, self-contained powers. The legislative authority may be comprehensive and general in its terms in the original grant of authority to a municipal corporation,[981] or, again, it may be special and particular applying to a specific case for a particular occasion.[982] The legislation, whether general or special, must be constitutional and, in other respects, legal, and these considerations may raise questions of local or special legislation in violation of constitutional provisions[983] or legislation not passing successfully the or-

also, Donnelly v. Decker, 58 Wis. 461, 46 Am. Rep. 637.

[980] City of Atchison v. Price, 45 Kan. 296, 25 Pac. 605; Brunswick Gas Light Co. v. Brunswick Village Corp., 92 Me. 493; Ostrander v. City of Lansing, 111 Mich. 693; City of St. Louis v. Oeters, 36 Mo. 456; Donahoe v. Kansas City, 136 Mo. 657; Stoudinger v. City of Newark, 28 N. J. Eq. (1 Stew.) 187; State v. City Council of Charleston, 12 Rich. Law (S. C.) 705.

[981] City of Denver v. Capelli, 4 Colo. 25; Cone v. City of Hartford, 28 Conn. 363; Shreve v. Town of Cicero, 129 Ill. 226; Title Guarantee & Trust Co. v. City of Chicago, 162 Ill. 505; Welch v. Town of Roanoke, 157 Ind. 398, 61 N. E. 791; City of Elkhart v. Wickwire, 121 Ind. 331; Maddux v. City of Newport, 12 Ky. L. R. 657, 14 S. W. 957; Kennedy v. Borough of Belmar, 61 N. J. Law, 20, 38 Atl. 756; Bacon v. Nanny, 55 Hun, 606, 7 N. Y. Supp. 804; Kelsey v. King, 32 Barb. (N. Y.) 410; Hartwell v. Railroad Co., 40 Ohio St. 155; Strowbridge v. City of Portland, 8 Or. 67; Beers v. Dalles City, 16 Or. 334, 18 Pac. 835; Horton v. City of Nashville, 72 Tenn. (4 Lea) 39; Dietz v. City of Neenah, 91 Wis. 422, 64 N. W. 299, 65 N. W. 500.

[982] Keese v. City of Denver, 10 Colo. 112, 15 Pac. 825. Generally charter provisions may be repealed by subsequent legislation upon the same subject. Bradley v. McAtee, 70 Ky. (7 Bush) 667; Butler v. City of Worcester, 112 Mass. 541; Washburn & M. Mfg. Co. v. City of Worcester, 116 Mass. 458; Morse v. City of Worcester, 139 Mass. 389; In re Leake & Watts Orphan Home, 92 N. Y. 116. The authority for "regulating, grading and otherwise improving" a certain avenue carries with it the right to construct a sewer in it.

[983] Ward v. Robert J. Boyd Pav. & Con. Co., 79 Fed. 390, holding Mo. St. of Mch. 18th, 1893, relative to sewers and drains for classified cities in the state unconstitutional as violating Sec. 7, Art. 9 of the Mo. Const. which provides for the division of the towns and cities of the state into four classes and declares that the powers of each class shall be defined by general laws. But see Owen v. Baer, 154 Mo. 434, and cases cited as holding that such law is not an unauthorized delegation of the law-making power but is unconstitutional as violating

dinary tests for determining the validity of laws.[984] As a rule, no general principles can be laid down which can be universally invoked for the determination of the legality of legislative authority for this particular purpose. It might be said, however, that the construction of a sewer involves the expenditure of public moneys raised through taxation of private property. Wherever this condition exists, the courts are conservative in construing legislation. Powers will not be granted ordinarily by implication unless the intent appears beyond question.[985] Expenditures even for such a necessary purpose as the construction of sewers are not permitted when their legality is in doubt as violating laws regulating the levy of taxes, the borrowing of moneys by public corporations or the disbursing of public funds.[986] The grant of the express power to construct sewers carries with it by implication the right to purchase property[987] or condemn lands[988] necessary for use.

art. 9, § 7, of the Mo. Const. providing for the classification of cities. This case also holds that the act is not in violation of Const. art. 4, § 53, forbidding the passage of local or special laws "Incorporating cities, towns or villages or changing their charters." See, also, Rutherford v. Hamilton, 97 Mo. 543.

Independent School Dist. v. City of Burlington, 60 Iowa, 500; Rutherford v. Heddens, 82 Mo. 388; Vreeland v. Jersey City, 54 N. J. Law, 49, 22 Atl. 1052; Tyler v. City of Plainfield, 54 N. J. Law, 529, 24 Atl. 494; Brown's Estate v. Town of Union, 62 N. J. Law, 142, 40 Atl. 632. The word "town" is used in its broad sense embracing the whole range of municipal laws.

[984] Thomas v. Gain, 35 Mich. 155.

[985] Hungerford v. City of Hartford, 39 Conn. 279.

[986] Town of Leominster v. Conant, 139 Mass. 384.

[987] Freburg v. City of Davenport, 63 Iowa, 119; Page v. O'Toole, 144 Mass. 303, 10 N. E. 851; Wilson v. City of New York, 1 Denio (N. Y.) 595; In re Long, 58 Hun, 609, 12 N. Y. Supp. 230.

[988] McDaniel v. City of Columbus, 91 Ga. 462; Hildreth v. City of Lowell, 77 Mass. (11 Gray) 345; In re Kingman, 153 Mass. 566, 12 L. R. A. 417. Vreeland v. Jersey City, 54 N. J. Law, 49. "The subject embraced in this legislation is the drainage of a neighborhood as distinguished from local sewerage, designed principally for the benefit of lands abutting on a sewer. The means by which the object is to be accomplished is the construction of a main sewer 'from such neighborhood to tide water, or other waters into which the sewerage of such city is emptied.' The charter of Jersey City provides that a sewer shall be constructed on the application of the owners of one-third of the property fronting on the improvement. The act of 1885 provides that any fifty owners of lands lying within the neighborhood proposed to be drained

§ 439. Nature of the power.

The power in common with many others granted public corporations is or may be discretionary in its character and, therefore, not ordinarily subject to review by the courts unless, in its exercise, the public authorities have acted fraudulently or oppressively or there is a manifest abuse of discretion in other respects.[989] The power must be exercised by the body to whom it is expressly granted,[990] and by this body only within the limits

may make the application and that thereupon the municipal authorities 'shall proceed to act.' The city charter in this respect must yield. The application presented to the board purported to be signed by more than fifty owners of lands proposed to be drained and sets out all the jurisdictional facts required by the statute. It was sufficient to confer jurisdiction on the board. The act purports also to deal with the entire subject of municipal action in this respect and hence operates to supersede special provisions in city charters on the same subject, except so far as their provisions are retained or adopted by the act."

[989] Shumate v. Heman, 181 U. S. 402; Drexel v. Town of Lake, 127 Ill. 54; Ryder's Estate v. City of Alton, 175 Ill. 94; City of Topeka v. Huntoon, 46 Kan. 634, 26 Pac. 488. The decision by a city council as to sewer districts under authority of law is conclusive. See, also, Grimmell v. City of Des Moines, 57 Iowa, 144.

City of Detroit v. Corey, 9 Mich. 165; Miller v. Anheuser, 2 Mo. App. 168. The necessity for a sewer is conclusively established by a city council when it passes an ordinance directing its construction.

City of St. Joseph v. Farrell, 106 Mo. 437; Stoudinger c. City of Newark, 28 N. J. Eq. (1 Stew.) 187, 446. In this case it is stated that "When by legislative grant the location and construction of sewers is committed to the judgment of municipal authorities, the acts of such authorities are not subject to judicial revision so long as they keep within their powers and do not abuse them." Lynch v. City of New York, 76 N. Y. 60; Jones v. Holzapfel, 11 Okl. 405, 68 Pac. 511. The power to establish a sewer carries with it the implied power of making a contract for its construction. Carr v. Northern Liberties, 35 Pa. 324, 78 Am. Dec. 342; Horton v. City of Nashville, 72 Tenn. (4 Lea) 39.

[990] Pine Bluff Water & Light Co. v. Sewer Dist. No. 1, 56 Ark. 205; Cochran v. Village of Park Ridge (Ill.) 27 N. E. 939; Lingle v. City of Chicago, 172 Ill. 170; Franklin Wharf Co. v. City of Portland, 67 Me. 46. The power should be exercised in such a manner as to avoid creating a nuisance. Dorey v. City of Boston, 146 Mass. 336, 15 N. E. 897; Collins v. City of Holyoke, 146 Mass. 298, 15 N. E. 908. The authority as granted cannot be delegated to others but agents may be employed. Downie v. Freeholders of Passaic County, 54 N. J. Law, 223, 23 Atl. 954; In re Wheelock, 51 Hun, 640, 3 N. Y. Supp. 890. In

of its jurisdiction.[991] The fundamental principle cannot be ignored that public corporations in their manifold relations and with their many officials are agents of the sovereign with limited and restricted powers, capable of exercising only those expressly granted and in the manner particularly prescribed by law.[992]

re New York Institution for Deaf & Dumb, 55 Hun, 606, 7 N. Y. Supp. 860; In re Taxpayers & Freeholders of Plattsburgh, 27 App. Div. 353, 50 N. Y. Supp. 356; Lutes v. Briggs, 64 N. Y. 404.

[991] Sault Ste. Marie Highway Com'rs v. Van Dusan, 40 Mich. 429; Farlin v. Hill, 27 Mont. 27, 69 Pac. 237. Land not within the limits of a city cannot be assessed to pay in part the cost of a sewer constructed by the city in front of such land. The court say: "From the way that the lots are numbered it is further somewhat apparent that the owner platted the ground in such a way that if he or any other owner ever cared to add the rest of the lode claim surface to the territory of the city, it might conveniently be done. The tract is not part of the city and the owner has no more right to privileges such as an owner of city lots would have, than a lode claim owner has whose property is opposite to the city and bounding on an outside boundary street. Thus having no such privileges, he is under no obligation to pay taxes or special assessments to the city. The city having accepted the plat with its eyes open to see and read what the plat and certificates plainly showed and declared, all of which it solemnly accepted, it cannot now exercise dominion over what was not turned over to the control of the city."

[992] Cone v. City of Hartford, 28 Conn. 363; White v. City of Saginaw, 67 Mich. 33, 34 N. W. 255. "The second section of the statute under which the proceedings were taken expressly requires that the necessity for the construction of the sewer in question shall first be determined by the common council of the city. In this case the record does not disclose that any such determination was ever made. They determined to make it, it is true, but it does not appear there was any necessity for it and this lies at the foundation of the entire proceeding. The necessity must exist in every case and must be found by the legislature or the common council. The power to determine when a special assessment shall be made and on what basis it shall be apportioned is confided to the legislature alone. It may determine the extent of territory which may be assessed for the improvement and may direct that the whole or any part thereof may be assessed upon the property in that territory. * * * It will be discovered by the record that the first assessment was upon the basis that the property benefited should pay half the expense of construction. The city did pay its half and several of the parties upon the roll paid their assessments in full and then that assessment was declared invalid by the council and the present assessment is ordered and made upon the basis that the property benefited should pay two-thirds of the expenses of the improvement, and

§ 440. Proceedings for construction.

The required proceedings for the legal construction of a sewer or a sewerage system must be taken, and, as a rule, should be had separate and distinct from those having for their purpose the carrying out of other governmental or delegated powers.[993]

that those who had paid the full amount of their assessment on the first roll should be exempt from further assessment. This could not be legally done and an assessment which requires such discrimination between the properties of persons taxed cannot be sustained. It makes taxation unequal and this is illegal under any system." Van Vorst v. Jersey City, 27 N. J. Law (3 Dutch.) 493. A sewer may be directed to be built by resolution as well as by ordinance unless the city charter provides to the contrary. Gillen v. Borough of Spring Lake, 61 N. J. Law, 392, 39 Atl. 684; Nelson v. City of New York, 5 Hun (N. Y.) 190.

[993] Village of Hinsdale v. Shannon, 182 Ill. 312. But one or more sewers may be provided for in one ordinance. Clay v. City of Grand Rapids, 60 Mich. 451; Peck v. City of Grand Rapids, 125 Mich. 416, 84 N. W. 614. "The only question to determine is can the common council construct a sewer under the guise of grading and graveling a street? The charter of the city confers no such authority. Under the act of 1873 providing for a board of public works in and for the city of Grand Rapids 'said board is empowered to determine and establish the grade lines of all streets; * * * to locate all necessary sewers; * * * to cause to be graded, graveled, paved, planked, or covered with other materials, all such streets * * * and to construct all such main and lateral sewers * * * as the common council shall by resolution declare to be necessary improvements.' By Act No. 444, tit. 3, § 10, subd. 39, Local Acts 1895, the common council is empowered 'to establish, construct, maintain, repair, enlarge and discontinue within the highways, streets,' etc., 'such * * * sewers as the common council may see fit with a view to the proper draining and sewerage of said city.' By the Local Acts of 1875 the board of public works is authorized to construct all such main and lateral sewers as the common council of the city of Grand Rapids shall by resolution declare to be necessary public improvements. The charter also provides for two classes of bonds, viz: 'street improvement bonds' and 'sewer construction bonds.' Counsel for the defendant seeks to justify this action of the common council on the ground tnat the sewer is a necessary part of the street and therefore comes within the resolution of the council, although the word 'sewer' is not mentioned in any of the proceedings. A sewer is not a necessary part of the street and when action is taken to lay out, establish, grade and pave a street, the construction of a sewer is not included within these terms. The district benefited by a sewer may be, and usually is, different from a district benefited

Public officials when required by law must, in the manner prescribed, report their action,[994] and the damages to private property, if any, occasioned by the construction of the improvement, must be paid.[995] But it has been held that the use of a street for the construction of a drain or open ditch for the purpose of improving its condition is a proper use of such street or high-

by the establishment of a street or highway. The inhabitants of the city are entitled to a hearing on each of such public improvements and neither can be included in the other. Grading and graveling may be a necessary improvement, while the construction of a sewer may not." Vreeland v. Jersey City, 54 N. J. Law, 49, 22 Atl. 1052. Where it is necessary to exercise the power of eminent domain in the construction of a sewer, this should be done under those provisions relating to its exercise by a city in general.

[994] Mills on Charles River v. Mills on Mill Creek, 24 Mass. (7 Pick.) 207.

[995] Cone v. City of Hartford, 28 Conn. 363. "There cannot be a doubt that, in the laying out and establishment of a highway, the right of repairing and maintaining, as well as of originally constructing it, is embraced, and that, therefore, when damages are assessed to a person for laying out and constructing a road upon his land, those damages include compensation as well for the repairing of such road as its original construction. Such reparation embraces and extends to the making of such gutters, drains and sewers as are necessary and proper in order to preserve the highway in good condition for the purposes for which it was made. And, for those purposes, we have no doubt that it is as competent to construct drains and sewers below, as it is upon the surface of the ground. On ordinary country roads, the gutters upon their sides are usually deemed sufficient to carry off the water and filth upon them. In populous places, however, where they accumulate in greater quantities, or where it may be necessary for the public to use, for passing and other proper purposes, every part of the highway, it is frequently requisite to make the drains of the highway beneath its surface, and the safety as well as the commodiousness of the public travel, and the healthfulness of the people in its vicinity may also require it. It is no objection therefore, to a sewer in a highway, that it is made beneath the surface of the ground, if the circumstances render it proper so to construct it." Haskell v. City of New Bedford, 108 Mass. 208; Field v. Town of West Orange (N. J. Eq.) 2 Atl. 236; In re Ashburton Sewer, 51 Hun, 644, 4 N. Y. Supp. 301. Abutting property owners not entitled to more than nominal damages for the additional burden imposed by reason of placing a sewer in a street. Van Brunt v. Town of Flatbush, 128 N. Y. 50, reversing 59 Hun, 192, 13 N. Y. Supp. 545. See Lewis, Em. Dom. §§ 121f and 127. But see Cummins v. City of Seymour, 79 Ind. 491.

way and the abutting owner is not entitled to compensation.[996] And the general principle obtains that since the prompt and proper drainage of buildings, house lots and streets, is necessary to the public health and, therefore, a matter of public concern, the authorities may construct public sewers or drains in the streets or highways to accomplish such results and this is a proper and ordinary use for which the owner will not be entitled to remuneration, such a use imposing no additional burden or servitude.[997]

Assessments for payment of costs. The cost of the construction of sewers in common with other local improvements is usually met by assessments upon benefited or adjoining property although, as already stated in previous sections,[998] since the va-

[996] Cummins v. City of Seymour, 79 Ind. 491; McMahon v. City of Council Bluffs, 12 Iowa, 268; Wilson v. Duncan, 74 Iowa, 491; Randall v. Christiansen, 76 Iowa, 169; Eagle Tp. Highway Com'rs v. Ely, 54 Mich. 173; White v. Yazoo City, 27 Miss. 357. But a private drain cannot be laid in a street over the fee of others without compensation. Murray v. Gibson, 21 Ill. App. 488; Conrad v. Smith, 32 Mich. 429; Glasby v. Morris, 18 N. J. Eq. (3 C. E. Green) 72; Smith v. Simmons, 103 Pa. 32; Borough of Susquehanna Depot v. Simmons, 112 Pa. 384. But see Wood v. McGrath, 150 Pa. 451, 16 L. R. A. 715.

[997] Leeds v. City of Richmond, 102 Ind. 372; City of Boston v. Richardson, 95 Mass. (13 Allen) 146; Lincoln v. Com., 164 Mass. 1; Chelsea Dye-House & Laundry Co. v. Com., 164 Mass. 350; Cabot v. Kingman, 166 Mass. 403, 33 L. R. A. 45; Warren v. City of Grand Haven, 30 Mich. 24; White v. Yazoo City, 27 Miss. 357; Glasby v. Morris, 18 N. J. Eq. (3 C. E. Green) 72; Stoudinger v. City of Newark, 28 N. J. Eq. (1 Stew.) 187, 446; Traphagen v. Jersey City, 29 N. J. Eq. (2 Stew.) 206; Kelsey v. King, 32 Barb. (N. Y.) 410; In re City of Yonkers, 117 N. Y. 564; City of Cincinnati v. Penny, 21 Ohio St. 499; Elster v. City of Springfield, 49 Ohio St. 82; Lockhart v. Craig St. R. Co., 139 Pa. 419.

[998] §§ 337 et seq., supra. Allen v. Woods, 20 Ky. L. R. 59, 45 S. W. 106. "The question of assessment or apportionment cannot be governed by advantage or disadvantage to one person within the district. If so, public improvements could rarely be made. The legislature must necessarily look at the district as a whole, and, upon this general view, determine whether such benefits will accrue from the improvement as will authorize its cost to be assessed upon the adjacent property. Such assessments are made upon the assumption that a portion of the community are specially benefited by the improvement and the principle is that the territory is benefited; that it is a common interest and that governed by equitable rules it must equally bear the burdens. Necessarily individual

lidity of a local assessment depends upon the reception by the property assessed of a special benefit, the construction of local sewers can only be assessed upon such property.[999] The main arteries of a sewer system or the expense connected with general planning and construction must be paid from the general corporate revenues.[1000]

§ 441. The location.

In locating a sewer, the main purpose of its construction cannot be forgotten and its precise location must be made with reference to this object and, therefore, in such a place as to best effect its purpose and serve the community for whose use it was designed.[1001] Municipal authorities in determining the location of a sewer act in a legislative capacity and, unless there appears a manifest abuse of power, courts will not interfere although the selection of a particular location may result in damage to prop-

cases of hardship will arise but it approaches equality as nearly as practicable. It follows that a lot owner may be compelled to pay his cost of the improvement although in his particular case his property may not be benefited."

Hoyt v. City of East Saginaw, 19 Mich. 39; White v. City of Saginaw, 67 Mich. 33, 34 N. W. 255; City of St. Louis v. Schoenemann, 52 Mo. 348; Henderson v. Jersey City, 41 N. J. Law, 489; Appeal of City of Williamsport, 187 Pa. 565, 41 Atl. 476. The cost of reconstructing a sewer cannot be charged upon abutting property owners.

[999] Drexel v. Town of Lake, 127 Ill. 54; City of Auburn v. Paul, 84 Me. 212. Where an act authorizing assessments for public sewers requires an acceptance by the city before it shall take effect, this may be done at an adjourned meeting of a city council without previous notice of the business to be transacted at that time. Slocum v. Selectmen of Brookline, 163 Mass. 23, 39 N. E. 351; Patton v. City of Springfield, 99 Mass. 627; Thomas v. Gain, 35 Mich. 155, 24 Am. Rep. 535; Van Wagoner v. City of Paterson, 67 N. J. Law, 455, 51 Atl. 922; Cleveland v. City of Yonkers, 51 Hun, 644, 4 N. Y. Supp. 84; McKee Land & Imp. Co. v. Swikehard, 23 Misc. 21, 51 N. Y. Supp. 399; Village of St. Albans v. Noble, 56 Vt. 525.

[1000] Callon v. City of Jacksonville, 147 Ill. 113; Downer v. City of Boston, 61 Mass. (7 Cush.) 277; In re Kingman, 153 Mass. 566, 27 N. E. 778, 12 L. R. A. 417; City of St. Joseph v. Owen, 110 Mo. 445; Heman v. Handlan, 59 Mo. App. 490; Heman v. Allen, 156 Mo. 534; Oil City v. Oil City Boiler Works, 152 Pa. 348. The decision of a city council that an entire sewer with its branches is a main sewer is final and conclusive except in extreme cases.

[1001] West Chicago Park Com'rs v. Baldwin, 162 Ill. 87; Lingle v. City of Chicago, 172 Ill. 170; State v. City of St. Louis, 56 Mo. 277.

erty.[1002] A public corporation in order to provide a proper outlet for its sewerage system may acquire property and expend moneys beyond the geographical limits of its jurisdiction.[1003] The fact that portions of a sewerage system pass under private property does not invalidate ordinances establishing such system.[1004]

[1002] Clapp v. City of Spokane, 53 Fed. 515. Where a manifest abuse of the power clearly appears, the action of municipal authorities will be restrained. Kirby v. Citizens' R. Co., 48 Md. 168; Waters v. Village of Bay View, 61 Wis. 642.

[1003] Cochran v. Village of Park Ridge, 138 Ill. 295, 27 N. E. 939. "The section of the statute which confers authority on a village to make local improvements by special assessments was no doubt intended to confine the improvement to the territory within the incorporated limits of the village, and under the statute the corporate authorities of the village would have no power to make improvements in territory outside of its incorporated limits. But what is the object and true scope of the improvement under consideration? Is it one within or outside of the incorporated limits of the village? The object was to furnish sewerage for the inhabitants of the village. The improvement was for the benefit of those residing within the incorporated limits of the village and for them alone; but in order to make the sewer a success, in order to make the improvement of any benefit to any person in the village, it must have an outlet. * * * In order to carry out the true scope and object of the ordinance providing for the improvement, it became necessary to expend money outside of the incorporated limits of the village; but it does not follow because that is the case, that the assessment here is made for an improvement outside of the village. The construction of the sewer from the incorporated limits of the village to the Desplaines river is not an improvement in that territory, but is one for the village, rendered a necessity from the geographical condition of the land upon which the village is located. The power to construct a sewer within the incorporated limits of the village would be a useless one unless the sewer could be connected with an outlet and should we hold that the statute prohibited a village or incorporated town from extending a sewer or drain beyond the incorporated limits when it was necessary to do so to obtain an outlet such a construction would defeat the obvious intention of the legislature in passing the statute." Following Shreve v. Town of Cicero, 129 Ill. 226.

Maywood Co. v. Village of Maywood, 140 Ill. 216; City of Coldwater v. Tucker, 36 Mich. 474, 24 Am. Rep. 601; Butler v. Town of Montclair, 67 N. J. Law, 426, 51 Atl. 494; Munn v. City of Pittsburgh, 40 Pa. 364.

[1004] Burhans v. Village of Norwood Park, 138 Ill. 147, 27 N. E. 1088. "It is contended that the ordinance under which the system of sewers is constructed is void because it fails to provide an outlet. The record does not sustain this contention. James C. Elston testified: 'I am a civil engineer and acquainted and familiar with this

The ordinances or orders providing for or directing the construction of a sewer should be unambiguous and definite in their terms fixing the location.[1005]

§ 442. Construction.

In a preceding section the necessity has been emphasized of a strict compliance with the terms of legislative authority in respect to the exercise of all powers granted to public corporations. In the construction of sewers will be found no exception to this rule. The terms of the law, whether special or general, authorizing a particular improvement or series of improvements, must be strictly followed in all respects,[1006] and especially in connection with the mechanical construction. The manner[1007] and size, or form,[1008] the materials of which constructed,[1009] and the time

neighborhood. I designed the sewers for about sixty acres. The system, when properly extended, is adequate for house drainage and territory drainage—ample. * * * I have provided an outlet to the north branch of the Chicago River, three quarters of a mile; a good ditch with a fall of twenty-two feet in three fourths of a mile.' * * * It is true that appellants witness F. testified that this ditch in part runs over private property * * * but it is no reason for declaring the ordinance void." Citing Hunerberg v. Village of Hyde Park, 130 Ill. 156; Leman v. City of Lake View, 131 Ill. 388; Com. v. Abbott, 160 Mass. 282; City of St. Joseph v. Landis, 54 Mo. App. 315.

[1005] Bickerdike v. City of Chicago, 185 Ill. 280; Com. v. Abbott, 160 Mass. 282, citing Townsend v. Hoyle, 20 Conn. 1.

Jones v. Inhabitants of Andover, 26 Mass. (9 Pick.) 146; Hildreth v. City of Lowell, 77 Mass. (11 Gray) 345; Bennett v. City of New Bedford, 110 Mass. 433; Carr v. Dooley, 122 Mass. 255; Sheehan v. City of Fitchburg, 131 Mass. 523; Inhabitants of Wellesley v. Washburn, 156 Mass. 359. See, also, § 537, post.

[1006] Heman v. Payne, 27 Mo. App. 481; Bayha v. Taylor, 36 Mo. App. 427; Eyerman v. Blaksley, 78 Mo. 145; City of Kansas v. Swope, 79 Mo. 446. These Missouri cases construe that provision of the charter of the City of St. Louis which provides that every district sewer shall "connect with a public sewer or some natural course of drainage." Traphagen v. Jersey City, 29 N. J. Eq. (2 Stew.) 206.

[1007] In re Protestant Episcopal Public School, 46 N. Y. 178.

[1008] Rickcords v. City of Hammond, 67 Fed. 380. But the failure

[1009] Smythe v. City of Chicago, 197 Ill. 311; City of St. Joseph v. Wilshire, 47 Mo. App. 125. The power to determine the materials used in the construction of a sewer is legislative in its character and cannot be delegated by the city council to a subordinate public official.

and mode of construction[1010] if prescribed by law, must be in the way provided. In these respects legislation differs widely in the different states. Where the power to construct sewers and drains is granted in common with the exercise of similar power for the construction of other local improvements, the public authorities are vested with discretionary and legislative powers in this respect, and their action, except in case of fraud or where there has been a gross abuse of such authority, will not be interfered

to enter in an ordinance the size of a sewer as required by Ind. acts 1889, § 2, does not necessarily deprive the city council of all jurisdiction to order the improvement. City of Kansas v. Richards, 34 Mo. App. 521. Under a general grant of power for the establishment of a general sewerage system with sewer districts, the size, capacity, length and direction of the sewers are within the discretion of the common council. The court in this particular case held that the construction of a district sewer much larger than necessary to accommodate the drainage of a district was not an abuse of such discretionary power.

[1010] Burnham v. City of Milwaukee, 100 Wis. 8, 75 N. W. 1014. "The sewer in question was what is known as a 'barrel sewer.' * * * It was to be laid on Oregon and South Water streets. These streets run so as to form an angle of forty-five degrees at the point of intersection, so that at that point there was a curve in the sewer to correspond with that angle. This curve is shown on the plans and was perfectly evident to anyone knowing the location of the streets. The impracticability of making a turn at that point with a wooden sewer was as evident to the contractor at the time he made the contract as when he reached it in the work of actual construction. There was nothing hidden or concealed, no latent defect that had to be discovered by actual experiment. It was open and visible and appeared on the face of the plans as well as in the lay of the land. To allow the contractor to allege this as a defect in the plans, and to found liability thereon on the part of the city, is letting him out of a contract deliberately made and imposing a burden on the other party because he is let out. The city guaranties the plans as against any damage or loss that may come to the contractor through any latent defect therein, but when the alleged defect is as well known to the contractor as to the city, and the contractor voluntarily and deliberately enters into a contract to do the work in the way and manner prescribed, he assumes all risks of damages or loss resulting therefrom. But it appears that the contractor did not attempt to construct tne sewer, at this point, of wood. After it was demonstrated that it was impracticable to build it of wood, the board, as they had a right to do, ordered it built with an eight-inch brick wall; and it is because this wall had no foundation and collapsed that the contractor makes complaint. * * *

with.[1011] The rule also holds that such legislative and discretionary powers cannot be delegated to subordinate agents or bodies, the rule applying to the size of the sewer, the materials of which constructed or the manner and time of its construction.[1012] But the existence of a discretionary or legislative authority will not justify the action of public authorities in surrendering any of their delegated powers or in making any contracts or passing ordinances relating to their public functions which will embarrass in any way the proper performance of their public duties. Such powers "must be viewed as public trusts; not conferred upon individual members for their own emolument, but for the benefit of the community over which they preside."[1013]

From what has been said, it seems quite clear to our minds that the contractor has no just claim of liability against the city because of imperfections in the plans and specifications."

[1011] See the subject fully discussed in § 112.

[1012] Hessler v. Drainage Com'rs, 53 Ill. 105; Galbreath v. Newton, 30 Mo. App. 380; Ruggles v. Collier, 43 Mo. 353. "There is a clear distinction to be observed between legislative and ministerial powers. The former cannot be delegated; the latter may. Legislative power implies judgment and discretion on the part of those who * * * confer it." Sheehan v. Gleeson, 46 Mo. 100; City of St. Joseph v. Wilshire, 47 Mo. App. 125; King-Hill Brick Mfg. Co. v. Hamilton, 51 Mo. App. 120; City of St. Louis v. Clemens, 52 Mo. 133; Neill v. Gates, 152 Mo. 585.

[1013] Boyd v. Alabama, 94 U. S. 645; Kirby v. Citizens' R. Co., 48 Md. 168; North Pennsylvania R. Co. v. Stone, 3 Phila. (Pa.) 421. Elliott, Roads & St. § 476, and cases cited. "The authority to construct drains and sewers is by some of the courts referred to the police power, by others to the power of eminent domain, while others hold that the authority to take property is exercised under the power of eminent domain, but that the necessity for its construction may be rested upon the police power. It is enough here, however, to affirm that it is a sovereign power which cannot be abdicated or surrendered. As it is a sovereign power permanently resident in the state, all persons who acquire a right to use public highways by a grant from a local governmental agency take it subject to the paramount right of the public, for the general weal cannot be sacrificed or impaired for private benefit. We know that there are cases which hold that to some extent a local public corporation may so fetter itself by contract as to preclude it from resuming a power it has parted with by contract, but we much doubt the soundness of some of the decisions. At all events we think it is safe to assume that, when the public necessity demands it, a governmental corporation may temporarily interfere with the business of

§ 443. Sewer connections.

It stands without question that a public sewer although constructed at the cost of benefited or abutting property is subject to the control of the public authorities who can prescribe necessary and suitable regulations for its use[1014] and fix terms upon which connections can be made by private property owners.[1015] The efficiency of the sewer depends upon its successful operation as a whole which can only be done when so operated and without reference to a particular locality.

those to whom it has granted the privilege of using the public roads or streets without being compelled to make any compensation. The rule which we approve is illustrated in a case wherein it was held that a city may remove a street railway track in order to construct a sewer."

Mott v. Pennsylvania R. Co., 30 Pa. 9. "If one portion of the legislative power may be sold, another may be disposed of in the same way. If the power to raise revenue may be sold to-day, the power to punish for crimes may be sold to-morrow, and the power to pass laws for the redress of civil rights may be sold the next day. If the legislative power may be sold, the executive and judicial powers may be put in the market with equal propriety. The result to which the principle must inevitably lead proves that the sale of any portion of governmental power is utterly inconsistent with the nature of our free institutions, and totally at variance with the object and general provisions of the constitution of the state. * * * It is a question of constitutional authority, and not a case of confidence at all. Limitations of power established by written constitutions have their origin in a distrust of the infirmity of man. That distrust is fully justified by the history of the rise and fall of nations."

Pennsylvania R. Co. v. Riblet, 66 Pa. 164. But in some cases it has been held that mere matters of detail must be delegated to the proper officers. City of St. Joseph v. Owen, 110 Mo. 445.

[1014] Martin v. Hilb, 53 Ark. 300, 14 S. W. 94; City of St. Louis v. Thierry, 100 Mo. 176; Boyden v. Walkley, 113 Mich. 609, 71 N. W. 1099; Hill v. City of St. Louis, 159 Mo. 159, 60 S. W. 116; Van Waggoner v. City of Paterson, 67 N. J. Law, 455, 51 Atl. 922. The owner of a house may be compelled to connect it with the sewer in the street abutting his premises. Wendall v. City of Troy, 4 Keyes (N. Y.) 261; Slaughter v. O'Berry, 126 N. C. 181, 35 S. E. 241, 48 L. R. A. 442. A sewerage connection must be made by one of the responsible officers of the city. Cordeman v. City of Cincinnati, 23 Ohio St. 499; Hermann v. State, 54 Ohio St. 506, 32 L. R. A. 734; Crosby v. Village of Brattleboro, 68 Vt. 484.

[1015] Lewis v. Alexander, 24 Can. Sup. Ct. 551; Gage v. City of Chicago, 195 Ill. 490; City of Chicago v. Corcoran, 196 Ill. 146; Smythe v. City of Chicago, 197 Ill. 311; Belding Bros. & Co. v. Northampton Sewer Com'rs, 177 Mass. 39, 58 N. E. 156; Hendrie v. City of Boston,

§ 444. The construction of drains.

Closely connected with the construction of sewers is the establishment of a drainage system for a particular territory for the benefit of the public health, of public utility or the reclamation of low lands.[1016] In some cases the two terms, "drainage" and "sewerage" are used synonymously.[1017]

179 Mass. 59, 60 N. E. 386; City of Fergus Falls v. Boen, 78 Minn. 186, 80 N. W. 961.

[1016] Hagar v. Reclamation Dist. No. 108, 111 U. S. 701; Hagar v. Yolo County Sup'rs, 47 Cal. 222; Kilgour v. Drainage Com'rs, 111 Ill. 342.

Trittipo v. Beaver, 155 Ind. 652, 58 N. E. 1034; Ross v. Davis, 97 Ind. 79. To establish the fact that the drain will be a public utility it is not necessary to show that any large portion of the community will participate in its use. Anderson v. Baker, 98 Ind. 587.

Baltimore & O. & C. R. Co. v. Ketring, 122 Ind. 5. The legislation of April 8th, 1881, and March 8th, 1883, does not contemplate the drainage of fresh water lakes, but only wet, marshy lands, swamps, ponds and the like. Perkins v. Hayward, 124 Ind. 445. If a drain is either of public utility or a benefit to public highways or to public health, it is sufficient to authorize a special assessment. It is not necessary to accomplish all these results.

City of Valparaiso v. Parker, 148 Ind. 379; Oliver v. Monona County, 117 Iowa, 43, 90 N. W. 510. "The drainage law is not invalid for permitting the levying and assessment on land which is not benefited by the improvement, where the land is located in the drainage district; a theory of the law being that the drainage will promote the public health and welfare, and not merely render the lands of particular owners more valuable."

Griffith v. Pence, 9 Kan. App. 253, 59 Pac. 677; People v. Saginaw County Sup'rs, 26 Mich. 22. No power of taxation can be exercised to pay for the construction of a drain which results solely in a benefit to the land drained and is of no benefit to either the public health or public welfare.

Gillett v. McLaughlin, 69 Mich. 547; Lien v. Norman County Com'rs, 80 Minn. 58, 82 N. W. 1094; Dodge County v. Acom, 61 Neb. 376, 85 N. W. 292; In re Town of Penfield, 3 App. Div. 30, 37 N. Y. Supp. 1056. Drainage proceedings can only be upheld when the construction of the drain will benefit the public health.

Brown v. Keener, 74 N. C. 714. Drains may be constructed for the purpose of carrying off surplus water and enabling territory otherwise uninhabitable to be brought under cultivation.

Reeves v. Wood County Treasurer, 8 Ohio St. 333; McQuillen v. Hatton, 42 Ohio St. 202; Lake Erie & W. R. Co. v. Hancock County Com'rs, 63 Ohio St. 23; Seely v. Sebastian, 4 Or. 25. The drainage of low lands can be effected by public proceedings when it will result in a benefit to the public. Bryant v. Rollins, 70 Wis. 258.

[1017] City of Charleston v. Johnston, 170 Ill. 336; Gray v. Town of

A drainage system constructed for the purpose of reclaiming wet lands may be also used for irrigation. The same system may serve both purposes.[1018]

§ 445. Legislative authority.

Legislative authority is necessary that a public corporation expend its public moneys either for the construction or the maintenance of a drainage or irrigation system.[1019] It may be general

Cicero, 177 Ill. 459; City of Valparaiso v. Parker, 148 Ind. 379, 47 N. E. 330. "Formerly the word 'sewer' was defined to be a fresh-water trench, artificially made, encompassed with banks on both sides to carry surface water into the sea. * * * It may be true, when the term 'drainage' is used with reference to lands, that ordinary drainage of waters is intended, but it is clear that when that term is used with reference to a city or town it includes sewerage; that is, such drainage is and may be used for the removal of surface and storm water, the overflow of fountains, cisterns, public hydrants, water troughs, water closets, sinks, all filth and refuse liquids, and the diversion of natural watercourses. It is provided * * * that 'this act shall be liberally construed to promote the drainage of cities, the reclamation of wet lands and the improvement of the public health.' The removal of such water and filth is necessary to the health of a city and such removal constitutes the drainage of a city. * * * It would be a narrow construction of this statute for the drainage of cities and the improvement of public health to limit the same to drains for the removal of surface and storm water alone, unmixed with filth and refuse liquids of any kind. Such a construction would be contrary to the express language of the statute, and would defeat the intention of the legislature."

Carr v. Dooley, 122 Mass. 255. City authorities may construct a drain or sewer underneath a public street under a general grant of power to lay and maintain drains or sewers and this right can be exercised without incurring a liability for damages to adjoining property owners; this being true irrespective of whether the land was acquired by condemnation or dedication. Where land has been put to a public use and the offer accepted, it can be appropriated to any use to which a street might be lawfully put. Stoudinger v. City of Newark, 28 N. J. Eq. (1 Stew.) 446.

[1018] Fallbrook Irr. Dist. v. Bradley, 164 U. S. 112; Cribbs v. Benedict, 64 Ark. 555; Merrill v. Southside Irr. Co., 112 Cal. 426; Updike v. Wright, 81 Ill. 49. The construction of a levee along the banks of a river is not a "drainage of land by drains and ditches" within the meaning of the Ill. Statutes. Thorp v. Woolman, 1 Mont. 168; Norfleet v. Cromwell, 70 N. C. 634.

[1019] In re Central Irr. Dist., 117 Cal. 382, 49 Pac. 354. Construing and holding constitutional Cal. St. 1887, p. 29, the "Wright Act" so called. Swamp Land Dist. No. 150 v. Silver, 98 Cal. 51; Merrill v.

or special in its terms[1020] and like all other grants of power to public corporations is construed strictly.[1021] Such legislation is

Southside Irr. Co., 112 Cal. 426; Blake v. People, 109 Ill. 504; Kilgour v. Montmorency Drainage Com'rs, 111 Ill. 342.

Rich v. City of Chicago, 152 Ill. 18. Construing act of 1889 authorizing the creation of sanitary districts. McCaleb v. Coon Run Drainage & Levee Dist., 190 Ill. 549; Anderson v. Kerns Draining Co., 14 Ind. 199; Duke v. O'Bryan, 100 Ky. 710, 39 S. W. 444, 824; Inhabitants of Melrose v. Hiland, 163 Mass. 303, 39 N. E. 1031. The power to construct a drain carries with it the implied power to thereafter maintain and repair it. Britton v. Blake, 35 N. J. Law, 208; Reeves v. Wood County Treasurer, 8 Ohio St. 333. See, also, 14 Am. St. Rep. 308; 90 Am. Dec. 634.

[1020] Hagar v. Yolo County Sup'rs, 47 Cal. 222; Kirkland v. Public Works of Indianapolis, 142 Ind. 123; In re Drainage along Pequest River, 39 N. J. Law, 433.

[1021] Minnesota & M. Land & Imp. Co. v. City of Billings, 111 Fed. 972. A charter provision in this case giving a city authority to construct drains and sewers it was held was sufficient to enable that city to extend to a proper outlet outside the city limits a general system of drainage which it had constructed for the promotion of the general health of the city.

In re Central Irr. Dist., 117 Cal. 382, 49 Pac. 354; French v. White, 24 Conn. 170. A landowner has no authority under Connecticut drainage acts to construct a system of drains in such a manner as to discharge the water from his land upon that adjoining.

Witty v. Nicollet County Com'rs, 76 Minn. 286, 79 N. W. 112. Under authority of Minn. Laws 1887, c. 97. County commissioners cannot drain a public lake. "The question in the case is whether a board of county commissioners has authority * * * to establish and construct a public ditch so as to drain such lakes. It may be conceded, for the purposes of the case, that the legislature has the power to do so where the public good requires it and that it may delegate that power to a board or body like the board of county commissioners. But the question is whether the legislature has delegated this power by the act referred to. It is conceded that the act does not delegate any such power in express, specific terms, but the claim of the defendant is that this is necessarily or clearly implied. * * * As this right is a prerogative of sovereignty, there must be a clear and unambiguous grant from the legislature, to authorize its exercise by others. The powers granted by such statutes are not to be enlarged by doubtful intendment. * * * For these and other reasons which might be suggested we are of opinion that the act in question does not authorize the board of county commissioners to drain public meandered lakes and that in attempting to do so it exceeded its powers and was subject to injunction." McLaughlin v. Sandusky, 17 Neb. 110; In re Lent, 47 App. Div. 349, 62 N. Y. Supp. 227.

subject to constitutional[1022] and other objections that may be raised touching its legality either as violating express constitutional provisions or some fundamental rule determining the validity of laws.[1023]

§ 446. The authority; by whom; when and how executed.

The state itself can only act within the limits of its jurisdiction, much less can a subordinate agent do otherwise. The rule of law, therefore, applies that all bodies or officials to whom is intrusted the execution of any act in connection with the exercise of a particular grant of power are confined strictly to the district

[1022] In re Central Irr. Dist., 117 Cal. 382, 49 Pac. 354. The Wright Act, so called, Stat. 1887, p. 29, held constitutional. Heffner v. Cass & Morgan Counties, 193 Ill. 439, 58 L. R. A. 353; Griffith v. Pence, 9 Kan. App. 253, 59 Pac. 677. Kan. Acts 1879, c. 100, are not unconstitutional as taking private property for public use without compensation.

State v. Flower, 49 La. Ann. 1199. La. Session Acts of 1896, No. 114, relating to the drainage of the city of New Orleans does not violate constitution, art. 46, prohibiting the enactment of local or special laws. Dodge County v. Acom, 61 Neb. 376, 85 N. W. 292; Dakota County v. Cheney, 22 Neb. 437; State v. Colfax County, 51 Neb. 28; In re Lent, 47 App. Div. 349, 62 N. Y. Supp. 227. A law not providing for compensation to owners of property taken or damaged in the construction of a drain is unconstitutional. Pool v. Trexler, 76 N. C. 297; Brown v. Keener, 74 N. C. 714.

[1023] Fallbrook Irr. Dist. v. Bradley, 164 U. S. 112; People v. Parks, 58 Cal. 624. An act for the promotion of drainage which does not designate the locality where drainage is necessary or establish the boundaries of a drainage district but delegates this duty to a board is unconstitutional.

Young America Drainage Com'rs v. Shiloh Drainage Com'rs, 91 Ill. App. 241. Where no remedy is given in drainage laws, it will be presumed that the legislature in granting the right and creating a liability intended that the parties should use the proper remedies already established by common courts of justice.

Huston v. Clark, 112 Ill. 344. The Illinois drainage act of May 29th, 1879, held not unconstitutional as conferring the power to tax in the courts.

Heffner v. Cass & Morgan Counties, 193 Ill. 439, 58 L. R. A. 353; McKinsey v. Bowman, 58 Ind. 88. The rule of law applies that where two statutes conflict, the provisions of the later one will control.

Lien v. Norman County Com'rs, 80 Minn. 58, 82 N. W. 1094, holding general laws of 1887, c. 97, not repealed by general laws 1887, c. 98, providing for the formation of drainage districts. Dodge County v. Acom, 61 Neb. 376, 85 N. W. 292. Neb. St. 1899, c. 89, art. 1, is not

within the limits of which they can legally act.[1024] The principle also holds that grants of power to subordinate agencies are of a restricted nature. If general in terms, they are limited by the rule that official action is confined strictly to that which is necessary for the proper performance of particular official duties;[1025] if the grant is special in its character, it is clearly limited by a narrow construction of the terms employed.[1026] The particular

unconstitutional as violating any provision relating to due process of law, or the right of taking private property without compensation.

In re Tuthill, 36 App. Div. 492, 55 N. Y. Supp. 657; In re Lent, 47 App. Div. 349, 62 N. Y. Supp. 227; Brown v. Keener, 74 N. C. 714; Pool v. Trexler, 76 N. C. 297; Martin v. Tyler, 4 N. D. 278, 60 N. W. 392, 25 L. R. A. 838; Lewis County v. Gordon, 20 Wash. 80, 54 Pac. 779, and Skagit County v. McLean, 20 Wash. 92, 54 Pac. 781.

[1024] Lussem v. Sanitary Dist. of Chicago, 192 Ill. 404, 61 N. E. 544. The jurisdiction of the sanitary district of Chicago in respect to the Chicago River is co-extensive with and does not conflict with the jurisdiction of the city of Chicago. Wilson v. Sanitary Dist. of Chicago, 133 Ill. 443. A drainage district may include portions of a village already organized.

Fletcher v. White, 151 Ind. 401, 51 N. E. 482. But a landowner may be estopped by his conduct in permitting, without objection, work to be done for his benefit by an officer not having authority. Sauntman v. Maxwell, 154 Ind. 114, 54 N. E. 397; Bondurant v. Armey, 152 Ind. 244; Aldrich v. Paine, 106 Iowa, 461, 76 N. W. 812. Construing Iowa Code 1873, § 1207, and holding that boards of supervisors of counties have jurisdiction over all the territory within the county although a portion of this may be incorporated as a village or town. Inhabitants of Melrose v. Hiland, 163 Mass. 303, 39 N. E. 1031. The power to construct implies the power to maintain and repair after construction.

Woodbridge v. City of Cambridge, 114 Mass. 483; Robertson v. Baxter, 57 Mich. 127; Kent v. Perkins, 36 Ohio St. 639. A township may include within its limits an incorporated village, and an assessment can be made by its trustees upon village property for the construction of a township ditch.

[1025] Lussem v. Sanitary Dist. of Chicago, 192 Ill. 404, 61 N. E. 544. Scott v. Brackett, 89 Ind. 413. This principle of law cannot be deemed to apply to proceedings conferring legislative powers. Witty v. Nicollet County Com'rs, 76 Minn. 286, 79 N. W. 112; Nichnabotna Drainage Dist. v. Campbell, 154 Mo. 151.

[1026] O'Brien v. Wheelock, 184 U. S. 450, affirming 95 Fed. 883. First Nat. Bank v. Union Dist. No. 1, 82 Ill. App. 626. Indebtedness cannot be incurred in advance of the construction of a drain. Parish of Concordia v. Natchez R. R. & T. R. Co., 44 La. Ann. 613, 10 So. 809. Police juries under the Louisiana laws have no power to interfere with private drains.

Witty v. Nicollet County Com'rs,

application of this principle will be found in the notes and cases cited.

The law-making power of the state possesses the most ample authority to authorize and direct the construction and the maintenance of all works of local improvement;[1027] it is limited only by such constitutional provisions as the courts hold apply, and such other general principles of law as are pertinent and applicable for the protection of personal rights, of property or otherwise, from tyrannical and illegal legislative action.[1028] In applying the rules just given, it must be remembered that the place,[1029]

76 Minn. 286, 79 N. W. 112. No authority is given by laws of 1897, c. 97, for the drainage of public meandered lakes. Drainage Dist. No. 1 v. Daudt, 74 Mo. App. 579. A drainage board has no authority to employ and pay an attorney for enforcing the collection of a drainage tax. McLaughlin v. Sandusky, 17 Neb. 110; Belknap v. Belknap, 2 Johns. Ch. (N. Y.) 463.

[1027] Pittsburgh, C., C. & St. L. R. Co. v. Machler, 158 Ind. 159, 63 N. E. 210; Hoffman v. City of Muscatine, 113 Iowa, 332, 85 N. W. 17. But it is beyond the power of the legislature to compel an individual to construct a drain or sewer which serves as a public drain. "Nowhere is the city empowered to require the citizen to construct drains at his own expense to carry off the surface water accumulated by the improvements of the streets. * * * To permit the city to concentrate and throw large quantities of surface water on an ungraded lot and then compel the owner, when bringing to grade, to construct drains through it at his own expense, would impose an intolerable burden and might in some cases amount to the practical taking of private property without compensation."

Anketell v. Hayward, 119 Mich. 525, 78 N. W. 557; Casey v. Burt County, 59 Neb. 624, 81 N. W. 851; Dakota County v. Cheney, 22 Neb. 437; Harmon v. City of Omaha, 53 Neb. 164; Benjamin v. Hiler, 63 N. J. Law, 145, 47 Atl. 24; Thompson v. Wood County Treasurer, 11 Ohio St. 678; Bliss v. Kraus, 16 Ohio St. 55; Seely v. Sebastian, 4 Or. 25; Borough of Mauch Chunk v. McGee, 81 Pa. 433.

[1028] Parish of Concordia v. Natchez, R. R. & T. R. Co., 44 La. Ann. 613, 10 So. 809; Avery v. Police Jury of Iberville, 12 La. Ann. 556; Sicard v. Chitz, 13 La. (O. S.) 114; State v. Miller, 41 La. Ann. 53.

[1029] Minnesota & M. Land & Imp. Co. v. City of Billings, 111 Fed. 972. To secure a proper outlet for a general system of drainage, a city may extend it outside its limits. People v. Cook, 180 Ill. 341. Public officials cannot, by the laying of drains, affect the subdivision of unsubdivided land. This is a right which belongs to the property owner.

Briar v. Job's Creek Drainage Dist. Com'rs, 185 Ill. 257. A natural watercourse may be properly utilized in the construction of a drain. Sauntman v. Maxwell, 154 Ind. 114, 54 N. E. 397; Lipes v.

manner[1030] and time[1031] of the exercise of the power by subordinate agencies within the extent granted, is usually of a discretionary nature, and unless, as repeatedly held, there is a manifest abuse of power in its exercise or lack of it, courts will not interfere with the action of such subordinate agencies in carrying out the plain provisions of the law.[1032]

Hand, 104 Ind. 503; McMahon v. City of Council Bluffs, 12 Iowa, 268; Sturm v. Kelly, 120 Mich. 685; Brady v. Hayward, 114 Mich. 326; Northern Ohio R. Co. v. Hancock County Com'rs, 63 Ohio St. 32.

[1030] French v. White, 24 Conn. 170. Through the grant of power, however, the commission of a tort cannot be authorized. McCaleb v. Coon Run Drainage & Levee Dist., 190 Ill. 549; Cochran v. White, 151 Ind. 435, 51 N. E. 723; Pittsburgh, C., C. & St. L. R. Co. v. Machler, 158 Ind. 159, 63 N. E. 210; Kirkland v. Public Works of Indianapolis, 142 Ind. 123. The authority to improve a street includes the right to drain its surface waters. Hoffman v. City of Muscatine, 113 Iowa, 332, 85 N. W. 17. A property owner cannot be required to provide for more than the drain of a natural water course. Coomes v. Burt, 39 Mass. (22 Pick.) 422; Beals v. James, 173 Mass. 591, 54 N. E. 245; Sturm v. Kelly, 120 Mich. 685; Bruggink v. Thomas, 125 Mich. 9, 83 N. W. 1019. A liability will result from a negligent construction. Northern Ohio R. Co. v. Hancock County Com'rs, 63 Ohio St. 32; Wendel v. Spokane County, 27 Wash. 121, 67 Pac. 576.

[1031] Sturm v. Kelly, 120 Mich. 685. Contracts for the construction of a drain cannot be legally let until an order has been obtained.

[1032] De Gravelle v. Iberia & St. M. Drainage Dist., 104 La. 703, 29 So. 302. The action of public authorities in determining the extent of territory properly charged with the cost of drainage is legislative and, therefore, discretionary in character. The syllabus by the court on this point is as follows: "Drainage districts are established either by direct authority of the general assembly or by delegated authority to political bodies or subdivisions of the state. The body exercising this authority determines over what territory the benefits are so far diffused as to render it proper for all lands to contribute to the cost of the drainage work. The subject for its determination is legislative in character. The legislative acts cannot be attacked on the grounds of error in judgment regarding the special benefits and defeated by satisfying the courts that no special or particular benefits are received, unless under very exceptional conditions. They cannot be attacked for impolicy or overthrown by showing that in particular instances they operate harshly or unjustly. Judicial judgment is not to be substituted lightly for legislative judgment. The benefits contemplated need not be direct nor immediate." Town of New Iberia v. New Iberia & B. C. Drainage Dist., 106 La. 651. The rule is applied also to the selection of officers by drainage districts considered as distinct entities. Stout v.

§ 447. Drainage or irrigation districts.

In several states, the exercise of a power granted by law is contingent upon affirmative action by the people within the district whose property is to be assessed in a manner directed to pay the cost of a proposed improvement,[1033] or the right of the authorities may be dependent upon a determination of the "necessity" or "feasibility" for a drain irrespective of the manner

Chosen Freeholders & Surveyors of Hopewell, 25 N. J. Law (1 Dutch.) 202; Kelsey v. King, 32 Barb. (N. Y.) 410.

[1033] Fallbrook Irr. Dist. v. Bradley, 164 U. S. 112. Persons interested in a proposed improvement have the right to appear before the county supervisors and contest the facts upon which preliminary proceedings are based. They can also raise the question of a "reception of benefits." Ralston v. Sacramento County Sup'rs, 51 Cal. 592; Scott v. People, 120 Ill. 129; Lees v. Drainage Com'rs, 125 Ill. 47, affirming 24 Ill. App. 487. Drainage commissioners may, however, change the boundaries of a drainage district without requiring an amendment to the petition.

Mason & T. Special Drainage Dist. Com'rs v. Griffin, 134 Ill. 330, 28 Ill. App. 561; People v. Cooper, 139 Ill. 461. It is not necessary that guardians ad litem should be appointed for infant owners of land sought to be included in a drainage district. Shoemaker v. Williamson, 156 Ind. 384, 59 N. E. 1051; Watkins v. Pickering, 92 Ind. 332. The Ind. Act of March 9th, 1875, does not require a petition for the construction of a drain to be signed by all the land owners affected. Miller v. Graham, 17 Ohio St. 1. As to the effect of a "remonstrance" see Sauntman v. Maxwell, 154 Ind. 114, 54 N. E. 397. "The cases to the effect that the question as to what route is best and cheapest is wholly within the judgment of the drainage commissioners, and cannot, in the absence of fraud, be litigated on remonstrances against their report, apply merely to the special location of the drain that has been described in general terms in the petition. Manifestly, it is not within the discretion of the drainage commissioners to locate specifically a drain, other than the one generally described in the petition. If a drain wholly in the county were petitioned for, it would be without the purview of the amendatory act of 1889; it would be a subject-matter fully covered by the act of 1885 as originally passed, and the report of the drainage commissioners and the judgment of the court confirming the report, establishing a drain through a city would be void for want of jurisdiction over the subject matter. That a necessity exists for the drainage of country lands by means of a drain passing through the corporate limits of a city is a jurisdictional fact to be established by the petitioners, and as the method of determination of the sufficiency of the remonstrance for dismissal depends upon the existence of the necessity, that jurisdictional fact must be shown on the hearing of the remonstrance."

in which these questions may have been raised.[1034] The right then of the authorities to act is dependent upon the proper and legal performance of the neeessary steps as required by law and which are usually considered of a jurisdictional eharacter.[1035]

[1034] Brown v. Henderson, 66 Ark. 302, 50 S. W. 501. A report of officials against the construction of a ditch held final and conclusive under Sand. & H. Dig. § 1214.

McCaleb v. Coon Run Drainage & Levee Dist., 190 Ill. 549; Tillman v. Kircher, 64 Ind. 104. Where there is nothing in the proceedings or evidence to show that the drain was necessary and conducive to public health, convenience or welfare or a public benefit or utility, the assessment will not be legal.

Meehan v. Wiles, 93 Ind. 52. An order of county commissioners establishing a drain to be of public utility and benefit is an appealable order under Ind. St. 1876, p. 357, § 31.

Oliver v. Monona County, 117 Iowa, 43, 90 N. W. 510; Griffith v. Pence, 9 Kan. App. 253, 59 Pac. 677. The finding by a township trustee that the construction of a drain will be conducive to public health and welfare in the absence of a gross abuse of discretion is conclusive and is not subject to collateral attack. City of Springfield v. Gay, 94 Mass. (12 Allen) 612. A determination by a city council of the necessity for the construction of certain drains, the extent of territory benefited, and the respective proportions of the expense to be borne by the city and owners of real estate, cannot be revised by the county commissioners of the county in which the city is located.

Hall v. Palmer, 54 Mich. 270; Hackett v. Brown, 128 Mich. 141, 87 N. W. 102; Swan Creek Tp. v. Brown, 130 Mich. 382, 90 N. W. 38; Anketell v. Hayward, 119 Mich. 525; Dodge County v. Acom, 61 Neb. 376, 85 N. W. 292.

Lake Erie & W. R. Co. v. Hancock County Com'rs, 63 Ohio St. 23. A jury determining the public necessity of a proposed drain may consider facts brought to their knowledge from a personal view of the premises.

[1035] In re Central Irr. Dist., 117 Cal. 382, 49 Pac. 354. In discussing the point made in the text the court said: "The next contention of appellants is that the organization of the central irrigation district was illegal because no sufficient notice was given as required by the irrigation act of the time of the presentation to the board of supervisors of the petition for the formation of the district. The irrigation act provides that a petition, signed by the required number of freeholders of the proposed district, shall first be presented to the board of supervisors, accompanied by a good and sufficient bond. 'Such petition shall be presented at a regular meeting of the said board, and shall be published for at least two weeks before the time at which the same is to be presented, * * * together with a notice stating the time of the meeting at which the same will be presented.' The publication of this notice is an essential prerequisite to conferring upon the board of supervisors jurisdiction to proceed in the matter of

A failure to comply with statutory or constitutional provisions in respect to the necessary petition, the inclusion of the lands not contemplated by law or other statutory details, is usually fatal to the proceedings.[1036] Where officials, however, are vested with

the organization. It is by the terms of the act made mandatory that such notice should be given."

People v. Reclamation Dist. No. 556, 130 Cal. 607, 63 Pac. 27. The de facto existence, at least, of the reclamation district, must be approved in order to support proceedings by it. Huston v. Clark, 112 Ill. 344; Payson v. People, 175 Ill. 267; Richard v. Cypremort Drainage Dist., 107 La. 657.

[1036] Fallbrook Irr. Dist. v. Bradley, 164 U. S. 112; Dakota County v. Cheney, 22 Neb. 437; Casey v. Burt County, 59 Neb. 624, 81 N. W. 851. "Under section 4 * * * a petition for such improvement must be filed with the county clerk, setting forth certain facts, and accompanied by a good and sufficient bond, signed by two or more sureties, to be approved by the county clerk conditional for the payment of all costs that may occur in case said board of county commissioners shall find against such improvement. It will be observed, by reading the bond filed in the proceeding, that the conditions thereof do not comply with those prescribed in said statute, and such fact is conceded by counsel for appellants; but it is claimed that it is a good common-law bond and that, if it is, it is sufficient to confer jurisdiction upon the county commissioners, at least in the absence of objections to its sufficiency. It is a principle of law well established by the decisions of this court that statutes of the nature of the one in question are to be strictly construed and that, in order to sustain assessments levied under the provisions of such enactments, the record must affirmatively show a compliance with all the conditions essential to a valid exercise of the taxing power. Therefore, before a county board can acquire jurisdiction of a proceeding of this nature, a bond complying strictly with the provisions of section 4 of said chapter must be filed and approved. With the provisions of this section, the bond in several important respects, fails to conform. There are no sureties on the bond, the liability of the principals is limited to a specific sum, and it is not conditioned for the payment of the costs that may occur in case the board finds against such improvement, as the statute requires, but only provides that if, upon view of said route in the petition described, the commissioners shall find in favor of the location of said ditch, then the obligation to be void; otherwise, to be in force. If such a bond is upheld in this case there could be no reason why a bond providing a penalty limited to one cent, or to nothing, should not also be sustained; * * * It being plain, therefore, that this bond failed in many respects, to comply with the provisions and requirements of said section 4, it must be held to be void for which reason jurisdiction over the matter was not acquired by the county board and its acts thereunder, * * * were void and of no effect."

But a substantial compliance it has been held is all that is neces-

the power to determine the sufficiency of the averments in a petition or the character of the signatures, their findings in these respects are generally conclusive.[1037] In the absence of consti-

sary. See Brady v. Hayward, 114 Mich. 326. "It is urged that the control was given to the town drain commissioners and not to the county drain commissioners. . We think, however, that the section just referred to should be construed in connection with § 1740a7, which provides: 'The jurisdiction of the town drain commissioner shall be limited to all drains having their beginning, entire course and terminus within his township. * * * The county drain commissioner shall have concurrent jurisdiction with the township drain commissioner and shall also have jurisdiction over all other drains within his county,' etc.; and § 1740h9, which provides: 'Drains for which an application has been made or which have been constructed or partly constructed under any provision of law heretofore enacted, may be laid, constructed, completed, relaid, cleaned out, widened, deepened or extended as the case may be under the provisions of this act.' The law should be so construed as to give if possible, effect to all its provisions. If the last named provisions are to be given effect, the contention of the petitioner cannot be sustained. The legislature has indicated its desire to make this law a practical working law, by means of which the beneficial results intended to be accomplished by it can be wrought out. Sec. 1740g1 provides that the proceeding shall not be declared 'absolutely void in consequence of any error or informality of any officer in the location and establishment thereof nor by reason of any error or informality appearing in the record of the proceedings by which any such drain shall have been located and established, nor on account of any irregularity or informality in the condemnation of the right of way nor for want of any record thereof, but the court * * * shall if there be manifest error in the proceedings allow the plaintiff in action to show that he has been injured thereby.' The record discloses that the proposed undertaking is one of great magnitude and importance, involving a great many persons and a great many descriptions of land. The record shows that great care has been taken on the part of the drain commissioner to comply with all the provisions of the law. A large sum of money has already been expended in making surveys, securing releases, in advertising and in other ways. It has been twice decided that the proposed drain is a public necessity conducive to the public health. There is nothing to indicate any fraud or want of good faith. Such defects as have been shown are not jurisdictional but are mere irregularities that may be either waived or cured. * * * We think the writ of certiorari should have been dismissed."

[1037] People v. Reclamation Dist. No. 136, 121 Cal. 522; Reclamation Dist. No 537 v. Burger, 122 Cal. 442; Lower Kings River Reclamation Dist. v. McCullah, 124 Cal. 175; Craig v. People, 188 Ill. 416, 58 N. E. 1000; People v. Bug River Drainage Dist. Com'rs, 189 Ill. 55, 59 N.

tutional provision, however, the legislature may arbitrarily establish drainage districts, the legality of which is not contingent upon affirmative action of the property owners residing within such district,[1038] and legislation may be passed providing for the creation of sanitary districts without repealing existing laws authorizing the corporate authorities of cities and villages to construct and maintain drains by special assessments.[1039]

§ 448. Proceedings; the petition and its averments.

A petition properly signed,[1040] definite in its recitals and accurate in its descriptions for the establishment of a drain or drainage district, is usually required. A deficiency in either of these par-

E. 605; Oliver v. Monona County, 117 Iowa, 43, 90 N. W. 510.

[1038] Fallbrook Irr. Dist. v. Bradley, 164 U. S. 112. Tide-Water Co. v. Coster, 18 N. J. Eq. (3 C. E. Green) 518, 90 Am. Dec. 634. "That the legislative authority is competent to effect the end provided for in this act, I can entertain no doubt. The purpose contemplated is to reclaim and bring into use a tract of land covering about one-fourth of the county of Hudson and several thousand acres in the county of Union. * * * It is difficult from the great expense of such works to build roads across it. * * * To remove these evils and to make this vast region fit for habitation and use, seems to me plainly within the legitimate province of legislation. * * * I have no difficulty, therefore, in concluding that the legislature was fully authorized to adopt measures to accomplish the general design embraced in this act." State v. Hiler (N. J. Law) 47 Atl. 24.

[1039] Rich v. City of Chicago, 152 Ill. 18.

[1040] In re Central Irr. Dist., 117 Cal. 382, 49 Pac. 354. Owners of residence lots in towns and cities held "not owners of land" as required by the Wright Act. Shoemaker v. Williamson, 156 Ind. 384, 59 N. E. 1051. A petitioner's signature unaccompanied by an allegation that he is a land owner is not defective. "The argument is that the petition is incurably bad, for failure of the petitioner to allege that he was the owner of land liable to be affected by, or assessed for, the expenses of construction of the ditch. It will be observed that the point made goes to the qualification of the petitioner, and not to the facts required by the statute to be averred. The reading of the statute is that the petition shall set forth the necessity for the ditch, with a general description of the proposed starting point, route and terminus. And this all that the statute prescribes the petition shall contain, but it must be signed by one, who is the owner of the land liable to be affected. The only facts, therefore, essential to the framing of a valid cause of action, are the statement of the necessity for the ditch and a general description of the beginning and ending and route traversed. So far as the sufficiency of the petition is concerned, the

ticulars is generally fatal.[1041] The petition may operate as a notice, and the only notice to the owners of lands affected, that

qualification of the petitioner might as well be affixed to his signature as stated in the body of the petition and we see no reason why it might not be omitted altogether and proved upon the hearing as any other fact. It is certainly very clear that the omission from the petition complained of does not belong to that class of infirmities that may be invoked for the first time in this court."

Watkins v. Pickering, 92 Ind. 332. Ind. Act March 9, 1875, does not require a drainage petition to be signed by all the landowers affected.

Wright v. Wilson, 95 Ind. 408; Wormley v. Wright County Sup'rs, 108 Iowa, 232, 78 N. W. 824. Defining "adjacent" owners within Code 1873, tit. 10, c. 2. Bell v. Cox, 122 Ind. 153; Zumbro v. Parnin, 141 Ind. 430.

[1041] Village of Hyde Park v. Carton, 132 Ill. 100, 23 N. E. 590; Craig v. People, 188 Ill. 416, 58 N. E. 1000. A list or schedule containing the names and postoffice addresses of landowners, enclosed and made a part of the petition is sufficient compliance with the statute.

People v. Barnes, 193 Ill. 620. But the court in this case decided that the question at issue was what knowledge the petitioners had at the time they filed the petition, of the ownership of the land. They were not charged with the duty of ascertaining the true owners as determined by the legal title.

Shoemaker v. Williamson, 156 Ind. 384, 59 N. E. 1051. Ind. St. 1894, § 5656, does not require the body of the petition to assert that the signers are landowners. Corey v. Swagger, 74 Ind. 211; Coolman v. Fleming, 82 Ind. 117; Wright v. Wilson, 95 Ind. 408; Troyer v. Dyar, 102 Ind. 396; Collins v. Rupe, 109 Ind. 340. It is not necessary to give the name of the civil township in which a drain is to be located where it is described by section, town and range.

Ross v. State, 119 Ind. 90. The following description held void for uncertainty. "Pt. S. E. ¼ of N. E. qr. frac. sec. 7, T. 6, S., R. 5 E." Metty v. Marsh, 124 Ind. 18; Sample v. Carroll, 132 Ind. 496. When the land descriptions follow tax duplicate lists, the description will prima facie sustain an assessment for benefits accruing from the construction of the ditch. Rogers v. Venis, 137 Ind. 221.

Richard v. Cypremort Drainage Dist., 107 La. 657; Mathias v. Carson, 49 Mich. 465. A description in a preliminary application giving only the line of the drain without stating its proposed width renders void proceedings to condemn land for the construction of a drain.

Kinnie v. Bare, 68 Mich. 625; Id., 80 Mich. 345. It is not necessary to allege under Laws 1885, No. 227, c. 3, § 1, in the primary petition for the construction of a drain that it is necessary for the public health or highways or that it is a public necessity. Null v. Zierle, 52 Mich. 540; Frost v. Leatherman, 55 Mich. 33; Town of Muskego v. Drainage Com'rs, 78 Wis. 40. The allegation that a town as a whole will be benefited by a drain is not necessary in the petition for the improvement.

their rights are the subject of attack.[1042] The necessity for accurate descriptions and the reasons for the rules given above are apparent.[1043] Irregularities, however, in proceedings under drain-

[1042] Fallbrook Irr. Dist. v. Bradley, 164 U. S. 112. Upon the hearing of such petition after due notice, persons interested in the proposed improvement may appear before the board of supervisors of the county and contest the facts on which the petition is based and the further question of benefit to any particular land included in the description of the proposed district.

In re Central Irr. Dist., 117 Cal. 382, 49 Pac. 354; Goodrich v. Stangland, 155 Ind. 279, 58 N. E. 148. Under Burns' Rev. St. 1894, § 5654, a notice of the filing of the petition for the construction of a drain is required. The form and contents are also prescribed.

[1043] People v. Bug River Special Drainage Dist. Com'rs, 189 Ill. 55, 59 N. E. 605. An order is not necessarily defective only as to such lands insufficiently described. Where this is the point at issue the court say: "A ground of special demurrer to the pleas is, that in each of them a list of the lands annexed is given, with the names of the owners and an attempted description, and that a few of these tracts are so insufficiently described that they cannot be located. There are some twenty different tracts here listed, and a small fraction of them are described merely as a part of a certain forty acre tract, with no way to ascertain what part it is. In those cases the land is not described so as to be capable of identification and it is claimed that the whole order of annexation is therefore void, and the plea is insufficient. The argument is that if the order annexing these various tracts of land is invalid as to any tract it is invalid as to all. In the original organization the territorial boundaries of the district were given and fixed. The tracts of land annexed, as set out in the pleas, are scattered pieces adjoining the original boundary, lying in nine different sections, many of them not connected in any way with the others. It is undoubtedly true that where a district is organized it must be organized as a unit, and the proceeding must be valid as a whole. * * * But in this case the relation of the parties to each other and the district is entirely different. The rights of each one depend solely upon his individual relation with the district. If any one of them by his voluntary act, has connected his lands with the district, the law deems him as having voluntarily applied to have said lands included, and the commissioners may annex, classify and assess them. If he makes such an application, they have jurisdiction over him and his lands regardless of notice to or jurisdiction over any other person. The annexation is several as to each land owner, although many tracts may be annexed at the same time. The question is whether the individual and separate action of the owner has brought a particular tract of land within the jurisdiction of the commissioners. One owner may dispute the fact of having made the connection and application contemplated by the statute and his rights may depend upon the existence of such fact. As to another, the attempted annexation may

age laws usually cannot be attacked collaterally.[1044] A description of lands in such a petition or in any of the proceedings in connection with the establishment of a district or levying the assessment on property need be only so sufficient and definite that the boundaries can be ascertained or the identity of the piece can be established by a competent surveyor or by reference to other tracts or parcels.[1045] In one case the ruling was made that

be void because the land cannot be identified but there is no joint relation between the owners. We do not think that one owner can object for another or insist that the commissioners shall have jurisdiction over every other person whose lands they may undertake to annex to the district. The pleas are not subject to the objection raised by the special demurrer." People v. Barnes, 193 Ill. 620; Carr v. State, 103 Ind. 548, and Heick v. Voight, 110 Ind. 279. But a petition is sufficient where its averments are fairly and reasonably specific.

[1044] People v. Reclamation Dist. No. 556, 130 Cal. 607, 63 Pac. 27. One is precluded from controverting the fact of a de facto organization by the rule covering collateral attack. Osborn v. People, 103 Ill. 224; Blake v. People, 109 Ill. 504; Morrell v. Union Drainage Dist. No. 1, 118 Ill. 139; Evans v. Lewis, 121 Ill. 478; People v. Jones, 137 Ill. 35. But see the case of Payson v. People, 175 Ill. 267, as holding that in a proceeding to collect a delinquent special assessment, a collateral attack may be made upon the legality of the organization of the drainage district.

Cochran v. White, 151 Ind. 435, 51 N. E. 723; Baltimore & O. S. W. R. Co. v. Jackson County Com'rs, 156 Ind. 260, 58 N. E. 837, 59 N. E. 856; Cauldwell v. Curry, 93 Ind. 363; Young v. Wells, 97 Ind. 410; Indianapolis & C. Gravel Road Co. v. State, 105 Ind. 37; McMullen v. State, 105 Ind. 334; Sunier v. Miller, 105 Ind. 393; Beals v. James, 173 Mass. 591, 54 N. E. 245; Scholtz v. Smith, 119 Mich. 634, 78 N. W. 668; Benjamin v. Hiler, 63 N. J. Law, 145, 47 Atl. 24; Kelly v. Dolan, 67 N. J. Law, 90, 50 Atl. 453.

[1045] People v. Barnes, 193 Ill. 620; Milligan v. State, 60 Ind. 206; Wright v. Wilson, 95 Ind. 408; Richard v. Cypremort Drainage Dist., 107 La. 657. "The plaintiff's contention is, that although as he concedes, the tax payers, by voting the tax countenanced the system of drainage advertised as before mentioned, and sanctioned to some extent at least, the method followed by the use of a map to indicate lines, yet that this is not to be considered in the light of a ratification, for the statute contemplates a form to be followed from which there should not be any material deviation; that the manner of opening the drains had not been matured, nor the location of the drain fixed, as required by vote. As a condition precedent, it was necessary to fix the limits. We think this was done to an extent sufficient to make all parties concerned aware of the lines as well as of the location of the drains; that this information was given by the ordinance, the advertisements and the maps. Besides the evidence dis-

the description of the lands affected need only be so sufficiently accurate as to enable the auditor to describe them on the duplicate tax lists.[1046] The hearing upon such petition should be public,[1047] and notice is generally required to be served upon all those interested who may be affected by the construction of the proposed drainage system or drain, or the establishment of the drainage district.[1048]

closes that it was impossible to describe the location and extent of the drain in a printed ballot, but that they were minutely described on a map made by the secretary of the drainage board who is a surveyor by profession. This is sufficient compliance with the law as relates to description of location of districts and drains. We are warranted in concluding that every voter was notified of the location of the canal, the drains to it, and of the limits of the district. In leaving the subject we must say that while there was not a map-like distinctness of trace in the ordinance in question of the police jury, there is sufficient description of the district to sustain the boundaries as described." Dodge County v. Acom, 61 Neb. 376, 85 N. W. 292.

[1046] Craig v. People, 188 Ill. 416, 58 N. E. 1000; Spahr v. Schofield, 66 Ind. 168.

[1047] Land Owners v. People, 113 Ill. 296; Campbell v. Dwiggins, 83 Ind. 473; Tyler v. State, 83 Ind. 563.

[1048] In re Central Irr. Dist., 117 Cal. 382, 49 Pac. 354. A defective notice cannot be cured by proof of actual knowledge on the part of the person whose interests are affected.

See, as to manner and length of publication, People v. Reclamation Dist. No. 136, 121 Cal. 522; Reclamation Dist. No. 537 v. Burger, 122 Cal. 442.

Craig v. People, 188 Ill. 416, 58 N. E. 1000; Payson v. People, 175 Ill. 267; Sanner v. Union Drainage Dist., 175 Ill. 575; Elgin, J. & E. R. Co. v Hohenshell, 193 Ill. 159; People v. Barnes, 193 Ill. 620; Osborn v. Maxinkuckee Lake Ice Co., 154 Ind. 101, 56 N. E. 33; Wright v. Wilson, 95 Ind. 408. This case also holds that a voluntary appearance will not dispense with statutory notice. Jackson v. State, 103 Ind. 250; Williams v. Stevenson, 103 Ind. 243. Oral proof of posting of notices is admissible. Meranda v. Spurlin, 100 Ind. 380; Brosemer v. Kelsey, 106 Ind. 504; Peters v. Griffee, 108 Ind. 121. A landowner insufficiently served but having knowledge of the proceedings and making no objection will be estopped to urge such irregularities. Carr v. Boone, 108 Ind. 241; Kennedy v. State, 109 Ind. 236; Dickinson v. Van Wormer, 39 Mich. 141; People v. Ruthruff, 40 Mich. 175; Willcheck v. Edwards, 42 Mich. 105; Bixby v. Goss, 54 Mich. 551. A failure to give notice either actual or constructive to a non-resident owner of lands is a jurisdictional error. Bettis v. Geddes, 54 Mich. 608; Corey v. Jackson Probate Judge, 56 Mich. 524; Campau v. Charbeneau, 105 Mich. 422; Hauser v. Burbank, 117 Mich. 642, 463; Curran v. Sibley County, 47 Minn. 313. The publication of a notice, for three successive weeks, of the

§ 449. The appointment of commissioners or viewers.

Upon the filing of a proper petition, the law may provide that upon a determination by the proper tribunal of the public necessity for the drain or ditch, commissioners or viewers shall be appointed who shall qualify[1049] and proceed to examine the route of the proposed improvement and determine the damages and benefits to be suffered or derived by its establishment.[1050] Their report in these respects may be subject to exception and appeal by those having the right who may deem themselves aggrieved.[1051] All these proceedings are usually determined and

time set by the county board for the hearing of a petition for the opening of a ditch as required by Laws 1887, c. 97, § 8, is jurisdictional. Eaton v. St. Charles County, 8 Mo. App. 177; Scattergood v. Lord, 26 N. J. Law (2 Dutch.) 140. The same notice is necessary in altering a ditch as required upon its original construction. Sessions v. Crunkilton, 20 Ohio St. 349; Baltimore & O. & C. R. Co. v. Wagner, 43 Ohio St. 75; Town of Muskego v. Drainage Com'rs, 78 Wis. 40. A publication of an order prescribing the notice to be given of the time and place of hearing of a petition in drainage proceedings is a substantial compliance with the statute when the order contains all the essentials of a valid notice.

[1049] Trigger v. Drainage Dist. No. 1, 193 Ill. 230; People v. Gary, 196 Ill. 310; State v. Findley, 67 Wis. 86.

Such commissioners should not only qualify but should also be disinterested persons. Lower Kings River Reclamation Dist. v. Phillips, 108 Cal. 306; Kellogg v. Price, 42 Ind. 360; High v. Big Creek Ditching Ass'n, 44 Ind. 356. A person whose sister-in-law, niece and nephew own land along the line of a proposed ditch is not a disinterested party.

Rogers v. Venis, 137 Ind. 221. The fact that a person is engaged in the business of making tile does not disqualify him.

In re Ryers, 72 N. Y. 1. The county judge in drainage proceedings under New York Laws 1869, c. 888, is not disqualified from appointing drainage commissioners because of his ownership of lands affected by the proceedings. Olmsted v. Dennis, 77 N. Y. 378; Durden v. Simmons, 84 N. C. 555.

[1050] Young America Drainage Com'rs v. Shiloh Drainage Com'rs, 91 Ill. App. 241; McCaleb v. Coon Run Drainage & Levee Dist., 190 Ill. 549; Heffner v. Cass & Morgan Counties, 193 Ill. 439, 58 L. R. A. 353. Oliver v. Monona County, 117 Iowa, 43, 90 N. W. 510. To justify an assessment upon lands benefited, it is only necessary to show that the public health of the district will be promoted by the construction of the drain. The meaning of the word benefit is not confined to the idea that the lands of particular owners must be rendered more valuable. Peck v. Watros, 30 Ohio St. 590.

[1051] In re Bradley, 108 Iowa, 476, 79 N. W. 280; Oliver v. Monona

controlled by specific requirements of local laws. The cases cited in the notes discuss the propositions from the standpoint of general laws.[1052] Proceedings having for their purpose the appointment of commissioners and the ascertainment of damages and benefits accruing to private property owners are based upon the power of eminent domain. One of the essentials of a legal exercise of this power is the giving of notice to parties whose rights or interests may be affected.[1053] Statutory provisions are usually found fixing the form of such notice[1054] and the manner and time

County, 117 Iowa, 43, 90 N. W. 510. The right of appeal is a privilege which can be legally withdrawn at any time. Smith v. Smith, 97 Ind. 273; De Gravelle v. Iberia & St. M. Drainage Dist., 104 La. 703, 29 So. 302. The validity of such proceedings should be attacked on specific grounds; general charges of irregularity will not suffice. People v. Wasson, 64 N. Y. 167.

Those aggrieved have not, as a general rule, the right to a trial by jury. See Cairo & F. R. Co. v. Trout, 32 Ark. 17; Koppikus v. State Capitol Com'rs, 16 Cal. 248; People v. Blake, 19 Cal. 579; Whiteman's Ex'x v. Wilmington & S. R. Co., 2 Har. (Del.) 514; Dronberger v. Reed, 11 Ind. 420; People v. Michigan S. R. Co., 3 Mich. 497.

[1052] In re Bradley, 108 Iowa, 476. A drainage application is a general proceeding in which a jury cannot be allowed. Hackett v. Brown, 128 Mich. 141, 87 N. W. 102. The minutes of the survey need not be signed by the surveyor. Dodge County v. Acom, 61 Neb. 376, 85 N. W. 292. The presumption is always in favor of the correctness and legality of the proceedings taken.

[1053] Bixby v. Goss, 54 Mich. 551. "Plaintiff is a nonresident of the state, and is nowhere named in the proceedings. Her husband is named, however, and it is assumed that he is owner of a quarter section of land, which includes the land owned by the plaintiff. The assessment of compensation for land taken, and also of the tax laid for benefits, is made to the husband. Plaintiff, in the affidavit for certiorari, says that she had no notice, actual or constructive, of any of the proceedings while they were pending, and the record does not show that any was given. This being the case, the proceedings as to this plaintiff were absolutely void. The failure to give notice, so that the parties concerned may have an opportunity to be heard in the proceedings is not to be deemed a mere error or informality but as depriving the commissioner of jurisdiction to take further steps."

Hackett v. Brown, 128 Mich. 141, 87 N. W. 102. Where the proceedings were properly pending as against a landowner, his subsequent purchaser cannot complain. Daniels v. Smith, 38 Mich. 660; Lane v. Burnap, 39 Mich. 736; Willcheck v. Edwards, 42 Mich. 105; Dunning v. Essex Tp. Drain Com'r, 44 Mich. 518. The giving of the notice required by statute may be waived. Lampson v. Ingham County Com'rs, 45 Mich 660.

[1054] Bixby v. Goss, 54 Mich. 551;

of its service.[1055] Where the laws are silent in respect to notice, its necessity will be implied for the reasons stated above.[1056] In a New York case,[1057] the court said, "It must be conceded that property cannot be taken by the right of eminent domain without some notice to the owner or some opportunity on the part of the owner at some stage of the proceeding to be heard as to the compensation to be awarded him. An act of the legislature arbitrarily taking property for the public good and fixing the compensation to be paid could not be upheld: there would in such case be the absence of that 'due process of law' which both the federal and state constitutions guarantee to every citizen. * * * It may, however, be stated generally that due process of law requires an orderly proceeding adapted to the nature of the case in which the citizen has an opportunity to be heard and to defend, enforce and protect his rights. A hearing or an opportunity to be heard is absolutely essential. We cannot conceive of due process of law without this." And, in a Pennsylvania case[1058] it is said that "notice, or at least the means of knowledge, is an essential element of every just proceeding which affects rights of persons or property."

§ 450. Report of commissioners or viewers.

The commissioners or viewers, providing their appointment be legal, after consideration of the evidence as produced by property owners, should file a report or findings in respect to the damages suffered by and benefits accruing to property with the compensation to which the owners may be entitled upon consideration of all legal conditions.[1059] The form and substance of

Hackett v. Brown, 128 Mich. 141, 87 N. W. 102; Town of Muskego v. Drainage Com'rs, 78 Wis. 40.

[1055] People v. Burnap, 38 Mich. 350; Town of Muskego v. Drainage Com'rs, 78 Wis. 40.

[1056] Strachan v. Brown, 39 Mich. 168.

[1057] Stuart v. Palmer, 74 N. Y. 183, affirming 10 Hun, 23.

[1058] City of Philadelphia v. Miller, 49 Pa. 440.

[1059] Spahr v. Schofield, 66 Ind. 168; Indianapolis & C. Gravel Road Co. v. Christian, 93 Ind. 360; Smith v. Smith, 97 Ind. 273. No report on lands not affected by a proposed drain need be made though such lands were described in the petition for the improvement. Lipes v. Hand, 104 Ind. 503; Claybaugh v. Baltimore & O. R. Co., 108 Ind. 262; Bohr v. Neuenschwander, 120 Ind. 449; Zigler v. Menges, 121 Ind. 99; Blemel v. Shattuck, 133 Ind. 498; Lane v. Burnap, 39 Mich. 736; Nugent v.

this report[1060] and the time of its filing may be prescribed by law,[1061] and in addition, in some instances, notice to the property owner of the latter fact.[1062] Such proceedings are usually strictly construed and a failure to observe statutory provisions may render them null and void.

§ 451. Damages and benefits.

In the appropriation of private property for a public use, for the damages suffered by the individual, the law affords a compensation full, ample and just,[1063] and in determining the benefits

Erb, 90 Mich. 278; Dakota County v. Cheney, 22 Neb. 437; Olmsted v. Dennis, 77 N. Y. 378.

[1060] Goodrich v. Stangland, 155 Ind. 279, 58 N. E. 148. A report is not invalid because it embraces branch drains not expressly petitioned for.

[1061] Sarber v. Rankin, 154 Ind. 236, 56 N. E. 225. An extension of time may be obtained, following Bondurant v. Armey, 152 Ind. 244.

[1062] Crapo v. Hazelgreen (C. C. A.) 93 Fed. 316; Claybaugh v. Baltimore & O. R. Co., 108 Ind. 262; Munson v. Blake, 101 Ind. 78. "No order was made at any time by the court extending or changing the time so designated. Commissioners of drainage cannot under this statute, violate or ignore the order of the court fixing the time for the filing of their report and present a report when it suits their pleasure or convenience. To permit them to do so, would render the statute subject to great abuses. It would, in many cases, result in requiring the constant attendance in court of persons desiring to remonstrate against the report and ceaseless vigilance on their part to avert action thereon in their absence. No such inconveniences or perils should be imposed upon them and none will be imposed if the provision of the statute is, as it must be complied with."

[1063] Harward v. St. Clair & M. Levee & Drainage Co., 51 Ill. 130; Elmore v. Drainage Com'rs, 135 Ill. 269; McCaleb v. Coon Run Drainage & Levee Dist., 190 Ill. 549. The cost of constructing farm bridges across a drain is not to be included in an estimate of the damages. See, also, the case of Heffner v. Cass & Morgan Counties, 193 Ill. 439, 58 L. R. A. 353, as discussing the liability for cost of rebuilding bridges removed by commissioners in constructing a drain or ditch along natural depressions or watercourses. Culbertson v. Knight, 152 Ind. 121, 52 N. E. 700; Duke v. O'Bryan, 100 Ky. 710, 39 S. W. 444, 824; Landry v. McCall, 3 La. Ann. 134; Day v. Hulburt, 52 Mass. (11 Metc.) 321. Those not parties to drainage proceedings cannot be affected by any finding of damages. Nevins v. City of Fitchburg, 174 Mass. 545, 47 L. R. A. 312; Bungenstock v. Nishnabotna Drainage Dist., 163 Mo. 198, 64 S. W. 149; People v. Nearing, 27 N. Y. 306; People v. Haines, 49 N. Y. 587; Watson's Ex'r v. Pleasant Tp., 21 Ohio St. 667; Askam v. King County, 9 Wash. 1; Skagit County v. McLean, 20 Wash. 92, 54 Pac. 781; Smith v. Gould, 61 Wis. 31.

accruing to private tracts of land it is proper to take into consideration whatever, through the construction of the improvement, will tend to make the land more valuable for tillage, more convenient or desirable as a place of residence or whatever may increase its general market value.[1064] The setting off of these special benefits against the damages that may be suffered by the same property will be controlled by the decisions of each state in respect to the exercise of the power of eminent domain as touching such questions.[1065] The limits of this work forbid a more extended reference to the cases.

§ 452. Assessments and methods of apportionment.

The construction of a drain or ditch is usually considered a local improvement and its cost is, therefore, levied upon the property benefited[1066] according to the measure or standard as suggested in preceding sections,[1067] the measure of "benefits received" being its location as adjoining property,[1068] its propinquity,[1069] its superficial area,[1070] its frontage upon the proposed improvement[1071] or the actual benefits received as determined by evidence produced and bearing upon the question.[1072] The legality of these

[1064] Winkelmann v. Drainage Dist., 24 Ill. App. 242; Culbertson v. Knight, 152 Ind. 121, 52 N. E. 700; Wilson v. Talley, 144 Ind. 74; Poundstone v. Baldwin, 145 Ind. 139.

[1065] Lovell v. Sny Island Levee Drainage Dist., 159 Ill. 188; McCaleb v. Coon Run Drainage & Levee Dist., 190 Ill. 549; Elgin, J. & E. R. Co. v. Hohenshell, 193 Ill. 159; Trittipo v. Beaver, 155 Ind. 652, 58 N. E. 1034. Where the statutes direct damages to be paid out of assessments for benefits, a showing that the total damages will exceed the total benefits may warrant a dismissal of the proceedings. Pittsburgh, C., C. & St. L. R. Co. v. Machler, 158 Ind. 159, 63 N. E. 210; Lancaster v. Leaman, 110 Ky. 251, 61 S. W. 281; Peck v. Watros, 30 Ohio St. 590.

[1066] Gilkerson v. Scott, 76 Ill. 509; People v. Keener, 194 Ill. 16; Cypress Pond Drainage Co. v. Hooper, 59 Ky. (2 Metc.) 350; In re Kingman, 153 Mass. 566, 27 N. E. 778, 12 L. R. A. 417. It is not necessary to determine a measure for the apportionment of the cost of a drain in advance of the levy of an assessment, following City of Lowell v. Oliver, 90 Mass. (8 Allen) 247; Lien v. Norman County Com'rs, 80 Minn. 58, 82 N. W. 1094; Tidewater Co. v. Coster, 18 N. J. Eq. (3 C. E. Green) 518.

[1067] See §§ 337 et seq., supra.

[1068] Spear v. Drainage Com'rs, 113 Ill. 632; Lipes v. Hand, 104 Ind. 503.

[1069] Chambliss v. Johnson, 77 Iowa, 611; Blue v. Wentz, 54 Ohio St. 247.

[1070] Moore v. People, 106 Ill. 376.

[1071] Gray v. Town of Cicero, 177 Ill. 459.

[1072] Fallbrook Irr. Dist. v. Bradley, 164 U. S. 112. An ad valorem assessment of lands benefited will

various methods by which the cost of the ditch or drain is apportioned have been tested and determined.[1073] An apportionment of the cost, if made in a uniform manner upon all property affected, whatever may be the measure or standard for determining its proportion, will be legal and an assessment collected in

be constitutional, not depriving persons assessed of property without due process of law. Reclamation Dist. No. 537 v. Burger, 122 Cal. 442, 55 Pac. 156; Reclamation Dist. No. 108 v. West, 129 Cal. 622, 62 Pac. 272; People v. Wild Cat Drainage Dist. Com'rs, 181 Ill. 177. A landowner subsequently connecting his private drain with a public ditch can be required to pay his proper proportion of the cost of its construction as based upon benefits received. See, also, People v. Drainage Dist. No. 5, 191 Ill. 623, as holding that under such circumstances landowners will be considered as voluntarily included in the drainage district and their lands will, therefore, be subject to the proper proportion of the assessment.

Osborn v. Maxinkuckee Lake Ice Co., 154 Ind. 101, 56 N. E. 33; Beals v. James, 173 Mass. 591, 54 N. E. 245. A failure to receive benefits will relieve land from a liability for the special assessment. Dodge County v. Acom, 61 Neb. 376, 85 N. W. 292; People v. Jefferson County Ct., 56 Barb. (N. Y.) 137; Peck v. Watros, 30 Ohio St. 590.

[1073] Sarber v. Rankin, 154 Ind. 236, 56 N. E. 225. An irregularity in the acceptance of work will not relieve property receiving benefits of a drain from a payment of its proper proportion of the cost. Oliver v. Monona County, 117 Iowa, 43, 90 N. W. 510; Lien v. Norman County Com'rs, 80 Minn. 58, 82 N. W. 1094. "The authority of the legislature to enact drainage laws is derived from the police power, the right of eminent domain or the taxing power, and is undoubted. It is founded in the right of the state to protect the public health and provide for the public convenience and welfare. The authority is uniformly recognized and sustained by the courts upon one of the three grounds. There is not full harmony as to the grounds on which the laws are sustained; some courts placing the power to enact them upon one and some upon another ground. But all agree in sustaining them when enacted in the interest of the public health, convenience or welfare. Where the laws have for their object the reclamation of large tracts of wet and swampy lands for agricultural purposes, they are sustained under the right of eminent domain. The fact that large tracts of otherwise waste lands may be thus reclaimed and made suitable for agricultural purposes is deemed and held to constitute a public benefit. When the object is to drain such lands in the interest of the public health and welfare, such laws are sustained and upheld as a proper exercise of the police power. The test as to the validity of such laws is found in the objects and purposes thereof. When for a purely private purpose, they are invalid and unenforceable. The legislature has no power to exercise the right of eminent domain, the police power or the power of taxation for private purposes; and unless the act un-

the manner provided by law from the property thus charged.[1074] The principles controlling and regulating the enforcement and collection of special assessments will also control this particular one.[1075] Such provisions are generally strictly construed operat-

der consideration has for its objects the furtherance of public interests, it cannot be sustained. In all cases where such laws are authority to provide for assessing the cost and expense of the improvement against the lands benefited follow as a natural result. The power to so assess the cost of the improvements against lands benefited is a necessary and proper incident to the exercise of the power to make the improvement. And a statute providing therefor is not open to the constitutional objection that it is unequal taxation."

[1074] Weinreich v. Hensley, 121 Cal. 647; First Nat. Bank of Sterling v. Drew, 191 Ill. 186, 60 N. E. 856. An assessment including indebtedness incurred before it was made is illegal.

Hammond v. People, 178 Ill. 254. Assessments in excess of the cost as originally determined are, however, illegal. Laverty v. State, 109 Ind. 217; People v. Keener, 194 Ill. 16; Storms v. Stevens, 104 Ind. 46; Lockwood v. Ferguson, 105 Ind. 380; New Orleans Canal & Banking Co. v. City of New Orleans, 30 La. Ann. 1371. An exemption from drainage assessments is illegal.

Clapp v. Minnesota Grass Twine Co., 81 Minn. 511, 84 N. W. 344; Baltimore & O. & C. R. Co. v. Wagner, 43 Ohio St. 75. Notice to the party charged is necessary. State v. Henry, 28 Wash. 38, 68 Pac. 368. School lands are not exempt from their proportionate part of the construction of drainage ditches under Wash. Laws 1895, p. 142.

[1075] Lower Kings River Reclamation Dist. v. McCullah, 124 Cal. 175. It is not necessary to describe land in an assessment list by its smallest legal subdivisions.

Hammond v. People, 178 Ill. 254. Costs incurred in enforcing a lien for drainage assessment will follow the decree.

People v. Keener, 194 Ill. 16. Objections to the collection of a drainage assessment may be made jointly by several landowners where the reasons are the same.

New Eel River Draining Ass'n v. Durbin, 30 Ind. 173; Studabaker v. Studabaker, 152 Ind. 89, 51 N. E. 933. "The complaint proceeds upon the theory that the installment of the benefits assessed against the land of appellant, for the payment of which appellees are proposing to sell her real estate, is absolutely void, for the reason that the ditch has not been completed as provided for under the original specifications. The facts and matters alleged in the complaint and upon which appellant bases her right to an injunction, do not pertain to the original proceedings to establish the ditch. Neither the proceedings under which the work of constructing the ditch was inaugurated, nor the assessments as originally confirmed, nor the final order directing the proposed work to be carried into effect, are challenged, and all of said proceedings or acts of the commissioners, under the facts, must be presumed to have been in all respects regular and as conforming to the requirements of the law. The complaint does not im-

ing as the exercise of an arbitrary power directed against private property.[1076] Official authority to consider applications for review, correction or setting aside of a drain assessment and the procedure in respect to these questions, will depend upon the language of special or local statutes.[1077]

§ 453. Appeals.

The report of the commissioners or viewers upon the questions legally submitted to them is subject to appeal and exception by those who may deem themselves aggrieved and who are entitled to this right.[1078] The ground of appeal or exception should spe-

pute any invalidity to the proceedings establishing the ditch for the reason that the board of commissioners was not invested with jurisdiction over the subject-matter or on account of the absence originally of notice to appellant, whose land is affected by the construction of the improvement. * * * That a landowner cannot, by a suit for an injunction, obtain a review of the assessment of benefits against his land for the construction of a public ditch, is settled by our decisions." Trimble v. Koch, 26 Ohio St. 434; Allyn v. Depew, 28 Ohio St. 619. See, also, chap. VI, subd. II, on Special Assessments.

[1076] Weinreich v. Hensley, 121 Cal. 647; People v. Clayton, 115 Ill. 150. The failure to return a delinquent list to the collector at the proper time will not affect the validity of the proceedings where the necessary notice has been given. Payson v. People, 175 Ill. 267. In a proceeding to collect a delinquent special assessment, a nonresident may show that he received no notice of the proceedings for the organization of the drainage district as required by law. Allerton v. Monona County, 111 Iowa, 560, 82 N. W. 922.

[1077] Scholtz v. Ely, 123 Mich. 541, 82 N. W. 237.

[1078] See, also, authorities cited § 449. Sarber v. Rankin, 154 Ind. 236, 56 N. E. 225; Trittipo v. Beaver, 155 Ind. 652, 58 N. E. 1034; Makeever v. Martindale, 156 Ind. 655, 60 N. E. 341. A remonstrance will not be considered if unaccompanied by the bond required by law to be filed at the same time.

Inwood v. Smith, 156 Ind. 687, 60 N. E. 703; North v. Davisson, 157 Ind. 610, 62 N. E. 447. An essential of a legal appeal is a proper party. Munson v. Blake, 101 Ind. 78; Morgan Civil Tp. v. Hunt, 104 Ind. 590. A remonstrance should be verified. Studabaker v. Studabaker, 152 Ind. 89; Ex parte Sullivan, 154 Ind. 440; In re Wilson, 21 Ky. L. R. 231, 51 S. W. 149. The appeal bond must be filed as required by statute. Lancaster v. Leaman, 21 Ky. L. R. 617, 52 S. W. 963. Appeal authorized under Ky. St. § 2396.

Long v. Ionia Probate Judge, 130 Mich. 338, 89 N. W. 938. A corporation can only appeal when authorized in the manner provided by law. Swan Creek Tp. v. Brown, 130 Mich. 382, 90 N. W. 38. The right to restrain the construction of a drain is

cifically state the error complained of;[1079] indefinite and general charges will not usually be sustained.[1080] The question of all irregularities in the proceedings may be raised unless the time for such action has elapsed,[1081] the party is estopped by his laches or conduct,[1082] has waived any rights either by negative or affirmative conduct,[1083] or has failed to use other remedies that should first be exhausted.[1084] On appeal the presumption is in favor of the correctness of the decision of the lower tribunal.[1085]

dependent upon the ownership of the land. Dressen v. Nicollet County Com'rs, 76 Minn. 290; People v. Watson, 64 N. Y. 167; Stanly v. Watson, 33 N. C. (11 Ired.) 124. To entitle one to an appeal, his interests should have been affected.

[1079] Moffit v. Medsker Draining Ass'n, 48 Ind. 107; Higbee v. Peed, 98 Ind. 420; Meranda v. Spurlin, 100 Ind. 380; Lancaster v. Leaman, 22 Ky. L. R. 1842, 61 S. W. 281. "Any person who is a party to a proceeding and feels aggrieved by any part of the judgment and desires to have that part reviewed must appeal therefrom. If one party appeals from a certain part of the judgment and does not question the balance of it, it does not give those who may be made defendants in the appeal that is prosecuted the right to have the circuit court review the whole judgment that was rendered in the proceeding in the county court."

[1080] Etchison Ditching Ass'n v. Hillis, 40 Ind. 408.

[1081] Elgin, J. & E. R. Co. v. Hohenshell, 193 Ill. 159; Trigger v. Drainage Dist. No. 1, 193 Ill. 230; Cochran v. White, 151 Ind. 435, 51 N. E. 723; Toy v. Craig, 158 Ind. 444, 63 N. E. 796; Oliver v. Monona County, 117 Iowa, 43, 90 N. W. 510; Nishnabotna Drainage Dist. v. Campbell, 154 Mo. 151.

[1082] People v. Chapman, 127 Ill. 387; Trimble v. McGee, 112 Ind. 307; Dunkle v. Herron, 115 Ind. 407; Cass County Com'rs v. Plotner, 149 Ind. 116; Auditor General v. Melze, 124 Mich. 285, 82 N. W. 886. "The appellants stood by, saw these proceedings taken; do not claim to be damaged; their assessments are small; and they took none of the statutory steps to contest the legality of the drains. They are now about completed. Under the repeated decisions of this court we think they are not now in a position to raise the questions." Swan Creek Tp. v. Brown, 130 Mich. 382, 90 N. W. 38.

[1083] Briar v. Jobs Creek Drainage Dist. Com'rs, 185 Ill. 257; People v. Wayne County Drain Com'r, 40 Mich. 745; Hackett v. Brown, 128 Mich. 141, 87 N. W. 102; Kellogg v. Ely, 15 Ohio St. 64. Before the doctrine of estoppel should operate, there should be opportunity for an appeal. See Tinsman v. Monroe County Drain Com'r, 90 Mich. 382.

[1084] Lees v. Drainage Com'rs, 125 Ill. 47; Sanner v. Union Drainage Dist., 175 Ill. 575.

[1085] Lower Kings River Reclamation Dist. v. McCullah, 124 Cal. 175. "It appears from the transcript that a large amount of evidence was offered, both by the defendants contesting and also on behalf of the corporation district, bearing upon the char-

§ 454. Construction.

The manner, the time, and the place, of the construction of a drain or ditch as already suggested in a preceding section,[1086] are discretionary matters with the authorities legally charged, and unless there is a palpable abuse of such discretion, property owners have no right to interfere with the action of the public authorities.[1087] The cost of construction may include the fees of engineers.[1088]

Maintenance. The maintenance of ditches or drains, after their original construction is apportioned in much the same manner as the original cost for the construction,[1089] and the duty of keeping them in repair rests upon those to whom, by law, it is given.[1090]

§ 455. Expenditures in connection with a supply of water.

It is the author's belief that the proper functions of a public corporation are to regulate and govern and that it is neither de-

acter of the land, as well as upon the manner of assessing the same, and the question of relative benefits and whether such assessment was in proportion to the benefits. And the findings of the court on all these questions are in favor of the plaintiff corporation and against said defendants. From an examination of such testimony, it clearly appears that the most that can be said in favor of said defendants is that there is a substantial conflict in such testimony; but there is evidence sufficient to support the findings, and, that being the case, this court will not, under well-established rules, interfere with such findings." But see the case of McKinsey v. Bowman, 58 Ind. 88.

[1086] See § 446, ante.

[1087] State v. Henry County Com'rs, 157 Ind. 96, 60 N. E. 939; Studabaker v. Studabaker, 152 Ind. 89, 51 N. E. 933. It is the duty of the supervising engineer to show that the ditch is completed as provided in the specifications. Zigler v. Menges, 121 Ind. 99.

[1088] Watts v. Gibson County Com'rs, 22 Ind. App. 309, 52 N. E. 825.

[1089] Sarber v. Rankin, 154 Ind. 236, 56 N. E. 225; Campbell v. Dwiggins, 83 Ind. 473. A statute which gives a township trustee the absolute unlimited and final power of providing for the repair of drains upon ex parte proceedings is unconstitutional as taking property without due process of law. Ingerman v. Noblesville Tp., 90 Ind. 393; Roundenbush v. Mitchell, 154 Ind. 616. The cost of maintenance may be apportioned upon the basis of benefits. Citing and following Johnson v. Lewis, 115 Ind. 490; Kirkpatrick v. Taylor, 118 Ind. 329; Zimmerman v. Savage, 145 Ind. 124.

[1090] Sanitary Dist. of Chicago v. Lee, 79 Ill. App. 159. This duty would include the erection of a

sirable nor legal that it engage in undertakings, do those things or transact that business, which, properly, should be left to private enterprise. To govern and regulate efficiently and rightly requires complete disinterestedness, a condition which cannot exist where hope of gain or fear of loss are attendant essentials of certain acts or transactions. It is difficult to separate completely at all times the radically different acts of governing and regulating and engaging in a pursuit or undertaking having for its ultimate purpose the making of a profit. As has been said, "the fundamental powers of a state are limited to safeguarding political and industrial equity between its citizens or the groups of citizens who are created legal persons by its authority. This safeguarding necessarily requires judicial and impartial relations to the subject of control. Such relations can be maintained only where the controlling power has no interest in the subject of control either as "beneficiary, an owner or a user of its services." These, as some of the considerations, have impelled the courts, until comparatively recent times, to withdraw from all public corporations, including municipalities, the legal right to engage in the business of securing and supplying water, either for their own use or that of the individual members of the community. However, since it is claimed that this act is the distribution of a natural product and essential to the good health of the people rather than the manufacture and sale of a commodity, it comes within a legal exercise of the police power and is not to be regarded as a private enterprise to be carefully avoided. As said in a recent case:[1091] "Water-works are public utilities; the power

bridge and its continuous maintenance. Fletcher v. White, 151 Ind. 401, 51 N. E. 482.

[1091] Asher v. Hutchinson Water, Light & Power Co., 66 Kan. 496, 61 L. R. A. 52. See, also, Merrill v. Southside Irr. Co., 112 Cal. 426, 44 Pac. 720; Warner v. Town of Gunnison, 2 Colo. App. 430; White v. Farmers' High Line Canal & Reservoir Co., 22 Colo. 191, 43 Pac. 1028, 31 L. R. A. 828; Smith v. Inhabitants of Lincoln, 170 Mass. 488, 49 N. E. 743; Springfield F. & M. Ins. Co. v. Village of Keeseville, 148 N. Y. 46, 30 L. R. A. 660; David v. Portland Water Committee, 14 Or. 98; Huron Waterworks Co. v. City of Huron, 7 S. D. 9, 30 L. R. A. 848; City of Springville v. Fullmer, 7 Utah, 450, 27 Pac. 577; Metcalfe v. City of Seattle, 1 Wash. St. 297; State v. Snodgrass, 1 Wash. St. 305; Smith v. City of Seattle, 25 Wash. 300; Ellinwood v. City of Reedsburg, 91 Wis. 131.

Smith v. City of Nashville, 88 Tenn. 464, 7 L. R. A. 469. "Nothing should be of greater concern to a municipal corporation than the pres-

to own or otherwise provide a system of water-works conferred upon cities has relation to public purposes and for the public and appertains to the corporation and its political or governmental capacity: they are supported at public expense and are subject to the exclusive control of the city in its governmental capacity for the convenience, health and general welfare of the city." From the standpoint of the expenditure of public moneys, it would be well to consider and follow strictly the legal rights of a public corporation and the purpose and object of organization. A supply of pure and wholesome water at a reasonable cost is the end sought to be attained; logically, it would seem as if this were an object for private undertaking and private consideration, subject to the ever present and sufficient power of the government to regulate and control the time, manner and quality of the supply and the compensation charged.[1092] It is quite commonly conceded, however, at the present time, that public corporations, especially municipalities, have the legal right to make provision for a sufficient supply of water for their own use.[1093] Whether they have such right to the

ervation of the good health of the inhabitants. Nothing can be more conducive to that end than a regular and sufficient supply of wholesome water which common observation teaches all men can be furnished in a populous city only through the instrumentality of well equipped waterworks, hence, for a city to meet such a demand is to perform a public act and confer a public blessing." * * * It cannot be held that the city in doing so is engaging in a private enterprise or performing a municipal function for a private end.

[1092] San Diego Land & Town Co. v. National City, 174 U. S. 739; Rogers Park Water Co. v. Fergus, 180 U. S. 624; Los Angeles City Water Co. v. City of Los Angeles, 88 Fed. 720; Davenport v. Kleinschmidt, 6 Mont. 502, 13 Pac. 254.

[1093] Illinois Trust & Sav. Bank v. Arkansas City Water Co., 67 Fed. 196; Intendant & Town Council of Livingston v. Pippin, 31 Ala. 542; City of Rome v. Cabot, 28 Ga. 50. A municipal corporation possessing the usual powers expressly granted by the legislature has the implied power to make such contracts in its corporate capacity as the local authorities may regard essential and necessary for the public welfare, including a contract for the construction of a system of waterworks for the purpose of supplying the city and its inhabitants with water.

Murphy v. City of Waycross, 90 Ga. 36; Dutton v. City of Aurora, 114 Ill. 138; City of Vincennes v. Callender, 86 Ind. 484. A municipality may, under Ind. statutes, become part stockholder in a private corporation authorized to construct waterworks.

City of Lexington v. Lafayette County Bank, 165 Mo. 671. The au-

same extent to furnish and supply water for private consumption is more questionable.[1094] In either case the weight of authority is to the effect that a municipal corporation in supplying itself and its inhabitants with water "is not exercising its governmental or legislative powers, but its business or proprietary powers."[1095] The law in this respect has been conclusively set-

thority to provide a city with water for the extinguishment of fire and the convenience of the inhabitants generally implies the power to levy a tax for the purpose of meeting the expense incurred in carrying out such a power. Atlantic City Waterworks Co. v. Atlantic City, 48 N. J. Law, 378, 6 Atl. 24; City of Memphis v. Memphis Water Co., 52 Tenn. (5 Heisk.) 525; City of Brenham v. Brenham Water Co., 67 Tex. 542. A municipality can retain the exclusive privilege of supplying water for its own use and that of the community. The court say in part: "The city having been given such power as we have stated (to construct waterworks) it must be understood that it was intended, not only that it might use it, but that it should use it, if deemed necessary, for the public welfare, so long as the power is possessed by it, i. e., until taken away by the legislature. Will not the contract under consideration, if valid, have the effect not only to embarrass the city government in the exercise of the power conferred upon it but to withdraw from it the right to provide, in any other authorized way, water for public purposes and use of its inhabitants which was the sole purpose for which the power to erect, maintain, and regulate water-works was given to it? It seems so to us; for, as we have before said, the contract in effect, assumes to give an exclusive right, —assumes to surrender to a private corporation, for a period of twenty-five years, the power which the legislature conferred on the municipal government. The power given to a municipal corporation to contract in relation to a given subject-matter does not carry the implication that it may contract, even with reference to that, so as to render it unable in the future so to control any municipal matter over which it is given power to legislate as may be deemed best." City of Ysleta v. Rabbitt (Tex. Civ. App.) 28 S. W. 702; City of Austin v. Nalle, 85 Tex. 520; City of Springville v. Fullmer, 7 Utah, 450; Attorney General v. City of Eau Claire, 37 Wis. 400; Ellinwood v. City of Reedsburg, 91 Wis. 131.

[1094] See cases cited generally this section. Wainwright v. Queens County Water Co., 78 Hun, 146, 28 N. Y. Supp. 987; Luzerne Water Co. v. Toby Creek Water Co., 148 Pa. 568; Brymer v. Butler Water Co., 172 Pa. 489; White v. City of Meadville, 177 Pa. 643, 34 L. R. A. 567.

[1095] Safety Insulated Wire & Cable Co. v. City of Baltimore (C. C. A.) 66 Fed. 140; Little Falls Elec. & Water Co. v. City of Little Falls, 102 Fed. 663; City of Greenville v. Greenville Waterworks Co., 125 Ala. 625; Wagner v. City of Rock Island, 146 Ill. 139, 34 N. E. 545, 21 L. R. A. 519; City of Newport v. Com., 21 Ky. L. R. 42, 50 S. W. 845, 51 S. W. 433. A franchise tax required by Ky. St. § 4077, must be paid by a municipality operating waterworks

tled by a recent decision of the circuit court of appeals of the eighth circuit, written by Judge Sanborn.[1096] The use of the power when granted is supposedly based upon the exercise of the power which has for its purpose the protection of public and private property and the preservation of the good health of the community.[1097]

(a) Character of the power; a continuing one and to be expressly granted. The power when granted is regarded by the courts as a continuing one, discretionary in its character, and one, the exercise of which, or a failure to do so, will not be interfered with by the courts;[1098] provided the action whatever it may be is taken in a legal manner. Assuming the legal right to ex-

and selling water to private consumers. Blades v. Detroit Water Com'rs, 122 Mich. 366; State v. City of Great Falls, 19 Mont. 518, 49 Pac. 15; Kearney v. Borough of West Chester, 199 Pa. 392, 49 Atl. 227. But see Smith v. City of Nashville, 88 Tenn. 464, 7 L. R. A. 469.

[1096] Illinois Trust & Sav. Bank v. Arkansas City, 76 Fed. 271, 34 L. R. A. 518. We quote in part from his decision: "First, it ignores the settled distinction between the governmental, or public, and the proprietary, or business, powers of a municipality, and erroneously seeks to apply to the exercise of the latter a rule which is only applicable to the exercise of the former. A city has two classes of powers,—the one legislative, public, governmental, in the exercise of which it is a sovereignty and governs its people; the other proprietary, quasi private, conferred upon it, not for the purpose of governing its people, but for the private advantage of the inhabitants of the city and of the city itself as a legal personality. In the exercise of the powers of the former class it is governed by the rule here invoked. In their exercise it is ruling its people and is bound to transmit its powers of government to its successive sets of officers unimpaired. But in the exercise of the powers of the latter class it is controlled by no such rule, because it is acting and contracting for the private benefit of itself and its inhabitants, and it may exercise the business powers conferred upon it in the same way, and in their exercise it is to be governed by the same rules that govern a private individual or corporation. In contracting for water works to supply itself and its inhabitants with water, the city is not exercising its governmental or legislative powers, but its business or proprietary powers. The purpose of such a contract is not to govern its inhabitants, but to obtain a private benefit for the city itself and its denizens." But see to the contrary, Lehigh Water Co.'s Appeal, 102 Pa. 515.

[1097] Hackensack Water Co. v. City of Hoboken, 51 N. J. Law, 220; Mauldin v. City Council of Greenville, 33 S. C. 1, 11 S. E. 434, 8 L. R. A. 291.

[1098] Fidelity Trust & Guaranty Co. v. Fowler Water Co., 113 Fed. 560; Warren v. City of Chicago (Ill.) 9 N. E. 883; Janeway v. City of Duluth, 65 Minn. 292; Lawrence v.

pend moneys for this purpose, it is not regarded as one of those powers included in a common grant.[1099] To be legally exercised the power must be expressly given;[1100] it cannot be implied from

Freeland, 55 Hun, 610, 8 N. Y. Supp. 807; Skaneateles Waterworks Co. v. Village of Skaneateles, 161 N. Y. 154, 46 L. R. A. 687; Lehigh Water Co.'s Appeal, 102 Pa. 515, affirmed 121 U. S. 388; Nalle v. City of Austin (Tex. Civ. App.) 21 S. W. 375; Lucia v. Village of Montpelier, 60 Vt. 537, 1 L. R. A. 169.

[1099] Wagner v. City of Rock Island, 146 Ill. 139, 21 L. R. A. 519; Savidge v. Village of Spring Lake, 112 Mich. 91; White v. City of Meadville, 177 Pa. 643, 34 L. R. A. 567; Smith v. Town of Westerly, 19 R. I. 437; Huron Waterworks Co. v. City of Huron, 7 S. D. 9, 62 N. W. 975, 30 L. R. A. 848; Yesler v. City of Seattle, 1 Wash. St. 308, and Seymour v. City of Tacoma, 6 Wash. 138, hold that a provision for waterworks is within the title of an act providing for the construction of internal improvements. But see Lake Charles Ice, Light & Waterworks Co. v. City of Lake Charles, 106 La. 65.

[1100] City of Walla Walla v. Walla Walla Water Co., 172 U. S. 1, affirming 60 Fed. 957. Subsequent legislation held as repealing former provisions requiring a vote of taxpayers in order to authorize the making of a contract by a city for a supply of water.

National Foundry & Pipe Works v. Oconto Water Co., 52 Fed. 29; Los Angeles City Water Co. v. City of Los Angeles, 88 Fed. 720. The legislature if it possesses the right originally to grant a power to a subordinate public corporation may subsequently ratify an unauthorized exercise of it. See, also, as holding the same principle, Mayo v. Dover & F. V. Fire Co., 96 Me. 539. But see Squire v. Preston, 82 Hun, 88, 31 N. Y. Supp. 174.

National Tube-Works Co. v. City of Chamberlain, 5 Dak. 54. Where the general power is given to construct and maintain a system of waterworks, an ordinance is unnecessary to carry into effect this power unless the city charter so requires.

Dutton v. City of Aurora, 114 Ill. 138. Such authority will be liberally construed. Wagner v. City of Rock Island, 146 Ill. 139, 21 L. R. A. 519; Taylor v. McFadden, 84 Iowa, 262, 50 N. W. 1070. A majority of the votes cast only is required under the provisions of the Iowa Code, § 471, not a majority of all the legal voters of the city. City of Burrton v. Harvey County Sav. Bank, 28 Kan. 390; Inhabitants of Rockport v. Webster, 174 Mass. 385; Lewick v. Glazier, 116 Mich. 493, 74 N. W. 717; Webb City & C. Waterworks Co. v. City of Carterville, 142 Mo. 101; Conger v. Summit Tp., 52 N. J. Law, 483, 19 Atl. 966. Construing laws N. J. 1888, p. 366, relating to the procurement of a supply of water for municipal corporations.

Mueller v. Egg Harbor City, 55 N. J. Law, 245, 26 Atl. 89; Hornby v. City of Beverly, 48 N. J. Law, 110, assent of voters necessary; Lewis v. Moore, 54 N. J. Law, 121; People v. Bird, 55 Hun, 610, 8 N. Y. Supp. 801; In re Long Island Water Supply Co., 30 Abb. N. C. 36, 24 N. Y. Supp. 807; City of Charlotte v. Shepard, 120 N. C. 411; Egerton v. Goldsboro Water Co., 126 N. C. 93; Lehigh

general grants of authority though some few cases hold to the contrary.[1101] The principle controlling the exercise of such a power seems to be that public corporations can legally secure a system for a supply of water when either granted in express terms the right or when given in express terms the power to do certain acts or perform certain functions that in order to do or perform, such a water system will be regarded as one of the usual, proper and necessary agencies for effecting the result and carrying out the powers thus granted.[1102] Many municipal char-

Water Co.'s Appeal, 102 Pa. 515, affirmed 121 U. S. 388; White v. City of Meadville, 177 Pa. 643, 34 L. R. A. 567; Arnold v. City of Pawtucket, 21 R. I. 15; City of Memphis v. Memphis Water Co., 67 Tenn. (8 Baxt.) 587.

Nalle v. City of Austin (Tex. Civ. App.) 21 S. W. 375. The grant of power to erect waterworks will not authorize the construction of a dam for the purpose of supplying power not only for such waterworks, but for general and private purposes. City of Austin v. McCall, 95 Tex. 565, 68 S. W. 791; Ogden City v. Bear Lake & River Water-Works & Irr. Co., 16 Utah, 440, 52 Pac. 697, 41 L. R. A. 305. The converse principle is also true that where a municipality has established a system of waterworks it cannot sell the same except upon direct authority. Yesler v. City of Seattle, 1 Wash. St. 308; Seymour v. City of Tacoma, 6 Wash. 138; Attorney General v. City of Eau Claire, 37 Wis. 400. If the grant to construct waterworks including a dam gives the optional right to permit such dam to be used for private purposes, the statute is invalid.

[1101] City of Greenville v. Greenville Waterworks Co., 125 Ala. 625; Heilbron v. City of Cuthbert, 96 Ga. 312. The right to contract a debt for the construction of waterworks and electric light plant will be implied from the general grant of the right "to do all things for the benefit of the city."

Lake Charles Ice, Light & Waterworks Co. v. City of Lake Charles, 106 La. 65; Webb City & C. Waterworks Co. v. Webb City, 78 Mo. App. 422; City of Memphis v. Memphis Water Co., 52 Tenn. (5 Heisk.) 495; Ellinwood v. City of Reedsburg, 91 Wis. 131. "Did the city of Reedsburg, under its charter, possess power to build a system of waterworks? * * * It is not necessary to seek for an express delegation of power to the city to build a waterworks * * * plant in order to determine whether such power exists, for the general power in respect to police regulations, the preservation of the public health and the general welfare includes the power to use the usual means of carrying out such power, which includes municipal water * * * service." Citing Rushville Gas Co. v. City of Rushville, 121 Ind. 206, 23 N. E. 72, 6 L. R. A. 315; City of Crawfordsville v. Braden, 130 Ind. 149, 28 N. E. 849, 14 L. R. A. 268, and Mauldin v. City Council of Greenville, 33 S. C. 1, 11 S. E. 434, 8 L. R. A. 291.

[1102] Intendant & Town Council of

ters have clauses giving to the authorities the power to provide for the cleanliness of the people or for protection from fire.

(b) The power a discretionary one. In common with many other powers granted municipal or public corporations by the state, the securing of a water supply both in its extent and manner is a discretionary one; the exercise or nonexercise of such a power is rarely interfered with by the courts.[1103] The language of the grant from the state, however, may be of such a character as to be regarded by the courts as mandatory, and the performance of the acts accompanying the power a duty to be enforced in a proper proceeding.

§ 456. Manner of exercise of the power.

When the power is granted, it generally takes one of two forms or the manner of its exercise may be optional in respect to the

Livingston v. Pippin, 31 Ala. 542; City of Greenville v. Greenville Water-Works Co., 125 Ala. 625; Grace v. City of Hawkinsville, 101 Ga. 553; Webb City & C. Waterworks Co. v. Webb City, 78 Mo. App. 422. See, also, cases cited in the following note.

[1103] Janeway v. City of Duluth, 65 Minn. 292. "It is alleged in the complaint that there is no necessity for a new water plant; that the present plant owned by a private corporation is adequate and sufficient for the needs of the city and its people and that the new plant will entail endless expense on the taxpayers. Whether or not a new water plant is necessary, is a legislative question; not a judicial one. The court cannot substitute its judgment for that of the city council and the voters of the city."

Arnold v. City of Pawtucket, 21 R. I. 15; Nalle v. City of Austin (Tex. Civ. App.) 21 S. W. 375; Lucia v. Village of Montpelier, 60 Vt. 537, 1 L. R. A. 169. "When the legislature delegates to an incorporated village power, without limitation, to supply itself with water for fire and domestic uses, such power rests in the discretion of the voters of the village in respect to the amount of money to be expended on aquaducts and the supply of water, if exercised in good faith and for a proper municipal purpose." See, also, Nalle v. City of Austin (Tex.) 22 S. W. 668, which holds that "where a city has power under its charter to issue bonds for the purpose of erecting city waterworks, a court will not interfere on the ground that the proposed waterworks are greater than the present needs of the city demand, unless there is an undoubted excess of authority and the abuse of the discretion of the city council is palpable; in such a case, the proposed constructions must speak for themselves and no inquiry will be made from other sources as to the hidden motives of the city council."

Day v. City of Austin (Tex. Civ. App.) 22 S. W. 757. In an action

two.[1104] The power, if optional, when exercised in either of the two ways suggested later, should be considered conclusive,[1105] though some cases hold that a grant of a franchise, not exclusive, to private persons, will not prevent a municipality from subsequently erecting waterworks to supply water for its own use and that of private consumers; these holdings being based upon

to restrain the issue of bonds by a city authorized by vote of the taxpayers as required by law, evidence is immaterial as to the motives prompting individual taxpayers to vote in favor of the issue of the bonds.

[1104] National Foundry & Pipe Works v. Oconto Water Co., 52 Fed. 29. An optional power in this case not held granted by the charter of the city. Andrews v. National Foundry & Pipe Works (C. C. A.) 61 Fed. 782; Westerly Waterworks Co. v. Town of Westerly, 80 Fed. 611. The right to secure a supply of water given a public corporation does not carry with it the power to grant an exclusive right to a private company to construct waterworks. See, also, Id., 75 Fed. 181, following 19 R. I. 437, 35 Atl. 526; City of Austin v. Bartholomew (C. C. A.) 107 Fed. 349; Anoka Waterworks, Elec. Light & P. Co. v. City of Anoka, 109 Fed. 580; Donahue v. Morgan, 24 Colo. 389, 50 Pac. 1038. A municipality may secure this supply partly through contract with private individuals and partly through a system of public waterworks.

Farnham, Waters, § 147. "The plan which is easiest and, in most cases, most feasible, is to contract for a supply by means of a plant which is to be constructed without expense to the municipality except to pay for the water which is delivered to it under the contract. This plan relieves the municipality from the necessity of investing large amounts of capital which it is not always in a condition to invest; and also relieves it from the necessity of providing officers to look after the construction and operation of the plant, its maintenance, and the collection of the revenue. Contracts for a supply of this kind frequently give the municipality the option to purchase the plant at a time more or less remote, and the question then arises as to the duty or ability of the municipality to carry out its contract. The plan which is attended with most expense and inconvenience to the municipality is that of constructing its own plant. The questions which will arise in the acquisition of rights of way and water supply under an attempt to construct a plant of its own are similar to those which will arise in similar attempts by private corporations."

[1105] Helena Consol. Water Co. v. Steele, 20 Mont. 1, 37 L. R. A. 412; Atlantic City Water Works Co. v. Atlantic City, 39 N. J. Eq. (12 Stew.) 367; Warren Water Co. v. Borough of Warren, 200 Pa. 504, 50 Atl. 250; Wilson v. Borough of Rochester, 180 Pa. 509; White v. City of Meadville, 177 Pa. 643, 34 L. R. A. 567; Metzger v. Borough of Beaver Falls, 178 Pa. 1; Welsh v. Borough of Beaver Falls, 186 Pa. 578; Carlisle Gas & Water Co. v. Carlisle Water Co., 188 Pa. 51. See, also, Id., 182 Pa. 17;

specific charter or statutory provisions.[1106] The corporation may be given the right to directly expend public moneys,[1107] either

Tyrone Gas & Water Co. v. Borough of Tyrone, 195 Pa. 566; Troy Water Co. v. Borough of Troy, 200 Pa. 453.

[1106] Lehigh Water Co. v. Easton, 121 U. S. 388; Westerly Waterworks v. Town of Westerly, 80 Fed. 611; Bienville Water Supply Co. v. City of Mobile, 95 Fed. 539; Id., 175 U. S. 109, and Skaneateles Water Co. v. Village of Skaneateles, 184 U. S. 345, construing specific ordinances and franchises which are held not to convey exclusive right or to prevent the municipality in such case from constructing its own waterworks. Colby University v. Canandaigua, 96 Fed. 449; City of Helena v. Helena Waterworks Co. (C. C. A.) 122 Fed. 1; Thomas v. City of Grand Junction, 13 Colo. App. 80; Long v. City of Duluth, 49 Minn. 280; Janeway v. City of Duluth, 65 Minn. 292; Syracuse Water Co. v. City of Syracuse, 116 N. Y. 167, 5 L. R. A. 546; In re City of Brooklyn, 143 N. Y. 596, 26 L. R. A. 270; City of Austin v. Nalle, 85 Tex. 520; North Springs Water Co. v. City of Tacoma, 21 Wash. 517, 47 L. R. A. 214.

[1107] Continental Const. Co. v. City of Altoona (C. C. A.) 92 Fed. 822; Thomas v. City of Grand Junction, 13 Colo. App. 80; Donahue v. Morgan, 24 Colo. 389; National Tube Works Co. v. City of Chamberlain, 5 Dak. 54; People v. Sherman, 83 Ill. 165; Hughes v. City of Momence, 163 Ill. 535; Taylor v. McFadden, 84 Iowa, 262; Young v. City of St. Louis, 47 Mo. 492. Where a statute authorizes the laying of water mains whenever the council shall declare the laying of the same necessary, the passage of a city ordinance directing the laying of a specific water main is equivalent to the statutory declaration of necessity.

Alter v. City of Cincinnati, 56 Ohio St. 47, 35 L. R. A. 737. The ownership of a water plant, it is here held, must be in the municipality alone; a joint ownership with private persons not permitted. Moran v. Thompson, 20 Wash. 525, 56 Pac. 29. But see Dullanty v. Town of Vaughn, 77 Wis. 38. The legislature may create a local board authorized and empowered to construct and maintain waterworks. A municipality in such a case is deprived of the power to act in this respect. See the following cases: Coyle v. Gray, 7 Houst. (Del.) 44, 30 Atl. 728. An act of the legislature establishing a board of water commissioners is constitutional although it gives to such board the full charge and control of a municipal water plant already constructed.

Wells v. City of Atlanta, 43 Ga. 67; Springfield Water Com'rs v. People, 137 Ill. 660. Such a statute is subject to repeal. Detroit Water Com'rs v. Detroit Citizens' St. R. Co., 131 Mich. 1, 90 N. W. 657, 91 N. W. 171; Dickinson v. City of Poughkeepsie, 75 N. Y. 65; Kingsley v. City of Brooklyn, 78 N. Y. 200.

David v. Portland Water Committee, 14 Or. 98. City of Nashville v. Hagan, 68 Tenn. (9 Baxt.) 495. The control of the waterworks may be jointly vested in such a water board and the municipal council. Austin v. McCall (Tex. Civ. App.) 67 S. W. 192.

those in hand,[1108] those secured by issuing bonds[1109] or by incurring an indebtedness, in the construction of a water plant; [1110] or

[1108] Fergus Falls Water Co. v. City of Fergus Falls, 65 Fed. 586; City of North Platte v. North Platte Waterworks Co., 56 Neb. 403; Hornby v. City of Beverly, 48 N. J. Law, 110. Assent of voters necessary.

[1109] Thomas v. City of Grand Junction, 13 Colo. App. 80, 56 Pac. 665. The power to sell bonds will be implied from the grant of authority to issue them.

Greeley v. City of Jacksonville, 17 Fla. 174; Dutton v. City of Aurora, 114 Ill. 138; Culbertson v. City of Fulton, 127 Ill. 30; Daily v. City of Columbus, 49 Ind. 169; Brady v. Moulton, 61 Minn. 185; Daniels v. Long, 111 Mich. 562. Where a statutory provision requires an affirmative vote of two-thirds of the electors voting at a general election, to issue bonds for the purpose of constructing waterworks, there should be an affirmative vote of two-thirds of the whole number of votes cast at such election; not merely two-thirds of the number voting on the single question of the issue of bonds.

State v. Babcock, 19 Neb. 223; State v. Babcock, 20 Neb. 522; State v. Babcock, 25 Neb. 500; Sweet v. City of Syracuse, 129 N. Y. 337; People v. Parmerter, 158 N. Y. 385; Elyria Gas & Water Co. v. Elyria, 57 Ohio St. 374; State v. Town of Newberry, 47 S. C. 418; City of Austin v. Nalle, 85 Tex. 520. The power to make bonds negotiable will be implied from the authority to issue them. See, also, cases cited under §§ 184 et seq., supra, relative to the issuing of negotiable securities upon consent of voters.

[1110] Dutton v. City of Aurora, 114 Ill. 138; Brady v. Moulton, 61 Minn. 185; Sweet v. City of Syracuse, 129 N. Y. 337; Miles v. Benton Tp., 11 S. D. 450. "The only important question presented is whether a civil township corporation can, under the constitution, be clothed with power to construct and maintain a system of waterworks adapted to the needs and conditions prevailing within its boundaries. We are not called upon to decide whether or not the law contains any particular provision which conflicts with the constitution, or which is not embraced within the title of the original act; but is the law as amended, in its entirety, void for the reason that the legislature is forbidden by the constitution from conferring upon civil township corporations the power to establish waterworks at the expense of their taxpayers? It would startle the profession and general public to suggest that an incorporated city in this state cannot be authorized to construct waterworks by means of an artesian well or what is extremely doubtful that article ten of the constitution was intended to apply to civil townships. The only limitation upon legislative power therein, affecting the proposition under discussion, is that 'no tax or assessment shall be levied or collected, or debt contracted by municipal corporations, except in pursuance of law for public purposes specified by law.' It will not be contended that an incorporated city may not expend its revenues in securing a water supply by sinking one or more artesian wells. It would be difficult to imagine any method of expending its rev-

it may be authorized to secure a supply through private enterprise either by a contract for such supply[1111] or by the grant of

enues for a more strictly public purpose. What possible distinction can be drawn between a city and a township in this respect. The powers which may be conferred upon a public corporation are not dependent upon the number or occupations of its inhabitants. It is quite as necessary and proper that people living in a civil township should have a sufficient supply of wholesome water for domestic uses as that people residing in an incorporated town or city should have such supply. We are aware of no constitutional provision which precludes the legislature from authorizing either of these classes of corporations to expend their revenues in supplying their inhabitants with water for all the uses named in the law under consideration with the possible exception of manufacturing purposes. * * * The maintaining of a public water tank, as provided for in the act, is in itself a sufficient benefit to all the taxpayers of a civil township to warrant the construction of an artesian well at the public expense." Faulkner v. City of Seattle, 19 Wash. 320.

[1111] Such a contract may be void in respect to some of its provisions and yet enforceable as to others. See Illinois Trust & Sav. Bank v. Arkansas City (C. C. A.) 76 Fed. 271, 34 L. R. A. 518; Fidelity Trust & Guaranty Co. v. Fowler Water Co., 113 Fed. 560; Gold v. City of Peoria, 65 Ill. App. 602; City of Quincy v. Bull, 106 Ill. 337; City of Valparaiso v. Valparaiso City Water Co., 30 Ind. App. 316, 65 N. E. 1063, and Columbia Water Power Co. v. City of Columbia, 5 S. C. (5 Rich.) 225; Edwards County v. Jennings (Tex. Civ. App.) 33 S. W. 585. A contract cannot include a provision by which certain private individuals are to be supplied gratuitously.

Moffett v. City of Goldsborough (C. C. A.) 52 Fed. 560, reversing 49 Fed. 213; Andrews v. National Foundry & Pipe Works, 61 Fed. 782; Santa Ana Water Co. v. Town of San Buenaventura, 65 Fed. 323. A contract for the supply of water to a municipality where one of the municipal officers is interested in the water company is void. See, also, Borough of Milford v. Milford Water Co., 124 Pa. 610, 3 L. R. A. 122, which holds such a contract void when a majority of the city council are stockholders in the water company.

Illinois Trust & Sav. Bank v. Arkansas City (C. C. A.) 76 Fed. 271, 34 L. R. A. 518; Fidelity Trust & Guaranty Co. v. Fowler Water Co., 113 Fed. 560. The acts required to be done under the terms of such a contract general in its terms are usually left to discretionary negotiations between the parties interested and their determination will not ordinarily be interfered with by the courts. People v. McClintock, 45 Cal. 11. The authority to make such a contract does not carry with it the implied power for the purchase of a site upon which to erect waterworks.

Davenport Water Co. v. City of Davenport, 64 Iowa, 55; City of Vincennes v. Callender, 86 Ind. 484; Nanley v. Emlen, 46 Kan. 655. The power to make such contract carries with it the right to impose a tax

an exclusive franchise or license for the construction of a water

for the payment of the contract obligation.

Conery v. New Orleans Waterworks Co., 41 La. Ann. 910; Webb City & C. Waterworks Co. v. Webb City, 78 Mo. App. 422; Davenport v. Kleinschmidt, 6 Mont. 502; City of North Platte v. North Platte Waterworks Co., 56 Neb. 403; City of Broken Bow v. Broken Bow Waterworks Co., 57 Neb. 548. The fact that some of the municipal officers were formerly stockholders and officers of a water company will not invalidate a contract made between such water company and the municipality.

Flemming v. Jersey City (N. J. Law) 42 Atl. 845. When such a contract involves the expenditure of nearly eight millions of dollars, a requirement for a deposit of one hundred thousand dollars by each bidder is not unreasonable. Atlantic City Waterworks Co. v. Atlantic City, 48 N. J. Law, 378; Passaic Water Co. v. City of Paterson, 65 N. J. Law, 472; Arnold v. City of Pawtucket, 21 R. I. 15; Palestine Water & Power Co. v. City of Palestine, 91 Tex. 540, 40 L. R. A. 203. But see the following cases construing the contract provisions suggested: City of Valparaiso v. Valparaiso City Water Co., 30 Ind. App. 316, 65 N. E. 1063 (hydrant rentals); Lake Charles Ice, Light & Waterworks Co. v. City of Lake Charles, 106 La. 65 (contract consideration); Alpena City Water Co. v. City of Alpena, 130 Mich. 518, 90 N. W. 323 (claim for reduced taxes); City of Grand Haven v. Grand Haven Waterworks, 119 Mich. 652 (use of hydrants for fire purposes); State v. City of Kearney, 49 Neb. 325, affirmed 49 Neb. 337 (rent for additional hydrants); Raton Waterworks Co. v. Town of Raton, 9 N. M. 70 (water rentals).

See, also, the following cases considering contract claims for reduced taxation largely on account of some special service rendered a municipality. Bartholomew v. City of Austin (C. C. A.) 85 Fed. 359; Maine Water Co. v. City of Waterville, 93 Me. 586, 49 L. R. A. 294; Ludington Water Supply Co. v. City of Ludington, 119 Mich. 480; Utica Waterworks Co. v. City of Utica, 31 Hun (N. Y.) 427; Monroe Waterworks Co. v. City of Monroe, 110 Wis. 11.

Little Falls Elec. & Water Co. v. City of Little Falls, 74 Minn. 197. A contract clause is invalid providing that in consideration of plaintiffs furnishing a certain supply of water for such purposes, the city should pay all the taxes on plaintiffs' waterworks assessed for city purposes, as violating constitution, art. 9, §§ 1 and 3, relating to the uniformity and equality of taxation. The court said: "The city had no authority to exempt this property from taxation or to commute the tax by accepting services in lieu of it. If a municipality can bind itself by any such contract, it would result in bartering away its taxing power. We may go further, and say that under the constitution the legislature itself could not grant a city authority to make any such contract. If a city could make such contracts, it is easy to see how, under the guise of contracts for the performance of some public service, the city council could relieve much private property from a large part of its just share of the burden of taxation for city purposes. The city, having had the benefit of a supply of water for city purposes, is

plant and the carrying on of the business,[1112] retaining the power to supervise, control in all respects the management and operation of the undertaking,[1113] though limited by the application of the principle that such a contract, license or franchise is protected against any impairment of its obligation.[1114] But such contract or franchise involves the due performance by the private water company of its obligation, namely, the rendering of good service, including both the quantity and quality of water and the manner of service;[1115] and such a corporation is usually regarded as a

bound to pay its reasonable value, but the plaintiff cannot recover on this void provision of the ordinance."

[1112] Andrews v. National Foundry & Pipe Works (C. C. A.) 61 Fed. 782; American Waterworks Co. v. Farmers' Loan & Trust Co. (C. C. A.) 73 Fed. 956; Fidelity Trust & Guaranty Co. v. Fowler Water Co., 113 Fed. 560; City of Valparaiso v. Gardner, 97 Ind. 1, 49 Am. Rep. 416; Cain v. City of Wyoming, 104 Ill. App. 538. In this case such right was held a license rather than a franchise. Village of Bolivar v. Bolivar Water Co., 62 App. Div. 484, 70 N. Y. Supp. 750; Gas & Water Co. of Downingtown v. Borough of Downingtown, 175 Pa. 341. See, also, later sections on exclusive franchises.

[1113] Spring Valley Waterworks v. Schottler, 110 U. S. 347; Columbus Waterworks Co. v. Long, 121 Ala. 245; San Diego Water Co. v. City of San Diego, 59 Cal. 517; City of Danville v. Danville Water Co., 178 Ill. 299; Danville Water Co. v. City of Danville, 186 Ill. 326, affirmed 180 U. S. 619; Rogers Park Water Co. v. Fergus, 178 Ill. 571; Freeport Water Co. v. City of Freeport, 186 Ill. 179, affirmed 180 U. S. 587; City of Leavenworth v. Leavenworth City & Ft. Leavenworth Water Co., 62 Kan. 643; Inhabitants of Stoughton v. Paul, 173 Mass. 148; State Trust Co. v. City of Duluth, 70 Minn. 257; State v. City of Crete, 32 Neb. 568; American Waterworks Co. v. State, 46 Neb. 194, 30 L. R. A. 447; City of Knoxville v. Knoxville Water Co., 107 Tenn. 647, 61 L. R. A. 888, affirmed 189 U. S. 434. See, also, authorities cited under sections on Exclusive Franchises, post.

[1114] See cases cited in preceding note and authorities cited in note, 61 L. R. A. pp. 102 et seq. Inhabitants of West Springfield v. West Springfield Aqueduct Co., 167 Mass. 128; Warsaw Waterworks Co. v. Village of Warsaw, 16 App. Div. 502, 44 N. Y. Supp. 876.

[1115] See authorities cited in sections upon the right of a municipality to grant exclusive franchises; Foster v. City of Joliet, 27 Fed. 899, affirmed U. S. Sup. Ct. by divided court in 30 Law. Ed. 942; Lanning v. Osborne, 76 Fed. 319; City of Austin v. Bartholomew, 107 Fed. 349; Capital City Water Co. v. City Council of Montgomery, 92 Ala. 366; Gold v. City of Peoria, 65 Ill. App. 602; Belfast Water Co. v. City of Belfast, 92 Me. 52, 47 L. R. A. 82; City of St. Cloud v. Water, Light & Power Co., 88 Minn. 329, 92 N. W. 1112. "The obligations of the parties as set out in the ordinance, constitute a contract. The city was enabled to

public quasi corporation with a special duty to perform which can be enforced by the proper authorities.[1116]

§ 457. Purchase of water plant already constructed.

The specific grant of the power to establish and maintain a water supply has been held to include the power to purchase from private persons a plant wholly or partially constructed and in

enter into such obligation by virtue of its charter powers and the general laws of the state, and was endowed with the right to construct, or cause to be constructed, a water system for the benefit of its inhabitants, and had control of its streets and could contract with reference to their use for the purpose of extending the system. In the exercise of such power the city entered into a contract, and granted the privilege of operating and maintaining a system of waterworks within its streets for the period of thirty years and the right to furnish water to its inhabitants at certain specified rates. In consideration of this privilege, the grantees agreed to extend the system purchased by the city to furnish water without charge for certain specific purposes, and, in connection with other things, to furnish daily 3,000,000 gallons of pure water for domestic purposes. The obligations thus entered into were mutual. Upon the one hand, the grantees, their successors and assigns, would be protected by the courts in the enjoyment of their rights,—for instance, in the collection of the hydrant rentals; on the other hand, the courts of the state are open to the city to secure the enforcement of its rights. No serious question can arise as to the nature of the contract obligation nor as to the jurisdiction of the court to administer relief. That the city is entitled to some relief for the long and persistent failure and refusal of the grantees and their successors to furnish water in accordance with their agreement is not seriously doubted but it is claimed that the city has not by its complaint, set forth a condition which entitled it to the relief prayed for, viz., a rescission of the contract and forfeiture of the right to occupy the streets for the purposes therein expressed. The right of the city to maintain this action does not necessarily rest upon the express terms

[1116] Bienville Water Supply Co. v. City of Mobile, 112 Ala. 260, 33 L. R. A. 59; Rogers Park Water Co. v. Fergus, 178 Ill. 571, affirmed 180 U. S. 624; City of Danville v. Danville Water Co., 180 Ill. 235. See, also, McCrary v. Beaudry, 67 Cal. 120.

Freeport Water Co. v. City of Freeport, 186 Ill. 179, affirmed 180 U. S. 587. City of Danville v. Danville Water Co., 178 Ill. 299; Danville Water Co. v. City of Danville, 186 Ill. 326, 180 U. S. 619; City of Winfield v. Winfield Water Co., 51 Kan. 70; City of Topeka v. Topeka Water Co., 58 Kan. 349; Kennebec Water Dist. v. City of Waterville, 97 Me. 185; Agua Pura Co. v. City of Las Vegas, 10 N. M. 6, 50 L. R. A. 224.

operation.[1117] When this right is available, municipal authorities often endeavor to drive a bargain and force a sale, by the private company, of its plant, by refusing to pay a fair value, the interests of bona fide investors suffering by the transaction. It has been held that such a proceeding is a taking of property without due process of law. Such a forced sale is generally sought to be effected by either the threat of competition, a refusal to extend a franchise for no good or sufficient reason but that of compelling the private corporation to come to its terms or by fail-

of the forfeiture set out in the ordinance, although the allegations of the complaint would justify a relief based thereon. The legal right rests inherently on the nature of the contract obligations, and in this respect the city occupies no different position than would an individual in seeking the assistance of the courts to be relieved from the obligations and burdens of a contract which, by the conduct of the other party, had become intolerable. It was the primary duty of the grantees and their successors to furnish pure water, and if there should be any dispute at any time as to the quality of water, the state board of health was named as arbiter. The city was not required to obtain specifications from such board and make demand for water of the standard adopted by it. State v. City of Philipsburg, 23 Mont. 16; Columbia Water Power Co. v. City of Columbia, 5 S. C. (5 Rich.) 225; Ellensburgh Water Supply Co. v. City of Ellensburgh, 13 Wash. 554.

[1117] National Waterworks Co. v. Kansas City, 62 Fed. 853, 27 L. R. A. 827; Id., 65 Fed. 691; Newburyport Water Co. v. City of Newburyport, 85 Fed. 723; Id., 103 Fed. 584; Wood v. Holly Mfg. Co., 100 Ala. 326. The purchase of a private plant by a public corporation cannot, by any pretense of public policy, be made devoid of a lien upon part of the machinery held by the manufacturer.

Stein v. McGrath, 128 Ala. 175; City of Los Angeles v. Los Angeles City Water Co., 124 Cal. 368. Such a contract for the purchase of a waterworks plant can be enforced by the vendor.

City of Rome v. Cabot, 28 Ga. 50; Taylor v. McFadden, 84 Iowa, 262; Youngerman v. Murphy, 107 Iowa, 686; City of Enterprise v. Smith, 62 Kan. 815, 62 Pac. 324. The power "to purchase" does not authorize a condemnation of a private water plant upon a refusal of the owners to sell at the price offered by the municipality.

Owensboro Water Co. v. Duncan's Adm'x, 17 Ky. L. R. 755, 32 S. W. 478; Farmington Village v. Farmington Water Co., 93 Me. 192; Mayo v. Dover & F. V. Fire Co., 96 Me. 539; Gloucester Water Supply Co. v. City of Gloucester, 179 Mass. 365, 60 N. E. 977; Braintree Water Supply Co. v. Inhabitants of Braintree, 146 Mass. 482; Newburyport v. City of Newburyport, 168 Mass. 541; Stroud v. Consumers' Water Co., 56 N. J. Law, 422, 28 Atl. 578. The power to purchase such a plant carries with it the power to purchase from more than one private company.

Edgerton v. Goldsboro Water Co.,

ing to pay water rentals due under legal contracts making fictitious objections to the quality or quantity of a water supply with the purpose of creating litigation in order to effect the same purpose. In a recent case,[1118] the question of a "fair and equitable value" was discussed. The court said, "The city by this purchase steps into possession of a water-works plant,—not merely a complete system for bringing water to the city and distributing it through pipes placed in the streets, but a system already earning a large income by virtue of having acquired connections between the pipes in the streets and a multitude of private buildings. It steps into possession of a property which not only has the ability to earn but is, in fact, earning. It should pay, therefore, not merely the value of a system which might be made to earn but that of a system which does earn." In this case the

126 N. C. 98; Warsaw Waterworks Co. v. Village of Warsaw, 16 App. Div. 502, 44 N. Y. Supp. 876; In re Water Com'rs of White Plains, 71 App. Div. 544, 76 N. Y. Supp. 11; Avery v. Job, 25 Or. 512; Peabody v. Westerly Waterworks, 20 R. I. 176; Town of Bristol v. Bristol & W. Waterworks, 23 R. I. 274, 49 Atl. 974; Stehmeyer v. City Council of Charleston, 53 S. C. 259; Texas Water & Gas Co. v. City of Cleburne, 1 Tex. Civ. App. 580, 21 S. W. 393; Winston v. City of Ft. Worth (Tex. Civ. App.) 47 S. W. 740; City of Austin v. McCall (Tex. Civ. App.) 67 S. W. 192. See, also, Id., 95 Tex. 565, 68 S. W. 791.

Tacoma Light & Water Co. v. City of Tacoma, 13 Wash. 115; Lidgerwood Park Waterworks Co. v. City of Spokane, 19 Wash. 365, 53 Pac. 352. But see Helena Consol. Water Co. v. Steele, 20 Mont. 1, 37 L. R. A. 412; Dullanty v. Town of Vaughn, 77 Wis. 38; City of Austin v. McCall, 95 Tex. 565, 68 S. W. 791.

[1118] National Waterworks Co. v. Kansas City (C. C. A.) 62 Fed. 853, 27 L. R. A. 827. See, also, Newburyport Water Co. v. City of Newburyport, 85 Fed. 723; Id., 103 Fed. 584; City of Los Angeles v. Los Angeles City Water Co., 124 Cal. 368; Inhabitants of West Springfield v. West Springfield Aqueduct Co., 167 Mass. 128; Newburyport Water Co. v. City of Newburyport, 168 Mass. 541; Gloucester Water Supply Co. v. City of Gloucester, 179 Mass. 365; Inhabitants of Falmouth v. Falmouth Water Co., 180 Mass. 325; In re Water Com'rs of White Plains, 71 App. Div. 544, 76 N. Y. Supp. 11; Town of Bristol v. Bristol & W. Waterworks, 23 R. I. 274, 49 Atl. 974; Pearl v. Corp. of Nashville, 18 Tenn. (10 Yerg.) 179; State v. Janesville Water Co., 92 Wis. 496, 32 L. R. A. 391. A waiver of the right to forfeit the franchise of a water company is effected by a long delay in moving for forfeiture accompanied by action upon the company in regard to the extension and operation of its works. The forfeiture based upon a neglect to comply with provisions of the contract in respect to the keeping of accurate accounts of the cost of construction.

company claimed that a "fair and equitable value" was a capitalization of the earnings and, on the other hand, the city insisted that such "fair and equitable value" was the cost of the reproduction of the plant. The court further said on these points, "We are not satisfied that either method by itself will show that which under all circumstances can be adjudged the 'fair and equitable value.' Capitalization of the earnings will not, because that implies a continuance of earnings and a continuance of earnings rests upon a franchise to operate the waterworks. The original cost of the construction cannot control for 'original cost' and 'present value' are not equivalent terms nor would the mere cost of reproduction of a waterworks plant be a fair test because that does not take into account the value which flows from the established connections between the pipes and the buildings of the city. It is obvious that the mere cost of purchasing the land, constructing the buildings, putting in the machinery and laying the pipes in the streets—in other words, the cost of reproduction—does not give the value of property as it is to-day. A complete system of waterworks such as the company has, without a single connection between the pipes in the streets and the buildings of the city would be a property of much less value than that system connected as it is with so many public buildings and earning in consequence more of the money which it does earn."[1119]

[1119] See, also, as discussing the question of fair and equitable value, Bull v. City of Quincy, 155 Ill. 571; Inhabitants of West Springfield v. West Springfield Aqueduct Co., 167 Mass. 128; Newburyport Water Co. v. City of Newburyport, 168 Mass. 541; Gloucester Water Supply Co. v. City of Gloucester, 179 Mass. 365. Inhabitants of Falmouth v. Falmouth Water Co., 180 Mass. 325. "This, then, is a case where the company in good faith made a contract for the construction of its plant, to be paid for substantially on the basis of the 'cash market value' of it at completion, where it never had any capital stock and never had issued any bonds, where it made a settlement with the contractor, fixing the amount due him in accordance with the contract, and owes the amount thereof either to the contractor, or to a creditor, who has lent it the money paid to the contractor, or in part to one and in part to the other; and where, after the company had operated its works for four months, its property was taken by the town; and the question of what is the actual cost of the property within the meaning of St. 1898, c. 66, par. 12. We have no hesitation in anything that it is the actual cost of the plant of the water company." * * * "It is argued by the town that this result amounts to substituting market value for actual cost, and actual cost

§ 458. Extra territorial authority.

Since public corporations are limited in the exercise of their powers in all respects to the territory within their jurisdiction, it follows as elementary and self-evident that they cannot control persons or property without their jurisdiction or grant rights or franchises capable of enforcement or exercise their own granted

excludes everything in the nature of a profit. It is true that actual cost excludes everything of the nature of a profit; but what is actual cost to the company includes a profit to the contractor, just as what is actual cost to the contractor included a profit to the merchants of whom he buys his material. The company had to pay a profit to the contractor as the contractor had to pay a profit to the material men. The legislature no more intended to open up a speculative question of the reasonableness of the profit made by the contractor in his contract with the company, than that of the reasonableness of the profit made by the material men in their contract with the contractor. What it intended to do, was to provide that the price to be paid by the town should not depend upon opinions as to the market value of the property when taken, but should be restricted to what it had cost the company, with interest at five per cent. That did not forbid the company in the first instance fixing the price, which it was to pay for the construction of its works, at the market value on completion, if it thought it to be for the best interests of those interested in the corporation to make a contract for its plant on that basis."

In re Water Com'rs of White Plains, 71 App. Div. 544, 76 N. Y. Supp. 11, where the court said: "When the proceedings were begun the commission had before it a corporation which had the right or privilege to furnish water to the village of White Plains and the inhabitants thereof. The right did not afford a monopoly, because the company was open to competition from other corporations which might legally be formed, or from the village itself. The company had a contract with the village, which expired by legal limitation in a few months. It is to be inferred that it had contracts with individuals, but the legal duration thereof does not appear. There was a possibility of an extension of the contract with the village, but every probability against it, for the reason that the village had exercised the right of notice under the purchase clause, which provided for a purchase at the close of the contract. There was not the slightest legal obligation upon the village or upon individuals to take a drop of water from the corporation beyond their respective contracts. (Skaneateles Waterworks Co. v. Village of Skaneateles, 161 N. Y. 154). Aside from the right of acquiring the franchise and the plant of the water company, the village had the right to go into the business of supplying water to itself and to its inhabitants. I conclude that there were no data whatever for any forecast that the corporation would have the assurance of any future business dealings even with the individual inhabitants,

and that any award of substantial damages, based upon the deprivation of such business, would have no foundation on their facts or on probabilities. * * * The contract with the village would have expired in 1897. These proceedings were begun in September, 1896. The water company was entitled to retain its property until the compensation determined on was paid, in as much as the court had not awarded prior possession thereof. The report was not confirmed until 1898. While the company retained its property, it was unable to fulfill its contracts and to collect its water rentals. I think that the compensation to be made was to be determined in view of the time of the award, and that, therefore, the commissioners would not have erred if they had entirely disregarded the possible profits to be realized under the contract which expired within a few months after the condemnation proceedings were begun. But, as I have said, they report that they did allow $3,000 in part payment 'for the nominal and practically valueless rights which the company possessed at the time of the commencement of the proceedings.' It is said that the notice of purchase under the contract was served too late. I take it that the learned counsel means that less than a year intervened the date of service of the notice and the expiration of the contract. But even so, there was no consequent obligation upon the village to renew the contract, and as the franchise was not exclusive, there is no presumption that the village would have been compelled to do so. But let us assume that though the commission intended to make an award for the waterworks and its system and for the 'inseparable franchises,' to operate them, which, being inseparable, necessarily followed the waterworks and the system (People v. O'Brien, 111 N. Y. 1), there still remained that other right or privilege, within the term 'franchises,' which may be described as the right of this corporation to be. And assume still more that such franchise emanating from the state (Skaneateles Waterworks Co. v. Village of Skaneateles, supra) was still potential, and must also be considered under the term 'franchise,' when the commissioners come to the question of compensation for the franchise, how could the commission determine upon any substantial sum that must be paid for wiping out the mere right of corporate existence? What was its value? It was not an exclusive right, but it was similar to rights which might be vested in other proposed incorporators, and in the village itself. It had no assured field for any business enterprise, for there was no obligation upon any one to deal with it. The value of corporate being is the profits anticipated from the exercise of corporate powers. The exercise in this case would require a new construction of an entire system. There is not the slightest proof that such a venture would result in any return whatever. * * * The question to be answered is what was the market value of the property, including its franchises, not its value to the petitioners nor the respondent, but its value in view of all the purposes to which it was naturally adapted (Moulton v. Newburyport Water Co., 137 Mass. 163). This would include the value of any business under existing contracts which might accrue to a purchaser at the time the compensation was paid and the property taken over. As I have

powers except within their geographical limits.[1120] But this principle does not prevent a municipality from selling water outside its jurisdiction; if this is done, it possesses, without question, the legal right to enforce any contract it may have made in respect to the price to be paid by the consumer.[1121] And it is also true

said before the purchaser would take the plant, the inseparable franchisé, the existing contract rights and the benefits of the going concern, but at the same time there was no exclusive franchise and no assurance of the continuance of a profit returning business. In Newburyport Water Co. v. City of Newburyport (168 Mass. 541, 555) the court, per Holmes, J., say: 'If capitalizing profits would give a much greater excess over the value of the land, water easements and plant of the company than the commissioners allowed, the reasons are to be found in the franchise and monopoly of the company, in its right to lay pipes in the streets, and partly, perhaps, in the personal skill of the management, none of which are things for which the city is to pay.' It is true that in the case at bar the village is to pay for the franchise, but it is not to pay, nor would any purchaser be compelled to pay, for any right to lay pipes, for the reason, also given by Holmes, J., in the case last cited that water pipes are not an additional burden to the street, and as soon as any one was authorized to furnish water, that right would imply the further right to lay pipes for that purpose. I see no reason why the award should be disturbed, either on account of the amount thereof or for any erroneous basis of compensation adopted by the commissioners."

[1120] Donahue v. Morgan, 24 Colo. 389. But the authority of a municipality in respect to the statement in the text will include additions or extensions to the city limits as they may be made from time to time.

Inhabitants of Quincy v. City of of Boston, 148 Mass. 389. An island three miles from shore though within the city limits cannot be supplied with water from the main water system without special legislative authority. Borough of Preston v. Fullwood Local Board, 53 Law T. (N. S.) 718; Inhabitants of Quincy v. City of Boston, 148 Mass. 389; Cooper v. City of Brooklyn, 11 App. Div. 71, 42 N. Y. Supp. 762; Williamsport Water Co. v. Lycoming Gas & Water Co., 95 Pa. 35; Gilchrist's Appeal, 109 Pa. 600; Bly v. White Deer Mountain Water Co., 197 Pa. 80. But see Town of West Hartford v. Hartford Water Com'rs, 68 Conn. 323. See, also, as holding the same, Inhabitants of Bloomfield v. Borough of Glen Ridge, 54 N. J. Eq. 284.

[1121] Town of West Hartford v. Hartford Water Com'rs, 68 Conn. 323; City of Lawrence v. Inhabitants of Methuen, 166 Mass. 206; Cooper v. City of Brooklyn, 11 App. Div. 71, 42 N. Y. Supp. 762; Halifax Corp. v. Soothill Upper Local Board, 31 Law T. (N. S.) 6; City of Pittsburgh v. Brace Bros., 158 Pa. 174. If a private consumer outside the city limits uses city water, it may recover the usual rentals. "The general proposition on which the appellants seek to rest their defense, that the powers of a municipal corporation are confined to its own territorial lim-

that where a public corporation is vested by the legislature with power sufficiently ample, it may acquire property or rights outside of its geographical limits for the purpose of constructing or maintaining a water supply system and exercise thereover such

its, is too plain for controversy. It can exercise no extra-territorial jurisdiction without some special provision authorizing it. But when such special provision exists, the act authorized by it may be lawfully done. Within its boundaries a municipal government may undertake to supply its citizens with water or light. When it does so, it may enforce the collection of the water rents by the entry of a lien therefor against the real estate upon which the water was furnished; and this lien may be proceeded upon, and the property bound by it brought to sale in the same manner that is practiced in the case of other municipal liens. By the Act of March 7th, 1843, § 4, it is provided that 'the mayor, aldermen and citizens of Pittsburgh may from and after the passage of this act proceed to recover water rents due and unpaid beyond the limits of the city, as well as within the same, in the same way as city taxes are now recoverable.' Since the passage of this act the city of Pittsburgh may furnish water to persons residing beyond the city limits, upon the same terms and conditions that it furnishes to its own citizens, and collect the water rents due from such persons 'in the same way as city taxes are now recoverable.' In 1882 the appellants were residing and doing business outside the city limits. In that year they applied in writing to the city authorities for a supply of water for use in their laundry, agreeing to take it in accordance with the provisions of the several ordinances relating to the supply of water and the assessment of water rents or taxes in force in said city. The city accepted their application and the water was furnished. For several years it was paid for without objection and at the rate or price fixed by the city ordinances. In 1889 an increase in the water rent was made. Because of its nonpayment, a lien was entered in favor of the city, and a scire facias issued thereon. The defendants interposed by way of defense the facts that they are not residents of the city and that the real estate which it is sought to charge is not within the city limits or subject to municipal taxes or liens. This defense would be good but for the act of 1843. The defendants were competent to contract for the water supply needed with any person or municipality that was able to supply them. The city was invested with power to contract with them by the act of 1843; and to employ the same methods to compel the payment of the water rents that it was authorized to employ within its own borders. The parties were therefore competent to contract upon this subject. They did actually contract upon the same terms and conditions in use in contracts between the city and its citizens. The water has been furnished by the city, and used by the defendants. A lien for the unpaid rents has been entered under the authority of the act of 1843 and the contract between the parties. The defendants stand on the same ground

authority as would necessarily accompany the protection of its interests.[1122] A public corporation may also acquire in its capacity as a private corporation, property outside of its jurisdiction to be used in connection with such an enterprise.

§ 459. Sale or lease of municipal plant.

Since legislative authority is necessary in the first instance to authorize the acquirement by purchase, lease or construction of a water supply plant, it follows that after one has acquired that, legislative authority is also necessary in order to make a legal sale or lease of the same however desirable or expedient such action may be.[1123] The purchaser or lessee under such circumstances is usually held to be substituted for the public corporation in its obligations. In the transaction the public corporation may make arrangement for a regulation by it of the services rendered and the rates to be charged as well as other provisions which may be considered of advantage to it.[1124] As usual with other contracts or conveyances of such a nature, a failure on the part of one of the parties to comply with its agreements and promises will give the right to the other party if it so elects to compel a rescission of the contract and a placing of the parties statu quo.[1125]

they would occupy if their laundry were inside the city and can make no defense that would not be open to them in that case. If the price charged for the water had been properly fixed under general ordinances and the proceedings have been regular in form, the city has the same right to recover against the defendants that it would have if their establishment was upon the other side of the city line."

[1122] Vernon Irr. Co. v. City of Los Angeles, 106 Cal. 237; Donahue v. Morgan, 24 Colo. 389; People v. Briggs, 50 N. Y. 553; People v. Sisson, 75 App. Div. 138, 77 N. Y. Supp. 376; City of Pittsburgh v. Brace Bros., 158 Pa. 174.

[1123] Los Angeles City Water Co. v. City of Los Angeles, 88 Fed. 720; Lake County Water & Light Co. v. Walsh, 160 Ind. 32, 65 N. E. 530; Arnold v. City of Pawtucket, 21 R. I. 15. Right to lease denied. Huron Waterworks Co. v. City of Huron, 7 S. D. 9, 30 L. R. A. 848; Texas Water & Gas Co. v. City of Cleburne, 1 Tex. Civ. App. 580, 21 S. W. 393. A municipality cannot legally surrender its control over its waterworks to a private individual or corporation. Ogden City v. Bear Lake & River Water-Works & Irr. Co., 16 Utah, 440, 41 L. R. A. 305. The power to dispose of a water-works system denied.

[1124] City of Los Angeles v. Los Angeles City Water Co., 177 U. S. 558.

[1125] Farmers' Loan & Trust Co. v. City of Galesburg, 133 U. S. 156.

§ 460. The power to construct includes what.

The power to construct must be found in some express provision of the law and comprises generally within the grant of the greater power the right to do all those acts which are reasonably necessary and proper to exercise efficiently the power granted.[1126] It would include the implied right to lay and construct water mains, hydrants, standpipes[1127] and all the necessary adjuncts to an efficient system for the supply of water.[1128]

Huron Waterworks Co. v. City of Huron, 7 S. D. 9, 30 L. R. A. 848.

[1126] Borough of Milford v. Milford Water Co., 124 Pa. 610, 3 L. R. A. 122.

[1127] Fergus Falls Water Co. v. City of Fergus Falls, 65 Fed. 587; City of Austin v. Bartholomew, 107 Fed. 349. The right of a grant "to construct waterworks * * * and erect hydrants, fire plugs, etc.," carries with it the implied power to erect hydrants of a water company for municipal purposes. "It appears that the city water company transferred to the Austin Water, Light and Power Company its contract with the city of Austin for the rental of hydrants and that the city acquiesced in this transfer without question, so far as the record shows, and that during all this period, as found by the verdict of the jury, the Austin Water, Light and Power Company complied substantially with its contract with the city to furnish the hydrants with water. It makes a clear case of consent on the part of the city to the transfer of the contract and a consent which we think is binding. It is urged, however, that this contract is not one which could be enforced against the city, unless it could be also enforced against the Water, Light and Power company, and that the company is not bound by, and could not be held to a compliance with the contract. We do not think this is true. The new company purchased from the old company its property, rights, contracts, privileges and franchises and went forward at once to carry out the contract with the city. We see no reason whatever for the claim that the obligations of this transferee company and the city were not correlative. If as we believe, under the facts in the case, the city can be required to pay for the water we think the Austin Water, Light and Power Company could be required to furnish it." See, also, as holding the same. City of Lexington v. Lafayette County Bank, 165 Mo. 671, 65 S. W. 943; Warren v. City of Chicago (Ill.) 9 N. E. 883.

[1128] Keen v. City of Waycross, 101 Ga. 588. Under authority granted to establish and maintain a municipal waterworks system, it is here held, a city cannot lawfully engage in a general plumbing business, buying and selling to private persons those articles usually used in securing a water supply. Linck v. City of Litchfield, 31 Ill. App. 118; Inhabitants of Stoughton v. Paul, 173 Mass. 148, 53 N. E. 272. "This is a bill brought to restrain the water commissioners of Stoughton from using land purchased by

(a) Use of streets. The grant of an express or the existence of the implied power to construct and maintain a water supply including its details carries with it the implied right and power to use or permit to be used the streets of a public corporation for laying out and constructing such a system.[1129] Ordinarily, the use of streets for such a purpose does not impose any additional burden or servitude and the adjoining owners, therefore, are not entitled to compensation for such use, it being one of the common and anticipated purposes to which they may be put.[1130] The

their predecessors in 1897 for a water supply and to set aside the sale and the contract made for the construction of waterworks. The only question is whether the commissioners had authority to buy the land. * * * The objection urged is that it was expected to get the waters of Knowles' Brook through wells on this land by interception or percolation. * * * We must assume that the purchase was for the purpose contemplated by the act unless the contrary clearly appears. Whether it was expected or hoped to get the water without a further act of taking or not, and without paying for anything but the land, no doubt it was expected to do whatever was necessary in order to get the water. It does not matter that an express taking of the water was postponed." Citing California Southern R. Co. v. Kimball, 61 Cal. 90.

Burnett v. City of Boston, 173 Mass. 173, 53 N. E. 379.

[1129] City of St. Louis v. Western Union Tel. Co., 149 U. S. 465; City of Quincy v. Bull, 106 Ill. 337; State v. City of St. Louis, 145 Mo. 551, 42 L. R. A. 113; Sharp v. City of South Omaha, 53 Neb. 700; State v. Cincinnati Gaslight & Coke Co., 18 Ohio St. 262.

[1130] City of Peoria v. Walker, 47 Ill. App. 182; City of Morrison v. Hinkson, 87 Ill. 587. Where a municipal corporation erects a water tank in the center of a street and in connection operates a steam engine, an abutting property owner can recover damages as this is not a use for which the grant could be appropriately used under a dedication as a street.

Barrows v. City of Sycamore, 150 Ill. 588, 25 L. R. A. 535, reversing 49 Ill. App. 590. Although a city cannot erect a stand pipe in connection with its waterworks system in one of the public streets without entitling an abutting property owner to compensation, to recover he must show some special damage suffered in excess of that sustained by the public generally.

Carpenter v. Capital Elec. Co., 178 Ill. 29, 43 L. R. A. 645; Lostutter v. City of Aurora, 126 Ind. 436, 12 L. R. A. 259; Wood v. National Waterworks Co., 33 Kan. 590; Witcher v. Holland Waterworks Co., 66 Hun, 619, affirmed 142 N. Y. 626; Village of Pelham Manor v. New Rochelle Water Co., 143 N. Y. 532; Smith v. City of Goldsboro, 121 N. C. 350; Provost v. New Chester Water Co., 162 Pa. 275. The rule applies even where a water pipe is laid underneath a sidewalk in such a manner as to pre-

public corporation may also in connection with the construction and maintenance of its system, wherever it is found necessary, condemn property for this use, a subject which will be considered in a succeeding section.[1131] Where permission has been granted to a private corporation or person to use streets or highways for this purpose, the right must be exercised at all times subject to the control of the proper municipal authorities.[1132] The rule that prevents an abutting property owner from recovering compensation for the use of streets in laying water pipes and mains does not apply to country highways and roads. The use of these for such a purpose or for the construction of sewers or the laying of gas pipes is commonly considered an additional burden for which the adjoining owner can recover compensation.[1133]

vent an abutter from building stairs to his basement.

Lewis, Em. Dom. (2 Ed.) § 128. "Water is a prime necessity and in densely populated districts cannot be obtained from the soil without danger to health. A supply of pure water, therefore, becomes a matter of public concern and its distribution by public authority by means of pipes laid in the public streets is an ancient and universal custom. Such a supply is not only a requisite to the public health but for the public safety as well, in order to afford the means of extinguishing fires and preventing conflagration and may even be connected with the use of the street for travel when used for sprinkling."

Lincoln v. Com., 164 Mass. 1; Bishop v. North Adams Fire Dist., 167 Mass. 364; Newburyport Water Co. v. City of Newburyport, 168 Mass. 541; Crooke v. Flatbush Waterworks Co., 29 Hun (N. Y.) 245; City of Cincinnati v. Penny, 21 Ohio St. 499; City of Memphis v. Memphis Water Co., 52 Tenn. (5 Heisk.) 495; West v. Bancroft, 32 Vt. 367.

The right to use either the streets or highways for such a purpose by private persons or corporations is not necessarily limited to or granted from a municipal corporation. It may be secured from the legislature in the first instance. See City of Louisville v. Louisville Water Co., 105 Ky. 754; Atlantic City Waterworks Co. v. Consumers' Water Co., 44 N. J. Eq. (17 Stew.) 427; Carlisle Gas & Water Co. v. Carlisle Water Co., 182 Pa. 17.

[1131] See § 463, post.

[1132] Citizens' Gas & Min. Co. v. Town of Elwood, 114 Ind. 332; Topeka Water Co. v. Whiting, 58 Kan. 618; Gas Light & Coke Co. v. City of Columbus, 50 Ohio St. 65, 19 L. R. A. 510.

[1133] Kincaid v. Indianapolis Natural Gas Co., 124 Ind. 577, 8 L. R. A. 602; Windfall Natural Gas M. & O. Co. v. Terwilliger, 152 Ind. 364; Covington Reservoir v. Hopp, 12 Ky. L. R. 140; Bloomfield & R. Natural Gaslight Co. v. Calkins, 62 N. Y. 386; Van Brunt v. Town of Flatbush, 128 N. Y. 50; Goodson v. Richardson, 9 Ch. App. 221, 30 Law T. (N. S.) 142.

(b) Limitations upon the power to construct. Not only may a public corporation be limited in its power to construct waterworks or contract therefor by the absence of statutory authority, but also when the statutory right exists by the fact that this course of action will throw upon the corporation a claim, obligation or debt in excess of the limit fixed by law.[1134] In case of a

[1134] See §§ 140 et seq., §§ 177 and 184; Kiehl v. City of South Bend, 76 Fed. 921, 36 L. R. A. 228; City of Ottumwa v. City Water Supply Co. (C. C. A.) 119 Fed. 315, 59 L. R. A. 604; Grace v. City of Hawkinsville, 101 Ga. 553; Gold v. City of Peoria, 65 Ill. App. 602; People v. Lake Erie & W. R. Co., 167 Ill. 283; City of Valparaiso v. Gardner, 97 Ind. 1; Taylor v. McFadden, 84 Iowa, 262, 50 N. W. 1070; Fidelity Trust & Safety Vault Co. v. City of Morganfield, 16 Ky. L. R. 647, 29 S. W. 442. An acquiescence in an irregular election will constitute an estoppel as against the municipality.

Monroe Water Co. v. Heath, 115 Mich. 277; Raton Waterworks v. Town of Raton, 9 N. M. 70. "The statutes are a public notice of their contents, and a complainant contracting presumably with a knowledge that defendant was limited, by the statute creating it, to a two mill levy for the discharge of its obligation, will not be heard to complain that the trustees of defendant refused to transcend that power.

"The power to make the contract in question, and to the proprietary grant and business portion of a quasi public nature, did not carry with it the power to depart from the mode prescribed by the statute for raising revenues with which to pay for the supply of water so contracted to be furnished.

"While a court in equity, in an action against a town for the specific performance of a contract for the payment of water rentals, may declare the validity of the contract, it has no jurisdiction to compel the town to make a levy, the remedy in such case being by mandamus.

"The contract of a town to pay more than it has the power to collect by taxation is not void, but obligates the town to exhaust its power, if necessary, to collect a tax sufficient within the statutory limitation the levy for two mills upon the entire tavazle property within its judisdiction." State v. City of Crete, 32 Neb. 568; Kingsley v. City of Brooklyn, 78 N. Y. 200; Woodside Water Co. v. Long Island City, 159 N. Y. 558; Farnsworth v. City of Pawtucket, 13 R. I. 83; Ellis v. City of Cleburne (Tex. Civ. App.) 35 S. W. 495; Seymour v. City of Tacoma, 6 Wash. 427.

Farnham, Waters, § 151. "Certain conveniences are regarded as necessary to the enjoyment of life in a municipal corporation. When persons are seeking a home in such a place, unless business considerations are imperative, the question of its water supply and sewer system, the light and transportation facilities, its parks and public buildings, is always taken into consideration. * * * The cost of such things, is, however, very heavy and present payment for them would seriously discount the supposed advantages of having them; so the practice has been general to raise

contract extending through a term of years with provisions for future payments, the obligation to make the payments is not considered a debt within the meaning of the phrase as ordinarily used.[1135] The argument in favor of the validity of such a contract, as already suggested, is that there is no present liability for the entire amount which would ultimately be paid under and by the terms of the contract if fully performed; the only liability which can arise is a present one for the payment of that part of the contract obligation already accrued which can be met from present and current revenues. The liability in all cases being a contingent one based upon an actual rendition of the services performed. Some authorities, however, have held to the contrary, notably, those in Illinois, where there is a constitutional provision

the money for their construction by means of bonds or other long-time evidences of indebtedness. So far has this practice been carried in some instances that the interest of the indebtedness has been so great as not only to prevent capital from coming into the municipality, but it has actually driven capital already there away to such an extent as to leave the municipality prostrate, and forever destroy all possibility of its becoming a prosperous city. To remove the temptation to resort to such means for securing coveted improvements, the constitutions or statutes in many states have limited the amount to which a municipal corporation might become indebted in proportion to the entire amount of its taxable property. The result is that in many cases the debt limit is reached long before all the necessary conveniences have been secured and various devices have been adopted to circumvent the constitutional or statutory provisions and secure the end desired without coming in open conflict with the constitution or statute."

[1135] See authorities cited in § 159. See, also, City of Walla Walla v. Walla Walla Water Co., 172 U. S. 1, affirming 60 Fed. 957; Keihl v. City of South Bend (C. C. A.) 76 Fed. 921, 36 L. R. A. 228; Cunningham v. City of Cleveland (C. C. A.) 98 Fed. 657; Fidelity Trust & Guaranty Co. v. Fowler Water Co., 113 Fed. 560; City of Centerville v. Fidelity Trust & Guaranty Co., 118 Fed. 332; McBean v. City of Fresno, 112 Cal. 159, 31 L. R. A. 794; Higgins v. City of San Diego, 118 Cal. 524; Danville Water Co. v. City of Danville, 186 Ill. 326, affirmed 21 Sup. Ct. 505, 180 U. S. 619; Grant v. City of Davenport, 36 Iowa, 396; Creston Waterworks Co. v. City of Creston, 101 Iowa, 687; Smith v. Inhabitants of Dedham, 144 Mass. 177; Ludington Water Supply Co. v. City of Ludington, 119 Mich. 480; Saleno v. City of Neosho, 127 Mo. 627; Lamar Water & Elec. Light Co. v. City of Lamar, 128 Mo. 188, 32 L. R. A. 157; Utica Water-Works Co. v. City of Utica, 31 Hun (N. Y.) 427; Territory v. City of Oklahoma, 2 Okl. 158; Stedman v. City of Berlin, 97 Wis. 505.

which forbids municipal or public corporations from becoming indebted "in any manner or for any purpose" in excess of a certain prescribed limit.[1136]

§ 461. The implied power to furnish water or to purchase apparatus for the extinguishment of fire.

One of the reasons most frequently given as the basis of the right of a public corporation to furnish a supply of water is the protection of property from fire, it being a legitimate exercise of the police power of the state or its delegated agencies to protect the property of those within their jurisdiction. The existence of the general power, it has been held, carries with it the implied power to purchase and maintain suitable apparatus for the extinguishment of fires including buildings for its housing and its permanent maintenance and to arrange for a supply of water for, as has been said, "science, so far as we know, has not yet suggested any means of extinguishing great fires without the application of water." Where the power is expressly granted there can be no question of the right of the municipality to its exercise.[1137] The existence of this implied power may authorize

[1136] Prince v. City of Quincy, 105 Ill. 138; Id., 128 Ill. 443. Where the court held that a contract between a public corporation and a water company by which the former agreed to pay a certain water rent payable in monthly instalments for a definite period was an incurring of indebtedness within the meaning of the constitutional clause and if the aggregate amount of such payments exceeded the constitutional limitation of indebtedness, the contract would be void. See, also, Cartersville Water-Works Co. v. City of Cartersville, 89 Ga. 689; City of Dawson v. Dawson Waterworks Co., 106 Ga. 696; Beard v. City of Hopkinsville, 95 Ky. 239, 23 L. R. A. 402; Niles Waterworks Co. v. City of Niles, 59 Mich. 312; Davenport v. Kleinschmidt, 6 Mont. 502; State v. City of Helena, 24 Mont. 521, 55 L. R. A. 336.

Read v. Atlantic City, 49 N. J. Law, 558, affirmed by divided court in 50 N. J. Law, 665; Smith v. City of Newburgh, 77 N. Y. 130.

[1137] Desmond v. City of Jefferson, 19 Fed. 483; City of Birmingham v. Rumsey & Co., 63 Ala. 352. The charter authorized the municipal authorities in this case "to do every matter and thing which they may deem necessary for the good order and welfare of said city." The court in sustaining the legality of a purchase of a fire apparatus said: "Good government and good order and welfare of a city imply much more than mere preservation of social order. Sanitary regulations and appliances for extinguishing fires, to an extent reasonably

the rendition of aid to local and private engine and hook and ladder companies.[1138]

§ 462. The acquisition of a water supply.

The grant of the power to furnish a water supply carries with it in addition to the right to construct and operate a plant for

commensurate with the city's wants, to be judged of by the corporate authorities, are certainly within the purview of good city government. We do not wish to be understood as affirming that any specific grant of power is necessary to the performance of this very necessary police function. We hold it is inherent in every city government, as one of its incidental powers, unless taken away by statute." Clark v. City of South Bend, 85 Ind. 276. "It was long ago declared that the power to prevent danger from fire is an incidental one belonging to all municipal corporations."

Baumgartner v. Hasty, 100 Ind. 575. "The rule has always been that a municipal corporation has the inherent power to enact ordinances for the protection of the property of its citizens against fire."

Corporation of Bluffton v. Studabaker, 106 Ind. 129; City of Burrton v. Harvey County Sav. Bank, 28 Kan. 390; Carleton & Co. v. City of Washington, 38 Kan. 726; Allen v. Inhabitants of Taunton, 36 Mass. (19 Pick.) 485.

Webb City & C. Waterworks Co. v. Webb City, 78 Mo. App. 422. "The power given a city of the fourth class, by § 4940, Rev. St. 1879, to 'prevent and extinguish fires' and to provide for the 'health and welfare of the city, its trade, commerce and manufacturies,' includes the authority to secure a contract for a supply of water. * * * Science, so far as we know, has not yet suggested any adequate means of extinguishing great fires without the application of water. * * * A fire engine without water would be quite a useless machine in the hands of a city government. Water is quite as indispensable in extinguishing fires as a fire engine. * * * It is apparent that the reasons why the grant of power to suppress fires should carry with it the power to procure water to extinguish fires are much more cogent than those which sustain the power to purchase the fire engines."

Green v. City of Cape May, 41 N. J. Law, 45; Witheral v. Mosher, 9 Hun (N. Y.) 412; Hunneman & Co. v. Fire Dist. in Jamaica, 37 Vt. 40. See, also, Corporation of Bluffton v. Studabaker, 106 Ind. 129, 13 Am. &

[1138] Torrey v. Inhabitants of Millbury, 38 Mass. (21 Pick.) 64. An appropriation of public moneys towards the purchase of a fire engine, the balance being raised by individual and private subscriptions authorized. The legality of the action was sustained by reason of a general duty resting upon municipal corporations to provide whatever shall be deemed "an object of common convenience and necessity." Van Sicklen v. Town of Burlington, 27 Vt. 70; Allen v. Inhabitants of Taunton, 36 Mass. (19 Pick.) 485.

the accumulation and distribution of the water, the power to obtain from some natural source the water itself.[1139]

The right of a public corporation, as suggested in the Minneapolis Mill Co. Case, supra, to divert water from some natural source, will depend upon the character of the waters—whether

Eng. Corp. Cas. 529. The grant of the power to extinguish fires or purchase fire engines carries with it the implied power to arrange for a supply of water either by the construction of works or by contract with private companies. Bridgford v. City of Tuscumbia, 16 Fed. 910; National Foundry & Pipe Works v. Oconto Water Co., 52 Fed. 29; Salena v. City of Neosho, 127 Mo. 627, 27 L. R. A. 769; Atlantic City Water Works Co. v. Atlantic City, 39 N. J. Eq. (12 Stew.) 367; Rome v. Cabot, 28 Ga. 50; Carleton v. City of Washington, 38 Kan. 726. But see Greenville Waterworks Co. v. City of Greenville (Miss.) 7 So. 409.

[1139] Minneapolis Mill Co. v. St. Paul Water Com'rs, 56 Minn. 485, affirmed 168 U. S. 349. The court in its opinion by Collins, Judge, says:

1. "The plaintiffs are riparian owners on a navigable or public stream, and their rights as such owners are subordinate to public uses of the water in the stream. And their rights under their charters are, equally with their rights as riparian owners, subordinate to these public uses.

2. "There can be no doubt but that the public, through their representatives, have the right to apply these waters to such public uses without providing for or making compensation to riparian owners.

3. "The navigation of the stream is not the only public use to which these public waters may be thus applied. The right to draw from them a supply of water for the ordinary use of cities in their vicinity is such a public use, and has always been so recognized. At the present time it is one of the most important public rights, and is daily growing in importance as population increases. The fact that the cities through boards of commissioners or officers whose functions are to manage this branch of the municipal government, charge customers for water used by them, as a means for paying the cost and expenses of maintaining and operating the plant, or that such consumers use the water for their domestic and such other purposes as water is ordinarily furnished by city waterworks, does not affect the real character of the use, or deprive it of its public nature.

4. "In thus taking water from navigable streams or lakes for such ordinary public uses, the power of the state is not limited or controlled by the rules which obtain between riparian owners as to the diversion from, and its return to, its natural channels. Once conceding that the taking is for a public use, and the above proposition naturally follows.

"Turning now to the provisions of defendant's charter, Laws 1885, c. 110, it will be seen that the board was not limited to public waters as the sources of its contemplated additional supplies. It was authorized to appropriate private waters

public, and to what extent, or private. If the waters are private property in all respects, a public corporation cannot divert them even by percolation or impair in any way the right of the owners to the quality, quantity or time of flow without the payment of compensation; either through a voluntary sale by the owner or a forced one through the exercise of the power of eminent domain.[1140] On the other hand, if the waters are public in their character, then the rights of riparian owners are subordinate to all public uses of such water.[1141] It is clear, however, that even under these principles, a public corporation would not have the

for the purpose, and hence the provisions of the act which provide for the ascertaining of, and making compensation for, damages caused by a diversion of water, must be construed as applying solely to cases where the board took private property by using or diverting merely private waters. Inasmuch as the state itself could use the waters in question, as against the plaintiffs, without compensation, it would require very clear language to that effect to justify the conclusion that the Legislature intended to impose on respondent board the burden of paying plaintiffs for what, as against the public, they did not own. If the right granted by the Legislature had been exclusively to divert waters from a certain specified body of public water, such as one of the 'great' ponds of Massachusetts, referred to in the cases cited from the reports of that state, so that the provisions in Laws 1885, c. 110, relating to compensation could not apply to anything else,—to the owners of private waters, for instance,—the construction contended for by appellants, that it was intended they should be compensated in case damages resulted, might arise by implication."

[1140] United States v. Great Falls Mfg. Co., 112 U. S. 645; Pine v. City of New York, 103 Fed. 337; Ulbricht v. Eufaula Water Co., 86 Ala. 587, 4 L. R. A. 572; Fifield v. Spring Valley Water Works, 130 Cal. 552. A riparian owner is not entitled to an injunction to restrain the diversion of the storm or flood water of the stream.

Harding v. Stamford Water Co., 41 Conn. 87; City of Emporia v. Soden, 25 Kan. 588; Hall v. City of Ionia, 38 Mich. 493; Higgins v. Flemington Water Co., 36 N. J. Eq. (9 Stew.) 538; Sparks Mfg. Co. v. Town of Newton, 57 N. J. Eq. 367; Salem Flouring Mills Co. v. Lord, 42 Or. 82, 69 Pac. 1033, 70 Pac. 832; Haupt's Appeal, 125 Pa. 211, 3 L. R. A. 536; Philadelphia & R. R. Co. v. Pottsville Water Co., 182 Pa. 418; Barre Water Co. v. Carnes, 65 Vt. 626, 21 L. R. A. 769; Leonard v. Village of Rutland, 66 Vt. 105; Rigney v. Tacoma Light & Water Co., 9 Wash. 576, 26 L. R. A. 425; City of New Whatcom v. Fairhaven Land Co., 24 Wash. 493, 54 L. R. A. 190.

[1141] City of Elgin v. Elgin Hydraulic Co., 85 Ill. App. 182; City of Canton v. Shock, 66 Ohio St. 19, 58 L. R. A. 637; Minneapolis Mill Co. v. St. Paul Water Com'rs, 56 Minn. 485.

right to divert or use the water to such an extent or in such a manner as to destroy entirely or even impair the character and use of the waters as public. A public corporation, to illustrate, would not have the right to divert, for a water supply, the waters of a navigable stream to such an extent as to destroy its character as such.[1142] A supply is usually secured from artesian wells, running streams or other natural bodies of water.[1143] The right of a municipality to a water supply and the legal questions involved depend largely upon the value, extent and source of the supply and therefore upon its value as a merchantable commodity. In sections of the country where the rain-fall is large and all sources of supply are ample in their extent, the question of securing it is of no importance, but in other sections where the rainfall is light or the demand large, and the value of water as a commodity is high, these questions may be of great moment. A public corporation in either case must acquire a right to the use of water by its purchase,[1144] through prescription[1145] or the process of eminent domain.[1146] The property of riparian owners or water rights cannot be taken without the payment of just compensa-

[1142] Sumner v. City of Gloversville, 35 Misc. 523, 71 N. Y. Supp. 1088; Smith v. City of Rochester, 92 N. Y. 463; City of Philadelphia v. Gilmartin, 71 Pa. 140. See Valparaiso City Water Co. v. Dickover, 17 Ind. App. 233, 46 N. E. 591.

[1143] State v. Board of Assessment, 1 S. D. 62; Miles v. Benton Tp., 11 S. D. 450.

[1144] Saunders v. Bluefield Waterworks & Imp. Co., 58 Fed. 133; Stein v. Burden, 24 Ala. 130; Vernon Irr. Co. v. City of Los Angeles, 106 Cal. 237; Strickler v. City of Colorado Springs, 16 Colo. 61; City of Baltimore v. Day, 89 Md. 551; Bailey v. Inhabitants of Woburn, 126 Mass. 416; Para Rubber Shoe Co. v. City of Boston, 139 Mass. 155; Warren v. Spencer Water Co., 143 Mass. 155; Mills on Monatiquot River v. Inhabitants of Randolph, Holbrook & Braintree, 157 Mass. 345; Gregory v. Lake Linden, 130 Mich. 368, 90 N. W. 29; Higgins v. Flemington Water Co., 36 N. J. Eq. (9 Stew.) 538; Appeal of Haupt, 125 Pa. 211, 3 L. R. A. 536.

Lord v. Meadville Water Co., 135 Pa. 122, 8 L. R. A. 202. The purchase by a water company of a tract of land containing a spring does not give it the right to appropriate all the waters of that spring. In re Barre Water Co., 62 Vt. 27, 9 L. R. A. 195. See, however, the cases of Minneapolis Mill Co. v. St. Paul Water Com'rs, 56 Minn. 485, and Watuppa Reservoir Co. v. City of Fall River, 147 Mass. 548.

[1145] Vernon Irr. Co. v. City of Los Angeles, 106 Cal. 237; Clark v. Amsterdam Water Com'rs, 51 Hun, 642, affirming 119 N. Y. 629.

[1146] See § 463, post.

tion[1147] or operation of law,[1148] even though that property is water and its future use, the preservation of the health of the people within the limits of some governmental agent. Water rights are subject to sale and transfer like other property, and contracts, deeds or other instruments transferring them, are subject to the same rules of construction as similar instruments.[1149] The right

[1147] Inhabitants of Plymouth v. Russell Mills, 89 Mass. (7 Allen) 438; Bailey v. Inhabitants of Woburn, 126 Mass. 416; Watuppa Reservoir Co. v. City of Fall River, 134 Mass. 267; Cowdrey v. Inhabitants of Woburn, 136 Mass. 409; Mills on Monatiquot River v. Inhabitants of Randolph, Holbrook & Braintree, 157 Mass. 345; Tracy v. Erwin, 62 Hun (N. Y.) 619; City of Reading v. Althouse, 93 Pa. 400; Appeal of Haupt, 125 Pa. 211, 3 L. R. A. 536; Leonard v. Village of Rutland, 66 Vt. 105; People v. Van Nort, 15 Abb. Pr. (N. S.; N. Y.) 242.

[1148] Wamesit Power Co. v. Allen, 120 Mass. 352; Lund v. City of New Bedford, 121 Mass. 286; Martin v. Gleason, 139 Mass. 183.

[1149] Jones v. Springfield Waterworks Co., 65 Mo. App. 388; Ingraham v. Camden & R. Water Co., 82 Me. 335. "It is contended for the complainants," said the court, "that inasmuch as the act allows an appropriation of the waters of the pond and its tributaries above the pond and makes no mention of the brook below the pond, the implication is that the natural flow of the brook is not to be prevented, and that the corporation are to take only such surplus of water as can be diverted without injury to a beneficial use of the flow in the brook as heretofore customarily enjoyed. And it is contended that the intention of the act was, not that the corporation would detain the waters wholly within the limits of the pond, but that they would carry its surplus in a state of high water off into reservoirs to be established in other places. We think it a strained construction of the act to say that the defendants must divert the waters of the pond in such a manner and to such an extent and at such times that there will be no interference with any rights of proprietors on the brook below. The act authorizes the corporation to detain the waters of the pond—not merely a portion—but all of them. No words qualify the amount to be taken. The grant is absolute."

Raritan Water Power Co. v. Veghte, 21 N. J. Eq. (6 C. E. Green) 463, reversing 19 N. J. Eq. (4 C. E. Green) 142.

Lord v. Meadville Water Co., 135 Pa. 122, 8 L. R. A. 202. "While a city or borough or a company having the right of eminent domain may take a spring or stream of water to supply a municipality, it can only do so by making compensation to those who are deprived of the use of the water as provided by the constitution. A taking without compensation is a trespass, as much so as the taking of land by a railroad company to construct its road without making compensation or filing a bond with security as provided by law. Where the power to take exists, it must be exercised according to law. If it is not, the corporation so taking becomes a

to acquire such water supply either by purchase or an exercise of the power of eminent domain must be expressly granted to subordinate public or municipal corporations.[1150]

§ 463. Exercise of the power of eminent domain.

Private property cannot be taken for a public use without the payment of just compensation and the use or the purpose of the taking must be public. The furnishing of a water supply, it has been held, is a public use or purpose sufficient to justify the exercise of the power.[1151] The fact that the public corporation intends to engage and does engage in the business of distributing and selling water to private consumers for drinking or other purposes as well as supplying its own necessities does not destroy the public character of such a use.[1152] As this power is inherent and exclusive in sovereignty before it can be legally exercised by any subordinate agent, there must have been a grant in clear and unmistakable terms.[1153] The extent to which the power can

trespasser and may be proceeded against as such. It is a mistake to assume that the purchase of this acre of land gave the company an absolute right to the spring of water. The water did not pass by the deed beyond its reasonable use by the vendee as a riparian owner."

[1150] Fay v. Salem & Danvers Aqueduct, 91 Mass. (9 Allen) 577; Watuppa Reservoir Co. v. City of Fall River, 134 Mass. 267; Cowdrey v. Inhabitants of Woburn, 136 Mass. 409; Martin v. Gleason, 139 Mass. 183; Mills on Monatiquot River v. Inhabitants of Randolph, Holbrook & Braintree, 157 Mass. 345; Small v. City of Brockton, 176 Mass. 15; Wadsworth v. Buffalo Hydraulic Ass'n, 15 Barb. (N. Y.) 88.

[1151] Great Falls Mfg. Co. v. Attorney General, 124 U. S. 581; Stein v. Burden, 24 Ala. 130; Burden v. Stein, 27 Ala. 104; St. Helena Water Co. v. Forbes, 62 Cal. 182; Reddall v. Bryan, 14 Md. 444; Thorn v. Sweeney, 12 Nev. 251; Olmsted v. Morris Aqueduct Co., 46 N. J. Law, 495; In re Malone Waterworks Co., 15 N. Y. Supp. 649; City of Syracuse v. Stacey, 86 Hun, 441, 33 N. Y. Supp. 929; Stamford Water Co. v. Stanley, 39 Hun (N. Y.) 424; In re New Rochelle Water Co., 46 Hun (N. Y.) 525; In re Village of Middletown, 82 N. Y. 196; Lord v. Meadville Water Co., 135 Pa. 122, 8 L. R. A. 202; Irving v. Borough of Media, 194 Pa. 648.

[1152] Long Island Water Supply Co. v. City of Brooklyn, 166 U. S. 685; Watson v. Inhabitants of Needham, 161 Mass. 404, 24 L. R. A. 287; Slingerland v. City of Newark, 54 N. J. Law, 62; In re Malone Waterworks Co., 38 N. Y. State Rep. 95; Wisconsin Water Co. v. Winans, 85 Wis. 26, 20 L. R. A. 662.

[1153] City of Santa Cruz v. Enright, 95 Cal. 105; Howe v. Norman, 13 R. I. 488.

be exercised when conferred will depend upon the terms of the grant.[1154] Within its limits, however, the extent of its exercise is discretionary with the municipal or public authorities. The quality and quantity of water needed or the specific rights condemned must be left necessarily to their determination, as they are the best judges of the local necessities to be supplied.[1155] In individual cases the respective rights of the parties must be determined by the language used in the proceedings leading to the appropriation of private rights. The right to exercise the power includes not only the capacity in the public corporation to acquire in this manner, lands, water sheds, riparian and water rights, but all other lands, easements or rights which may be necessary for use in the construction, operation and maintenance or distribution of any part of a water system which includes among other things, pumping and distributing stations, stand pipes, filtering basins and reservoirs or anything essential to their efficiency and safety.[1156] The right of exercising the power of eminent domain when granted a public corporation for the purpose of supplying itself and its inhabitants with water is regarded as a continuing power and not exhausted by its single exercise. The purpose of the grant is to secure an abundant supply of wholesome water for public and private use, and this could be easily defeated if the public corporation were not permitted to enlarge or alter the system or any of its parts from time to time

[1154] Pine v. City of New York, 103 Fed. 337. A city in one state cannot condemn lands for the purpose of a water supply in another state. Cain v. City of Wyoming, 104 Ill. App. 538; Dodge v. City of Council Bluffs, 57 Iowa, 560; Ingraham v. Camden & R. Water Co., 82 Me. 335; Johnson v. City of Boston, 130 Mass. 452; Pickman v. Inhabitants of Peabody, 145 Mass. 480; Mills on Monatiquot River v. Braintree Water Supply Co., 149 Mass. 478; City of Helena v. Rogan, 26 Mont. 452.

[1155] City of Los Angeles v. Pomeroy, 124 Cal. 597. The future growth of a city can be considered and its possible needs provided for Woodbury v. Marblehead Water Co., 145 Mass. 509.

[1156] Lake Pleasanton Water Co. v. Contra Costa Water Co., 67 Cal. 659; Spring Valley Waterworks v. Drinkhouse, 92 Cal. 528; Bishop v. North Adams Fire Dist., 167 Mass. 364; Burnett v. Com., 169 Mass. 417; Inhabitants of Stoughton v. Paul, 173 Mass. 148; Keller v. Riverton Water Co., 161 Pa. 422; Adams v. San Angelo Waterworks Co. (Tex. Civ. App.) 26 S. W. 1104; Adams v. San Angelo Waterworks Co., 86 Tex. 485. But reservoirs and standpipes are not included in the term "water mains."

under proper legislative authority as occasion and needs demand. If, however, the charter or the legislative grant of the power limits a public corporation to a single exercise of the power or a single authority to secure a water supply, its legal rights in this connection are limited to the extent of the grant.

§ 464. Protection of water supply.

The primary purpose of the authority for and legal right of a public corporation to engage in the business of selling and distributing water is the preservation of the health of the people which, it has been repeatedly held and conclusively established, can in no wise be better maintained than by an ample supply of pure and wholesome water for drinking, cooking and other purposes. The absolute purity and the quality of the water, therefore, are essential to the maintenance and existence of the right. This leads logically to the legal proposition that a public corporation engaged in such business can avail itself of all those remedies afforded by law which may be necessary to preserve the purity of the water and to protect it either at the source of supply or in its distribution from pollution, obstruction or diversion.[1157] The proceedings usually followed are those necessary for the securing of an injunction and the courts have repeatedly held that the discharge of refuse or other matter which pollutes a water supply is a continuing nuisance for which no adequate remedy

[1157] Missouri v. Illinois, 180 U. S. 208; Indianapolis Water Co. v. American Strawboard Co., 53 Fed. 970, affirmed 57 Fed. 1000; Lewis v. Stein, 16 Ala. 214; People v. Borda, 105 Cal. 636; People v. Elk River Mill & Lumber Co., 107 Cal. 221; City of Durango v. Chapman, 24 Colo. 169; Topeka Water Supply Co. v. City of Potwin, 43 Kan. 404; City of Baltimore v. Warren Mfg. Co., 59 Md. 96; Martin v. Gleason, 139 Mass. 183; State v. Wheeler, 44 N. J. Law, 88; State v. Diamond Mills Paper Co., 63 N. J. Eq. 111; Kelley v. City of New York, 6 Misc. 516, 27 N. Y. Supp. 164, affirmed 89 Hun, 246, 35 N. Y. Supp. 1109; Com. v. Russell, 172 Pa. 506; People v. McCune, 14 Utah, 152, 35 L. R. A. 396; City of Springville v. Fullmer, 7 Utah, 450, 27 Pac. 577. For the purpose of protecting the supply, a municipal corporation may be authorized to purchase all the land along the water body from which the supply is drawn or even the entire water shed itself. See People v. Elk River Mill & Lumber Co., 107 Cal. 221; Inhabitants of Brookline v. Mackintosh, 133 Mass. 215, and State v. Griffin, 69 N. H. 1, 41 L. R. A. 177.

exists at law and, therefore, will entitle the complainant to such relief. Prescriptive rights to foul a source of water supply cannot be acquired.[1158]

§ 465. Officials authorized to act for the municipality.

In making contracts for a water supply or granting exclusive licenses or franchises to private persons for the accomplishment of the same end, public corporations can only be bound through the action of those officials authorized and competent by law to represent the corporation. Such contracts or licenses and franchises must, therefore, in order to be legal and binding, not only be executed or granted pursuant to some legal authority,[1159] but by those officials or official bodies charged with the execution of this duty.[1160] Action of officials unapproved by the city coun-

[1158] Inhabitants of Brookline v. Mackintosh, 133 Mass. 215; Martin v. Gleason, 139 Mass. 183; State v. Griffin, 69 N. H. 1, 41 L. R. A. 177; Kelley v. City of New York, 89 Hun, 246, 35 N. Y. Supp. 1109.

[1159] See authorities cited under § 455, supra.

[1160] Illinois Trust & Sav. Bank v. Arkansas City, 76 Fed. 271, 34 L. R. A. 518. Number thirteen to the syllabi of this case reads as follows: "The presentation to the city council of a city in open session by a private party who is named as grantee in a defeated ordinance upon its records of a written acceptance of the terms of the ordinance and a bond to construct water-works accordingly, the construction of the works and the location of the hydrants by such grantee under the direction of the city council, the actual acceptance and use of the works by the city when completed and the passage by the city council of a formal resolution that the water-works erected under the ordinance are accepted by the city, constitute a binding contract between the city and the grantee in the ordinance for the construction and operation of the water-works according to its terms."

Los Angeles City Water Co. v. City of Los Angeles, 88 Fed. 720. The court in this case held that "A municipal corporation is bound by the declarations of its officers where such declarations accompany and are explanatory of an act done by the officer in the scope of his authority."

City of Centerville v. Fidelity Trust & Guaranty Co., 118 Fed. 332; Welch v. District of Columbia Com'rs, 3 MacArthur (D. C.) 463. In no case can an agent of a public corporation by his action bind a corporation in excess of the powers actually granted it.

Wells v. City of Atlanta, 43 Ga. 67; City of Connersville v. Connersville Hydraulic Co., 86 Ind. 184; Lake Charles Ice, Light & Water-works Co. v. City of Lake Charles, 106 La. 65. De facto officers equally with de jure ones are competent

cil, if such approval is necessary, cannot be enforced although the ruling may result in a disadvantage or an actual loss to the individual.[1161] All persons dealing with public corporations are charged with notice of, first, the peculiar character and nature of such corporations, and, second, all public laws affecting the particular question or matter in which they may be interested.

Form of contract and manner of making. The provisions of the law in respect to the manner of action must also be followed,[1162] and if the form of the contract or its substance is fixed,

to bind a corporation if vested originally with such power.

Winterport Water Co. v. Inhabitants of Winterport, 94 Me. 215; East Jordan Lumber Co. v. Village of East Jordan, 100 Mich. 201; Ludington Water Supply Co. v. City of Ludington, 119 Mich. 480. To establish the validity of a contract for a supply of water as between a municipality and a private water company, it is not necessary that record evidence should exist of the approval of such a contract by the city council, with a bond of the individual members.

Agua Pura Co. v. City of Las Vegas, 10 N. M. 6, 60 Pac. 208. County commissioners under statutes granting them authority to act as such, have no power to make a contract with a private water company for a supply of water for either public or private use.

David v. Portland Water Committee, 14 Or. 98; Esberg Cigar Co. v. City of Portland, 34 Or. 282, 55 Pac. 961, 43 L. R. A. 435; City of Austin v. McCall (Tex. Civ. App.) 67 S. W. 192. Where two statutes granting authority to certain officials in respect to a water supply are in irreconcilable conflict, the latest provision of the law will control.

[1161] Welch v. District of Columbia Com'rs, 3 MacArthur (D. C.) 463; Press Pub. Co. v. Holahan, 29 Misc. 684, 62 N. Y. Supp. 872; Keator v. Dalton, 29 Misc. 692, 62 N. Y. Supp. 878; City of Nashville v. Hagan, 68 Tenn. (9 Baxt.) 495. But see Ludington Water Supply Co. v. City of Ludington, 119 Mich. 480, which holds that where a municipality for a long time has acted upon a contract with a water supply company made by its council, it cannot question its legality because there is no record of the adoption of a resolution declaring it expendient to have waterworks constructed and the inexpediency of their construction by the municipality as required by statute; the contract itself reciting the adoption of such a resolution and both parties having acted upon it. See, also, Crebs v. City of Lebanon, 98 Fed. 549, which holds that a contract between a water company and a municipality ratified by the voters and the services called for rendered for a number of years, cannot be defeated because of irregularities in the location.

[1162] Continental Const. Co. v. City of Altoona (C. C. A.) 92 Fed. 822; Nicholasville Water Co. v. Councilmen of Nicholasville, 18 Ky. L. R. 592, 36 S. W. 549; Id., 38 S. W. 430. A franchise to a private water

a different one will not be held valid.[1163] As a public corporation exercises such power in its private or proprietary capacity, it will be controlled and the contract will be construed by the same rules of construction which would apply to the interpretation and enforcement of similar contracts between individuals.[1164]

company held invalid because bids for the service to be rendered by the water company were not received publicly as required by the constitution. But see the case of Hurley Water Co. v. Vaughn, 115 Wis. 470, 91 N. W. 971, which decides that a contract for a water supply for public use is not void where there was a failure to observe statutory requirements in respect to the letting of contracts to the lowest bidder; the court holding that there being but one water company in a position to supply the commodity desired in the nature of things, competitive bidding was impossible.

East Jordan Lumber Co. v. Village of East Jordan, 100 Mich. 201. A public corporation may, however, be estopped from denying the validity of a contract where informalities have been waived, its benefits received and audited bills paid from time to time.

Winterport Water Co. v. Inhabitants of Winterport, 94 Me. 215; Poppleton v. Moores (Neb.) 93 N. W. 747; Hornby v. Common Council of Beverly, 48 N. J. Law, 110. Where no independent authority is granted a city council, the legal voters of the city must act before a legal appropriation for a water supply can be made.

Tyrone Gas & Water Co. v. Borough of Tyrone, 195 Pa. 566. A contract relation is established as between a private water company and a municipality when the city avails itself of their facilities and draws upon the water supply for purposes of fire protection and other public uses. Stehmeyer v. City Council of Charleston, 53 S. C. 259; Johnson v. City of Rock Hill, 57 S. C. 371; Thompson v. Town of Sumner, 9 Wash. 310.

[1163] City of Greenville v. Greenville Waterworks Co., 125 Ala. 625. Where no form of contract is provided, one complying with the statute of frauds is sufficient. Saleno v. City of Neosho, 127 Mo. 627, 27 L. R. A. 769; Aurora Water Co. v. City of Aurora, 129 Mo. 540; Ricketson v. City of Milwaukee, 105 Wis. 591, 47 L. R. A. 685.

[1164] Little Falls Elec. & Water Co. v. City of Little Falls, 102 Fed. 663; City of Greenville v. Greenville Waterworks Co., 125 Ala. 625; Graves County Water & Light Co. v. Ligon, 23 Ky. L. R. 2149, 66 S. W. 725; City of St. Cloud v. Water, Light & Power Co., 88 Minn. 329, 92 N. W. 1112. The passage of an ordinance granting certain persons and their successors the privilege of constructing and maintaining waterworks for a stated period, when accepted, forms a contract between the parties.

Saleno v. City of Neosho, 127 Mo. 627, 27 L. R. A. 769, and Aurora Water Co. v. City of Aurora, 129 Mo. 540, hold that a contract for a municipal water supply need not be executed in duplicate to be legal under the Mo. Stats. but it is sufficient if the legislative act setting

The intention of the parties will be carried into effect if it is possible to do this by a reasonable construction. See also, in the notes, reference to other particular contract clauses decided by the cases cited.[1165] If a public corporation exercises volitional

forth the contract is accepted in writing by the other party to it.

Tyrone Gas & Water Co. v. Borough of Tyrone, 195 Pa. 566. A contract will be implied from the acceptance of the facilities of the water company by a municipality.

[1165] Moffett v. City of Goldsborough (C. C. A.) 52 Fed. 560, reversing 49 Fed. 213. A water supply company cannot be required to render more service than that called for by its contract.

Santa Ana Water Co. v. Town of San Buenaventura, 65 Fed. 323. A contract executed on behalf of the municipality by officers who are also interested in the water supply company is invalid.

Illinois Trust & Sav. Bank v. Arkansas City Water Co., 67 Fed. 196; Los Angeles City Water Co. v. City of Los Angeles, 88 Fed. 720. The fact that the water company is making large profits will not render the contract void where rates were reasonable at the time it was made.

City of Austin v. Bartholomew (C. C. A.) 107 Fed. 349. Hydrant rentals. Fidelity Trust & Guaranty Co. v. Fowler Water Co., 113 Fed. 560. An option for the purchase of waterworks invalid because made without authority does not render invalid other portions of the contract. Capital City Water Co. v. City of Montgomery, 92 Ala. 366. Hydrant rentals on extensions.

City of Montgomery v. Capital City Water Co., 92 Ala. 376. Construing a contract provision in respect to street sprinkling by a water supply company. San Diego Water Co. v. City of San Diego, 59 Cal. 517. A contract with reference to water rights is void when in conflict with the provisions of a statute relative to the same subject.

Carlyle Water, Light & Power Co. v. Carlyle, 31 Ill. App. 325. Location of stand pipe. Gold v. City of Peoria, 65 Ill. App. 602. Construing contract obligation of the municipality to take water continually during the period of the contract.

City of Quincy v. Bull, 106 Ill. 337. The valid portion of a contract for a water supply if separable from the rest can be enforced.

City of Valparaiso v. Valparaiso City Water Co., 30 Ind. App. 316, 65 N. E. 1063. Determining what is a reasonable rent for hydrants where the contract specifies that the company shall receive for hydrant rentals an amount not in excess of a certain sum. An invalid clause in the contract will not invalidate the whole contract where it can be separated from the rest.

City of Connersville v. Connersville Hydraulic Co., 86 Ind. 184. Payment of a claim for water supply. Davenport Water Co. v. City of Davenport, 64 Iowa, 55. Rent periods commence to run from the passage of the ordinance authorizing the contract.

Belfast Water Co. v. City of Belfast, 92 Me. 52, 47 L. R. A. 82. Provisions relative to hydrants and size of pipes as affecting the circulation of water. City of Grand Ha-

and discretionary powers by the construction of public waterworks, the manner in which this power is exercised must strictly follow the statutory authority.[1166] The action when initiated by public officials must be maintained and continued as provided by law and when necessary the assent of the voters[1167] or a municipal council secured, either to the construction of the works,[1168] the incurring of an indebtedness[1169] or for whatever required.[1170]

ven v. Grand Haven Waterworks, 119 Mich. 652. "A city upon an accounting with a private water company for the use of its hydrants for fire protection throughout a series of years, will be charged, in the absence of better data for measuring compensation, with interest and depreciation upon the cost to the city of a plant of its own up to the time such plant was acquired, and, after such time, with an equitable allowance per gallon for water actually furnished to the city by the private company."

State Trust Co. v. City of Duluth, 70 Minn. 257. Considering provisions to effect the enforcement of a contract. State v. Philipsburg, 23 Mont. 16. Additional hydrants.

State v. City of Crete, 32 Neb. 568. Construing clause requiring the laying of a certain number of feet of pipe. State v. City of Kearney, 49 Neb. 325; Id., 49 Neb. 337; City of Broken Bow v. Broken Bow Waterworks Co., 57 Neb. 548. A water contract is not void because the mayor of the city and one member of the council had formerly been stockholders in the water company.

Nicoll v. Sands, 131 N. Y. 19, affirming 60 Hun. 580, 14 N. Y. Supp. 448; Borough of Milford v. Milford Water Co., 124 Pa. 610, 3 L. R. A. 122. A contract between a water supply company and a municipality is void when a majority of the council are stockholders in the water company.

Columbia Water Power Co. v. City of Columbia, 5 S. C. (5 Rich.) 225. Amount of water supply. Ellensburgh Water Supply Co. v. City of Ellensburgh, 13 Wash. 554. A municipality is only liable for hydrant rentals for such hydrants as have actually been put in.

[1166] Stehmeyer v. City of Charleston, 53 S. C. 259.

[1167] Smith v. Inhabitants of Dedham, 144 Mass. 177; Morgan v. Gloucester City, 44 N. J. Law, 137; City of Charlotte v. Shepard, 120 N. C. 411; Edgerton v. Goldsboro Water Co., 126 N. C. 93.

[1168] Taylor v. McFadden, 84 Iowa, 262.

[1169] Read v. Atlantic City, 49 N. J. Law, 558. See, also, §§ 140 et seq., and 177, supra.

[1170] Taylor v. McFadden, 84 Iowa, 262. "Appellant's first contention is that the ordinance authorizing this tax is void because its taking effect was made to depend upon a vote of the people. Santo v. State, 2 Iowa, 203, and cases following that are relied upon. In that case it is held that 'the general assembly cannot legally submit to the people the proposition whether an act should become a law or not; and the people have no power in their primary or individual capacity

§ 466. The right to delegate the construction to private enterprise.

The power to authorize the construction by private individuals or corporations of a water plant in common with the direct power to construct must be expressly given[1171] or the optional power on the part of the public corporation to acquire a system for the supply of water by either or both of the two methods suggested. These rights, it is needless to add, must be executed in the manner provided by law since they are regarded as the exercise of an extraordinary power and not the performance of a usual governmental function or purpose.[1172] The grant to private parties

to make laws. They do this by representatives.' This ruling is based upon the constitutional provisions vesting the legislative authority of the state in the general assembly and prescribing how laws may be enacted, approved and of effect. These restrictions do not apply to the legislative authority of the councils of incorporated towns or cities; their powers are conferred by and limited to those expressed in the charter or statutes under which the municipal corporation exists and operates. The legislative powers of the state are conferred upon the general assembly and exercised independently of any vote of the people approving or disapproving the laws enacted; not so, however, as to the action of city and town councils in establishing waterworks. While § 471 of the code confers upon cities and incorporated towns, power to erect or to authorize the erection of waterworks, it is expressly provided, 'but no such works shall be erected or authorized until a majority of the voters of the city or town, at a general or special election, by vote, approve the same.' It is the approving vote that authorizes the erection of the waterworks. The argument is that the council had no power to enact this ordinance until after an approving vote. True, no action of theirs could establish waterworks without the approving vote but there is nothing in reason or the law why they might not express in the form of ordinance or otherwise, the material conditions, such as the kind of works and cost, upon which the vote was * * * called for upon the naked proposition of, for, or against the works. The vote determines simply whether the works shall be erected or authorized or not, and, while a council might proceed differently, we discover no reason why they may not, in advance of the vote, determine upon the kind of waterworks, the probable cost thereof, the amount of tax to be levied, and the like, thus leaving the people to vote more understandingly, and these provisions to have the double sanction of the council and people."

[1171] Franke v. Paducah Water Supply Co., 11 Ky. L. R. 17, 11 S. W. 432, 718.

[1172] Valparaiso v. Gardner, 97 Ind. 1.

is usually in the nature of an exclusive franchise or license giving the sole right to construct and operate the necessary facilities for obtaining and distributing a supply of water.[1173] This subject will be considered at length under that chapter relating to the control and regulation of the streets of a municipality but it might be said here that the validity of such contracts, licenses or franchises has been attacked upon several grounds, namely, as violating that principle of law preventing public officers from making contracts running through a period of years and limiting or restraining the powers of their successors[1174] and making the contract extend beyond the immediate term of office of such official.[1175] The greater weight of authority based upon moral, equitable and legal reasons is to the effect that such franchises are to be regarded as contracts and therefore protected by that provision of the Federal constitution prohibiting any state from passing a law impairing the obligation of a contract.[1176] This doctrine holds without question where the contract has been made in good faith and the franchise secured upon reasonable terms and conditions from the standpoint of both parties taking into consideration the necessary charge, original investment and the contingencies and uncertainties of municipal growth.[1177]

[1173] New Orleans Waterworks Co. v. Rivers, 115 U. S. 674; St. Tammany Waterworks Co. v. New Orleans Waterworks Co., 120 U. S. 64; Atlantic City Waterworks Co. v. Atlantic City, 39 N. J. Eq. (12 Stew.) 367.

[1174] City of Brenham v. Brenham Water Co., 67 Tex. 542.

[1175] City of Memphis v. Memphis Water Co., 52 Tenn. (5 Heisk.) 495.

[1176] Newburyport Water Co. v. City of Newburyport, 113 Fed. 677.

[1177] Los Angeles City Water Co. v. City of Los Angeles, 88 Fed. 720. In this case the point was made that an ordinance reserving the right to regulate water rates was obnoxious to the "contract clause" of the Federal Constitution. The court said: "A question has been raised by the defendants as to the proper construction of that clause of the contract above mentioned limiting the right of the city to regulate water rates, and it will be best to determine that question before passing upon the validity of said clause. The contention of defendants is that said clause refers exclusively to a right of regulation given the city by the contract itself and was not intended as a limitation upon any power which had been or might thereafter be conferred by the legislature of the state. This contention is not well taken. The contract does not grant, nor purport to grant, to the city any right in respect to the regulation of rates; the language being that 'the mayor and common council of said city shall have, and do reserve the right to regulate water rates,'

§ 467. Cost and manner of payment.

A system of public waterworks can be divided into that part which has for its purpose the securing and the maintenance of a supply, and again into that part consisting of the mains, hydrants and other facilities of a similar character used in the distribution of the supply, either for its own public use, that of private consumers, or both. The expense of the construction of the plant may, in respect to this division, be legally met from two sources. The cost of that part of the system which has for its purpose the distribution of the water can be and is generally paid by an assessment upon property benefited;[1178] the construction of water mains, hydrants and service pipes being considered in the nature of local improvements and therefore to be paid in the manner usually provided for the construction of such improvements.[1179] On the other hand, that part of the system

etc. The use of the word 'reserve' shows that the parties were contracting, not with reference to a right which it was supposed the lessees were granting to the city but with reference to a right or power which they assumed the city already possessed. The parties manifestly intended by the clause now under consideration that the lessees should have a right to the minimum rates prescribed, namely, the rates that were then charged; and, if the city was authorized to make such an agreement, neither it nor the legislature of the state could thereafter lawfully reduce the rates below the minimum so agreed upon."

[1178] Parsons v. District of Columbia, 170 U. S. 45. A local assessment in excess of the actual cost of the making of the improvement in this case, the laying of water mains is not invalid when it has for its purpose not only the payment of the original cost but also the creation of a fund for the purpose of making repairs. Springfield Water Com'rs v. Conklin, 113 Ill. 340; McChesney v. City of Chicago, 152 Ill. 543; Hughes v. City of Momence, 163 Ill. 535; Blades v. Detroit Water Com'rs, 122 Mich. 366; Turner v. Hand County, 11 S. D. 348; Smith v. City of Seattle, 25 Wash. 300.

[1179] See, also, authorities cited in preceding note; District of Columbia v. Burgdorf, 6 App. D. C. 465; Parsons v. District of Columbia, 170 U. S. 45; Crane v. Siloam Springs, 67 Ark. 30; Warren v. City of Chicago, 118 Ill. 329, 9 N. E. 883; People v. Sherman, 83 Ill. 165; Hughes v. City of Momence, 163 Ill. 535. Hewes v. Glos, 170 Ill. 436. A general system of waterworks is not a local improvement within the meaning of a statute authorizing the construction of local improvements by the levy of special assessments. An assessment for such purpose is void. The rule of collateral attack

which has for its object the accumulation and preservation of the

may, however, apply to sustain the validity of such proceedings.

Myers v. City of Chicago, 196 Ill. 591; City of Lemont v. Jenks, 197 Ill. 363. The excess of the cost of a water supply over the amount authorized by law to be expended for such purposes, cannot be provided for by a local assessment. Creston Waterworks Co. v. City of Creston, 101 Iowa, 687; City of Louisville v. Osborne, 73 Ky. (10 Bush) 226.

State v. Robert P. Lewis Co., 72 Minn. 87, 42 L. R. A. 639. See, also, 82 Minn. 390, 53 L. R. A. 421, reversing 72 Minn. 87, 42 L. R. A. 639, under the authority of Norwood v. Baker, 172 U. S. 269. A re-argument was granted and on page 402 of the same volume the court reverses its former opinion (p. 390) and reverts to the ruling in 72 Minn. 87, 42 L. R. A. 639, following French v. Barber Asphalt Pav. Co., 181 U. S. 324. Chief Justice Start concurs in the result, "on the ground that the case is ruled by State v. Robert P. Lewis Co., 72 Minn. 87, 42 L. R. A. 639, and Parsons v. District of Columbia, 170 U. S. 45."

State v. Pillsbury, 82 Minn. 359; Dasey v. Skinner, 57 Hun, 593, 11 N. Y. Supp, 821; Smith v. City of Seattle, 25 Wash. 300; Gleason v. Waukesha County, 103 Wis. 225.

But see State v. City of St. Louis, 169 Mo. 31, 68 S. W. 900.

See, also, Stehmeyer v. City of Charleston, 53 S. C. 259, which holds that a system of special assessments is invalid when levied upon property abutting on the streets through which water mains are laid for the purpose of paying bonds issued in payment of the cost of construction of waterworks. Palmer v. City of Danville, 154 Ill. 156. A special assessment cannot be levied against lots for the payment of the cost of lateral service water pipes.

The levy of water taxes as a local assessment on the frontage basis if conditions and circumstances justify it will be upheld. Jones v. Detroit Water Com'rs, 34 Mich. 273; State v. Robert P. Lewis Co., 72 Minn. 87, 42 L. R. A. 639. This decision was reversed in 82 Minn. 390, 53 L. R. A. 421, but on the authority of French v. Barber Asphalt Pav. Co., 181 U. S. 324, the opinion on page 390 was itself reversed and the ruling in 72 Minn. 87, 42 L. R. A. 639, sustained. But see Blades v. Detroit Water Com'rs, 122 Mich. 366; Cook Farm Co. v. City of Detroit, 124 Mich. 426; Tenbrook v. City of Philadelphia, 7 Phila. (Pa.) 105; City of Allentown v. Adams (Pa.) 8 Atl. 430. Farm land cannot be assessed according to the front foot rule for the purpose of laying a water pipe. Some cases sustain the validity of a water assessment against vacant property.

Dasey v. Skinner, 57 Hun, 593, 11 N. Y. Supp. 821. "The emergencies intended to be met, and the security to all the village inhabitants to be provided for by a common water supply, create other burdens of legitimate charge beyond that incident to its actual use for domestic purposes. One object * * * is the protection of the life and property of each individual living within the village limits and having a right to call for the protection it affords in the hour of peril. While it may be true that

supply should be paid from the general funds.[1180] The decision of the Federal court in the Ottumwa case is unquestionably the correct one, as Judge Lochren in the opinion well said: "The language of this section (referring to section 3, art. 11, Iowa

a resident owner of buildings within the corporate limits may not actually appropriate the water provided by drawing it from a faucet in his living room, still it does not follow he should, therefore, be freed from the expense of the maintenance of the system. The protection it furnishes in case of fire, and which he, as a resident, has the right, when the emergency demands, to invoke, is of greater benefit than the simple daily use for household purposes."

Batterman v. City of New York, 65 App. Div. 576, 73 N. Y. Supp. 44; Allen v. Drew, 44 Vt. 174; Richmond & A. R. Co. v. City of Lynchburg, 81 Va. 473. But where the levy of a water tax is regarded as a local assessment, the majority of the cases hold that an arbitrary assessment according to frontage or without regard to benefits is invalid and cannot be justified even as one case suggested "as a proper exercise of the police power"—this line of cases does not sustain the validity of water taxes or assessments levied upon vacant property. Vreeland v. Jersey City, 43 N. J. Law, 135, affirmed 43 N. J. Law, 638. Remsen v. Wheeler, 105 N. Y. 573; In re Union College, 129 N. Y. 308; In re Flower, 129 N. Y. 643; Stehmeyer v. City of Charleston, 53 S. C. 259.

[1180] City of Ottumwa v. City Water Supply Co. (C. C. A.) 119 Fed. 315, 59 L. R. A. 604, deciding contrary to the opinion rendered in Swanson v. City of Ottumwa, 118 Iowa, 161, 91 N. W. 1048, 59 L. R. A. 620. A discussion of this case will be found in § 461, ante, with quotations from the opinion. Frederick v. City of Augusta, 5 Ga. 561; Gold v. City of Peoria, 65 Ill. App. 602. "The assumption of a municipal debt by a water company, and its promise to pay the same, does not extinguish the debt as a liability against the city. That can be accomplished only by the holders of the debt accepting the promise of the water company to pay, agreeing to release the municipality."

Culbertson v. City of Fulton, 127 Ill. 30; Village of Morgan Park v. Wiswall, 155 Ill. 262; Village of Blue Island v. Eames, 155 Ill. 398; Hughes v. City of Momence, 163 Ill. 535; Youngerman v. Murphy, 107 Iowa, 686. Hall v. City of Cedar Rapids, 115 Iowa, 199. An arrangement for the payment of a water plant by a series of annual instalments technically termed "hydrant rentals" sufficient in amount to pay for water used and also at the end of the time the cost of the construction of the plant is a violation of the constitutional provision relative to the incurring of indebtedness. Savidge v. Village of Spring Lake, 112 Mich. 91, 70 N. W. 425; Trump Mfg. Co. v. Buchanan, 116 Mich. 113; State v. Babcock, 20 Neb. 522; Conger v. Inhabitants of Summit Tp., 52 N. J. Law, 483; Brown v. City of Cory, 175 Pa. 528. The fact that a water plant is to be paid for in instalments does not relieve the contract from a consti-

Const.) is plain and simple and its meaning is unmistakable; the incurring of indebtedness beyond the amount limited is absolutely and unqualifiedly prohibited no matter what the pretext or circumstances or the form which the indebtedness is made to assume. It curbs equally the power of the legislature, the officials and the people themselves; and was designed to protect the tax payers from the folly and improvidence of either or of all combined. * * * The proposed mortgage of the waterworks to secure the payment of the bonds emphasizes the fact that the city is indebted in the amount of the bonds by such pledge of the city's property for their payment. A mortgage which is to be discharged by the payment of money secures an indebtedness and cannot exist without the existence of a debt. Even if the creditor's remedy is limited by the contract, to the property of the debtor which is covered by the mortgage, the relation of the debtor and creditor exists and the debtor pays the debt when his mortgaged property is converted into money to discharge it just as certainly as if in the absence of any mortgage his same property were sold under execution for the same purpose. * * * The fact that these proposed bonds are to bear interest at 4½ per cent. cannot be overlooked. Why should the city pay interest—that constant, distinguishing, most irksome and disagreeable feature of indebtedness—upon money which it does not owe; money which belonged to it before it was received being only its own fixed revenues gotten hold of for present use a little in advance by 'anticipation' and in no wise by incurring indebtedness?" In

tutional prohibition against the incurring of indebtedness in excess of a certain limit.

Turner v. Hand County, 11 S. D. 348; Austin v. McCall (Tex.) 68 S. W. 791. The purchase of a water plant by a city creates a debt within the meaning of the constitutional provision although the transaction is a compromise of a claim against the city in favor of the water company.

City of Austin v. Nalle, 85 Tex. 520; Earles v. Wells, 94 Wis. 285. The constitutional limitation of indebtedness cannot be effected directly or indirectly, in this case, through the construction of waterworks by third persons; the municipality being responsible primarily for the payment of the bonds given by the contractors for the cost of the construction of the plant. But see Crane v. City of Siloam Springs, 67 Ark. 30. Under the Ark. statutes, a city may be organized into one local improvement district and the cost of the construction of an entire plant assessed upon all property within such district in proportion to benefits. See, also, §§ 140 et seq., 177, 184 and 461, ante.

referring to the decision of Swanson v. Ottumwa, the Federal court further added: "To our minds it is not persuasive and we decline to be guided by it. Its citations exhibit the unceasing attempt in that state and some others to nullify and evade wholesome constitutional limitations upon the power of municipalities to create indebtedness and thus place intolerable burdens on the tax payers; and its reasoning but adopts the ingenious but obviously untenable arguments by which such attempts have ever been supported."[1181] In some instances it is provided by law

[1181] City of Ottumwa v. City Water Supply Co. (C. C. A.) 119 Fed. 315, 59 L. R. A. 604. See, also, the opinion of the Circuit Court on granting the first preliminary injunction given in full, 119 Fed. 325 et seq. "The evil that existed, and which evil was corrected by the adoption of the constitutional provision, is known by all. If not so known, one has but to read the debates of the convention of 1857. He will find that many cities and counties in Eastern Iowa—the only part inhabited to a great extent—were in debt hopelessly. In some of those cities and counties the tax payers are still struggling to pay for improvements, some of which were never constructed. But all such improvements were loudly contended for by the people, as they are at the present day. And the evil was successfully checked, if the courts will but stand by the constitution. But in the case at bar the argument seems to be that the city can go in debt more than the 5 per-centum by calling it by some other name than 'debt.' It is said that the ordinance provides, and the bonds will so recite, that the money will all be obtained by a 'special assessment on all the taxpayers,' and that only at the rate of two mills per year; and that, with the surplus of the five mill levy, and the profits of private consumers, make the burden not a debt, but a 'special assessment.' Ordinarily, 'special assessments' mean the taxation of abutting property, such as is done for sidewalks, paving, etc. But a special levy of two mills on the dollar on all the property within the city, some of which may be one or more miles from a water main or hydrant, is not a 'special assessment,' and calling it such does not make it so. The constitution says, 'No municipal corporation shall be allowed to become indebted in any manner, or for any purpose, more than five per centum on the last assessment,' etc. The words 'for any purpose,' seems to me to cover a system of water works, and the words 'any manner' are broad enough to cover 'a two-mill levy.' If those words do not so mean, then, as I believe, they are utterly without meaning or force. If the provisions can be ridden down by a two-mill levy, then a ten or twenty mill levy per year can be authorized each year for the erection of waterworks, and a like sum for an electric plant, and then for a city hall, and then for parks, and public bath houses, and libraries, and so on, until, under the pretense urged in this case, absolute

that the profits from the operation of the plant shall be applied on the original cost of the construction; such an expenditure is then not within a constitutional provision relative to the incurring of indebtedness.[1182] If its cost is paid by the incurring of indebtedness, namely, the issue of bonds, these are considered as general corporate obligations. In some cases municipalities have attempted to construct waterworks through the issue of bonds and by making them a special charge upon the improvement constructed and its revenues attempted to defeat provisions of the law limiting the incurring of indebtedness.[1183] The weight of authority is, however, to the effect that such obligations are to be considered as general corporate indebtedness and cannot be excluded in a determination of the amount which a public corporation may constitutionally incur.[1184]

§ 468. Water rentals and regulations.

A municipality possessing the power to construct a water plant of its own, to supply both its wants and those of the community, unquestionably has the right to charge, usually on the basis of water used,[1185] such rentals as may be necessary to pay the cost

confiscation can be authorized by the legislature, under the guise of taxation, in one year." But see Wilson v. Trustees of Sanitary Dist. of Chicago, 133 Ill. 443, where the organization of the people residing within a municipality under another corporation or taxing district for the purpose of carrying on desired local improvements was sustained. But as said by a late author (Farnham, Waters, p. 739), "It is difficult to find language strong enough to use in condemnation of such devices; when considering them there is no wonder that justice is considered not only as blind but that it is sometimes thought to have abdicated its seat and that to obtain it people must take the matter into their own hands." See, also, Kennebec Water Dist. v. City of Waterville, 96 Me. 234.

[1182] Donahue v. Morgan, 24 Colo. 389; Attorney General v. City of Salem, 103 Mass. 138; Alter v. City of Cincinnati, 56 Ohio St. 47, 35 L. R. A. 737; Citizens' Bank v. City of Terrell, 78 Tex. 450. Where the revenues of such a plant are subject to appropriation by a city council for other purposes, they cannot be made the basis of a debt. Allen v. Drew, 44 Vt. 174; Winston v. City of Spokane, 12 Wash. 524; Faulkner v. City of Seattle, 19 Wash. 320. But see City of Joliet v. Alexander, 194 Ill. 457.

[1183] Comstock v. City of Syracuse, 5 N. Y. Supp. 874. See, also, cases cited in preceding note and under § 463, supra.

[1184] Smith v. Inhabitants of Dedham, 144 Mass. 177. See authorities cited in preceding notes.

[1185] Vreeland v. Jersey City, 43 N. J. Law, 135, affirmed in 43 N. J. Law, 638. A water tax arbitrarily

of operating,[1186] expensive and extravagant though it may be, to meet fixed charges and to protect itself against loss through the yearly depreciation of the property,[1187] to provide a fund for the

imposed upon property fronting on water mains or pipes is void as against unoccupied or vacant property. See, also, as holding water rentals assessed against vacant lots invalid, In re Union College, 129 N. Y. 308; Remsen v. Wheeler, 105 N. Y. 573, and In re Flower, 55 Hun, 158, 7 N. Y. Supp. 866.

[1186] Higgins v. City of San Diego, 131 Cal. 294; Park County Com'rs v. Locke, 2 Colo. App. 508, 31 Pac. 351. Such operating expenses include the wages of water commissioners. City of Detroit v. Water Com'rs of Detroit, 108 Mich. 494, 66 N. W. 377, 31 L. R. A. 463. The Detroit house of correction is not a public institution of the city of Detroit and therefore entitled to be supplied with water free of charge by the board of water commissioners. Albert v. Davis, 49 Neb. 579. Under the authority to prescribe water rents, a municipality cannot require a private consumer to purchase a water meter as a condition precedent to the use of water. Red Star Line S. S. Co. v. Jersey City, 45 N. J. Law, 246. Water rents must be, it is here held, uniform and according to the benefits received.

People v. Willis, 32 App. Div. 626, 53 N. Y. Supp. 1111. The Young Mens' Christian Association is not exempt from payment of water rentals, it not coming within that provision of the charter of the city of Brooklyn which releases "the several hospitals, orphan asylums and all other charitable and beneficent corporations" from the payment of water taxes. Skaneateles Waterworks Co. v. Village of Skaneateles, 161 N. Y. 154, 46 L. R. A. 687. When the water receipts are insufficient to pay such charges and the cost of operating, property may be taxed to meet the deficiency.

[1187] Jones v. Detroit Water Com'rs, 34 Mich. 273; City of Detroit v. Detroit Water Com'rs, 108 Mich. 494, 31 L. R. A. 463; Preston v. Detroit Water Com'rs, 117 Mich. 589. "The board is very properly given wide discretion in the management of the water plant. There is nothing in the record to show it has abused this discretion in fixing the rates. We think it is not accurate to speak of these water rates as taxes. All property except that which is exempt by law is subject to the payment of taxes, but the use of water is not compulsory. If the owner of property prefer to dig a well and construct a cistern instead of connecting with the system of waterworks, he, in most instances at least, would be at liberty to do so. It is true, if he is in the water district, he is entitled to the use of the water by complying with the regulations of the water board. It is also true these regulations must be reasonable; but it is not true they must be uniform, or that they must be based upon the value of the property where the water is used. 'The water rates paid by consumers are in no sense taxes but are nothing more than the price paid for water as a commodity just as similar rates are payable to gas companies.' It would be manifestly inequitable to require valuable premises, where

making of necessary repairs,[1188] and in addition to derive a profit from the business or aid in the construction of the works.[1189] It unquestionably has the power, if the right be conceded in the first instance, to construct the water plant and supply this commodity to charge such sum as it may determine upon, reasonable or unreasonable though it may be, and without any reference to the various items named in the preceding essentials.[1190] This fol-

from their character no water was used, to be charged with a water tax based upon values, while an adjoining piece of little value might, because of the character of its occupancy, use large quantities of water. When property has paid its proportion of the taxes growing out of fire protection and other uses in which property and the public in general have an interest, it has discharged its share of the burden." People v. Common Council of Long Island City, 76 N. Y. 20.

[1188] Stamford Water Co. v. Stanley, 39 Hun (N. Y.) 424.

[1189] Cook County v. City of Chicago, 103 Ill. 646; Wagner v. City of Rock Island, 146 Ill. 139, 34 N. E. 545, 21 L. R. A. 519; State v. City of Neodesha, 3 Kan. App. 319; Alter v. City of Cincinnati, 56 Ohio St. 47, 46 N. E. 69, 35 L. R. A. 737. "As to the water rent act, it is sufficient to say that the general assembly has full power to legislate upon the subject, and provide the purpose to which the water rent shall be applied; and there is no injustice in applying the water rent to aid in the construction of the waterworks, and the power to do so is certainly ample. Water rents are not, strictly speaking, taxes, and certainly not taxes on property to be regulated under article twelve of the constitution. Whether this statute applies water rents to general revenues * * * is doubtful." City Council of Charleston v. Werner, 46 S. C. 323; Stephens v. City of Spokane, 14 Wash. 298.

[1190] Parsons v. District of Columbia, 170 U. S. 45; Lanning v. Osborne, 76 Fed. 319. If rates are unreasonable, it is held here that a person aggrieved may have them annulled by the court and the question again submitted to the county board of supervisors. San Diego Flume Co. v. Souther (C. C. A.) 104 Fed. 706, affirming 90 Fed. 164; Fitch v. City & County Sup'rs of San Francisco, 122 Cal. 285, 54 Pac. 901; Jacobs v. City & County Sup'rs of San Francisco, 100 Cal. 121; Weldin v. City of Wilmington, 3 Pen. (Del.) 472, 51 Atl. 157.

Wagner v. City of Rock Island, 146 Ill. 139, 34 N. E. 545, 21 L. R. A. 519. Water rates need not be uniform since they are charges levied under the taxing power.

Cook County v. City of Chicago, 103 Ill. 646. A commissioner of public works may be authorized by ordinance to furnish water free to a county building reasonably situated within its limits.

Jones v. Detroit Water Com'rs, 34 Mich. 273; Preston v. Detroit Water Com'rs, 117 Mich. 589; Vreeland v. Jersey City, 43 N. J. Law, 135, affirmed 43 N. J. Law, 638. A water tax arbitrarily imposed upon prop-

lows necessarily from the application of the well known principle that a sovereign or any of its subordinate agencies in the exercise of a sovereign power is not answerable to the people in the exercise of that power.[1191] These charges are not considered taxes within the meaning of that word as used in various state constitutions or statutes and therefore they need not be levied in such a manner as to comply with provisions for the levying of taxes.[1192] Delinquent water rentals can be collected by public

erty fronting on water mains or pipes is void as against unoccupied or vacant property.

Dasey v. Skinner, 57 Hun, 593, 11 N. Y. Supp. 821; Silkman v. Water Com'rs of Yonkers, 152 N. Y. 327, 37 L. R. A. 827; Remsen v. Wheeler, 105 N. Y. 573; Arnold v. City of Pawtucket, 21 R. I. 15; Smith v. City of Seattle, 25 Wash. 300; City of Sherman v. Smith, 12 Tex. Civ. App. 580, 35 S. W. 294. But see Batterman v. City of New York, 65 App. Div. 576, 73 N. Y. Supp. 44.

[1191] Linck v. City of Litchfield, 31 Ill. App. 118.

[1192] Provident Sav. Inst. v. Jersey City, 113 U. S. 512; Attorney General v. City of Toronto, 23 Can. Sup. Ct. 514. But such rates must be uniform. Wagner v. City of Rock Island, 146 Ill. 139, 21 L. R. A. 519; St. Louis Brewing Ass'n v. City of St. Louis (Mo.) 37 S. W. 525. It is here held that water rentals are not "taxes" within the meaning of constitution, art. 10, § 3, providing for uniform taxation. "Plaintiff insists that, 'assuming that the words "manufacturing plant" were intended to be used as the synonym for "factory buildings," and that the amended ordinance is intended to say that any water taker using more than 50,000,000 gallons annually in factory buildings located in one or more adjoining blocks shall be charged one cent per one hundred gallons, whereas the water taker whose factory buildings are located in blocks not adjoining each other shall pay 1¼ cents for 100 gallons, it creates a discrimination forbidden by law, and is therefore void.' As a basis for this charge of discrimination, plaintiff relies upon section 3, art. 10, of the constitution of the state, and section 12, art. 7, of the charter of defendant. The former declares: 'Taxes may be levied and collected for public purposes only. They shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax.' The latter provides that no water rate shall be allowed or fixed by any other principle or consideration than that of producing revenue and exceptional discrimination in rates is forbidden. While the ownership of waterworks by the city and its right to distribute water to its inhabitants is for a public purpose, the charge it has the right to impose for the use of water is not derived from the taxing power but is an exaction the city has the right to make as compensation for the use. The obligation of one who uses water to pay for it rests upon contract." Jones v. Detroit Water Com'rs, 34 Mich. 273; Vreeland v. O'Neil, 36 N. J. Eq. (9 Stew.) 399; Silkman v. Water Com'rs of Yonkers, 152 N. Y. 327, 37 L. R. A. 827.

corporations through use of the ordinary remedies given litigants.[1193] Water is considered property by the courts and if it is secretly or wrongfully taken and used by private consumers, the same rules of law would apply as to the taking of other property.[1194]

[1193] Provident Sav. Inst. v. Jersey City, 113 U. S. 506. A water charge may be given a priority over prior mortgages.

City of Los Angeles v. Los Angeles City Water Co., 61 Cal. 65. The assignee of a lease of city waterworks stands in the same relation to the city in respect to the provisions of the lease as the original lessee.

City and County of San Francisco v. Spring Valley Waterworks, 53 Cal. 608. It is here held that water rentals are regulated by general laws authorizing the formation of waterworks despite the grant of a special franchise.

Springfield Water Com'rs v. Conkling, 113 Ill. 340; City of St. Louis v. Arnot, 94 Mo. 275; Carpenter v. City of Hoboken, 33 N. J. Eq. (6 Stew.) 27; Vreeland v. O'Neil, 36 N. J. Eq. (9 Stew.) 399, affirmed in Vreeland v. Jersey City, 37 N. J. Eq. (10 Stew.) 574. Hudson Trust & Sav. Inst. v. Carr-Curran Paper Mills Co., 58 N. J. Eq. 59, 43 Atl. 418. Water rentals have no priority over mortgages previously given.

Hennessey v. Volkening, 30 Abb. N. C. 100, 22 N. Y. Supp. 528; City of Pittsburgh v. Brace Bros., 158 Pa. 174. The principle would also apply in the collection of water rentals from one whose premises are outside the city limits but who was supplied with city water. City of Milwaukee v. Herman Zoehrlaut Leather Co., 114 Wis. 276.

[1194] Prindiville v. Jackson, 79 Ill. 337; City of Milwaukee v. Herman Zoehrlaut Leather Co., 114 Wis. 276. "This is an action to recover the value of 'stolen waters.' * * * It is distinctly charged that they were the property of the city in its mains and that they were clandestinely appropriated by the defendant to its own use and have never been paid for. If the water alleged to have been taken belonged to an individual or a private corporation authorized to deal in water, we apprehend there would be no question raised as to the right of recovery. The fact that the plaintiff is a municipal corporation cannot logically affect the right to recover so long as it is endowed by law with the power to maintain waterworks and furnish water to private consumers. The water in its pipes is property, it belongs to the city, it is of some value, and it is charged to have been taken by the defendant and never paid for. This makes a complete case on very well established legal principles. Nor can the fact that the city has established water rates, and is empowered to collect such rates from consumers as taxes are collected, affect the right to recover the value of water taken in defiance of the city's regulations. That method of payment was primarily intended for water sold by the city to consumers in accordance with its rules. Granting that this method may be used also to recover payments for water

Although water rentals or assessments are not regarded as taxes, being simply the purchase price of a commodity sold by a public corporation, yet, so far as their collection is concerned, they are generally treated as taxes.[1195] The customary remedy given or provided for the enforcement of the payment of water rentals is the right to cut off the water supply from those who may be in arrears after a designated time.[1196] This, it has been held in some cases, is an exclusive one.[1197]

clandestinely taken and converted, it cannot logically be held that it excludes the previously existing common-law remedy by way of an action for conversion. This proposition seems too clear for argument or discussion." Ferens v. O'Brien, 11 Q. B. Div. 21.

[1195] Provident Sav. Inst. v. Jersey City, 113 U. S. 506. "An act which makes water rentals a charge upon lands in a municipality, with a lien prior to all incumbrances, in the same manner as taxes and assessments, gives them priority over mortgages on such land made after the passage of the act, whether the water was introduced on the lot before or after the giving of the mortgage." The court in its opinion by Mr. Justice Bradley further say: "Nor are we prepared to say that an act giving preference to municipal water rents over such liens would be obnoxious to that charge. The providing a sufficient water supply for the inhabitants of a great and growing city, is one of the highest functions of municipal government, and tends greatly to enhance the value of all real estate in its limits; and the charges for the use of the water may well be entitled to take high rank among outstanding claims against the property so benefited. It may be difficult to show any substantial distinction in this regard between such a charge and that of a tax strictly so called." Springfield Water Com'rs v. Conkling, 113 Ill. 340; Vreeland v. O'Neil, 36 N. J. Eq. (9 Stew.) 399, affirmed Vreeland v. Jersey City, 37 N. J. Eq. (10 Stew.) 574; Field v. Inhabitants of West Orange, 39 N. J. Eq. (12 Stew.) 60. A sale of realty for unpaid water rates, if made after the expiration of the time limited by law is void.

In re Flower, 55 Hun, 158, 7 N. Y. Supp. 866; Hennessey v. Volkening, 30 Abb. N. C. 100, 22 N. Y. Supp. 528; Reid v. City of New York, 56 Hun (N. Y.) 156. A municipal corporation is not estopped by making an erroneous statement of water rates to be paid by specific property. East London Waterworks Co. v. Kellerman, 67 Law T. (N. S.) 319.

[1196] Sheward v. Citizens' Water Co., 90 Cal. 635; City of Atlanta v. Burton, 90 Ga. 486, 16 S. E. 214. Arrears of water charges due from a former tenant must be paid by a succeeding one desiring to have the water supply again. Wood v. City of Auburn, 87 Me. 287, 29 L. R. A. 376;

[1197] Hudson Trust & Sav. Inst. v. Carr-Curran Paper Mills Co., 58 N. J. Eq. 59.

(a) Regulations. A public corporation owning and operating waterworks not only has the right to charge such rates as it may deem advisable to consumers of water based, usually, upon the quantity consumed, but also has in addition the unquestioned power of establishing such reasonable regulations as the proper officials, may in their discretion, deem necessary and proper,[1198] controlling and regulating the manner, quantity, and time of use by individual consumers.[1199] So long as these regulations are not unreasonable and are uniform in their application, they will be sustained; their purpose being the better protection of property from fire, the prevention of waste and a facilitating of public control over the use of water by private consumers.[1200] If such regulations, however, are unreasonable or not uniform in their application, a municipality may be enjoined and prevented from enforcing them; these questions as usual being judicial ones.[1201]

(b) Water rentals charged by private plants. If a public corporation permits this supposed duty to be performed by private

McGregor v. Case, 80 Minn. 214; Coe v. New Jersey Midland R. Co., 30 N. J. Eq. (3 Stew.) 440. Such remedy cannot be enforced against the receiver of a road operating under directions of the court for arrears due from the railroad company. Hudson Trust & Sav. Inst. v. Carr-Curran Paper Mills Co., 58 N. J. Eq. 59; Sickles v. Manhattan Gaslight Co., 64 How. Pr. (N. Y.) 33; Silkman v. Water Com'rs of Yonkers, 71 Hun (N. Y.) 37.

Brass v. Rathbone, 153 N. Y. 435. The same remedy may be also given for a failure to comply with regulations controlling the use of water. Girard Life Ins. & Trust Co. v. City of Philadelphia, 12 Phila. (Pa.) 293; City of Harrisburg's Appeal, 107 Pa. 102.

[1198] Keen v. City of Waycross, 101 Ga. 588; Crosby v. City Council of Montgomery, 108 Ala. 498; Prindiville v. Jackson, 79 Ill. 337; Lumbard v. Stearns, 58 Mass. (4 Cush.) 60; New York Health Dept. v. Trinity Church, 145 N. Y. 32, 27 L. R. A. 710; Brass v. Rathbone, 153 N. Y. 435.

[1199] McCrary v. Beaudry, 67 Cal. 120, 7 Pac. 264; Price v. Riverside Land & Irrigating Co., 56 Cal. 431; Shiras v. Ewing, 48 Kan. 170.

[1200] Kelsey v. Fire & Water Com'rs of Marquette, 113 Mich. 215, 71 N. W. 589, 37 L. R. A. 675, and cases therein reviewed; State v. Goodfellow, 1 Mo. App. 495. The use of a special cock not an unreasonable regulation.

American Waterworks Co. v. State, 46 Neb. 194, 30 L. R. A. 447; State v. Griffin, 69 N. H. 1, 39 Atl. 260, 41 L. R. A. 177; Frothingham v. Bensen, 20 Misc. 132, 44 N. Y. Supp. 879; Brass v. Rathbone, 153 N. Y. 435; Jackson v. City of Ellendale, 4 N. D. 478, 61 N. W. 1030; Ward v. Folkestone Waterworks Co., 24 Q. B. Div. 334.

[1201] Dittmar v. City of New Braunfels, 20 Tex. Civ. App. 293. A citizen cannot be required as a condi-

enterprises, it may enter into such contracts with them as may seem advisable or expedient at that time and which can be abrogated or changed only in accordance with the well known principle of law controlling these questions.[1202]

§ 469. Performance of contract for water supply.

In a preceding section[1203] it is said that a public corporation may secure a supply of water for its own use through contract with private parties; the contract involving necessarily, so long as its terms are complied with by one party, the due performance of the obligations resting upon the other.[1204] On the part

tion precedent to his right to the use of city water to release the city from liability for any failure in supply or defects in commodity.

[1202] See authorities cited post, in sections upon the granting of exclusive franchises, especially water companies. Lanning v. Osborne, 82 Fed. 575; Los Angeles City Water Co. v. City of Los Angeles, 88 Fed. 720; Crosby v. City Council of Montgomery, 108 Ala. 498, 18 So. 723; McFadden v. Los Angeles County Sup'rs, 74 Cal. 571, 16 Pac. 397. Under California Constitution, art. 14, § 1, and act of March 12th, 1885, the board of county supervisors have no power to fix the rate to be charged stockholders by a private corporation organized to furnish water. City of Los Angeles v. Los Angeles City Water Co., 124 Cal. 368, 57 Pac. 210, 571. At the time a private plant is purchased by a municipality, it cannot avail itself of the benefit of water rental contracts made by such company with private consumers. San Diego Water Co. v. City of San Diego, 59 Cal. 517; State v. New Orleans Waterworks Co., 107 La. 1, 31 So. 395; State Trust Co. v. City of Duluth, 70 Minn. 257; City of Knoxville v. Knoxville Water Co., 107 Tenn. 647, 64 S. W. 1075, 61 L. R. A. 888; State v. Manitowoc Waterworks Co., 114 Wis. 487, 90 N. W. 442. See, also, the following cases recently decided in the supreme court, where the authorities are fully collated and reviewed, Freeport Water Co. v. City of Freeport, 180 U. S. 587. "Municipal corporations may be invested by statute with the power to bind themselves by an irrevocable contract not to regulate waterworks." Danville Water Co. v. City of Danville, 180 U. S. 619; Rogers Park Water Co. v. Fergus, 180 U. S. 624.

[1203] Section 456, ante.

[1204] Vicksburg Waterworks Co. v. City of Vicksburg, 185 U. S. 65. Where wrongful action on the part of a municipality is apprehended by a private water company, an injunction will restrain it from doing those acts which may impair the company's rights. Foster v. City of Joliet, 27 Fed. 899. A delay in the performance of a contract occasioned by both parties is no ground for its rescission. Bartholomew v. City of Austin (C. C. A.) 85 Fed. 359; City of Ft. Madison v. Ft. Madison Water Co. (C. C. A.) 114 Fed. 292; Henry v. City of Sacramento, 116 Cal. 628; Lake Charles Ice, Light & Waterworks Co. v. City of Lake Charles, 106 La. 65.

of the private company, the contract obligations require the rendition of good service,[1205] which, it has been held, includes

[1205] City of Winfield v. Winfield Water Co., 51 Kan. 70. "There can be no matter of higher public concern to every city than the supply of pure and wholesome water for all useful purposes, and, as population becomes more and more compact, and cities grow, the ability of the individual member of the municipal corporation to supply his individual wants in that direction constantly diminishes, and in all the larger places it becomes a matter of absolute public necessity that the city itself should, directly or indirectly, provide the supply. The preservation of favorable sanitary conditions is one of the very highest duties devolving on city authorities, and nothing else so directly and materially affects the health of a community as the character of its water supply. * * * Section 17 contains an agreement on the part of the water company to keep said works always in operation, to supply in ample quantity the city and inhabitants thereof with well settled and wholesome water. This section also provides for furnishing the city offices, schools and public drinking and watering fountains free. These supplies are clearly public,—they are supplies to public offices, public schools, and in public places, for the use of the public generally; and while the rates mentioned are free, it cannot be said, when all the provisions of the contract are construed together, that the water furnished the public at these places is in any sense a donation or free gift by the water company to the city or to the public. It cannot be contended for a moment that the water company intended to furnish water at these places 'free,' irrespective of the obligation of the city to use hydrants it contracted for, and to pay the rental provided for in the ordinance. Free water at these public places was unquestionably one of the inducements and considerations whih led the city to pass the ordinance and enter into the contract with the defendant. It may be conceded that dirty and foul water will extinguish fires and flush gutters, as well as pure and wholesome water, yet, this contract provides for nothing but a supply of 'well settled, wholesome water,' even for the purposes for which it should be used by the city itself. We think that, even if it could be said that this contract is divisible, and that the city can only enforce the provisions of it so far as it relates to the supply furnished the city itself, still the city has a right to insist on that quality of water which the contract calls for. But when we consider that the water consumed by the city through its free hydrants and the water consumed by the citizens for private uses ust of necessity flow through the same mains, be derived from the same source, be of the same quality and character, it seems as absurd to say that the provisions made by the city authorities, for the benefit of the inhabitants of the city generally, and assented to by the water company, may not be enforced by the city in behalf of the people, but may be violated by the water

not only the quantity[1206] and quality[1207] of the water supply, but

company at will, and that they may furnish to the city for public purposes water of any quality that will subserve those purposes, even though their contract requires them to furnish that which is pure and wholesome. We not only think that the city may enforce the provisions of the contract in favor of its citizens, but we think it clearly the duty of the city to do so." Brady v. City of Bayonne, 57 N. J. Law, 379.

[1206] Capital City Water Co. v. State, 105 Ala. 406, 29 L. R. A. 743; Eagle Iron Works v. Guthrie Center, 97 Iowa, 128; Winfield Water Co. v. City of Winfield, 51 Kan. 104; Adrian Waterworks v. City of Adrian, 64 Mich. 584; City of Grand Haven v. Grand Haven Waterworks, 99 Mich. 106; Burns v. City of Fairmont, 28 Neb. 866; Olmsted v. Morris Aqueduct, 46 N. J. Law, 499; Borough of Easton v. Lehigh Water Co., 97 Pa. 554; City of Sherman v. Connor, 88 Tex. 35.

[1207] Foster v. City of Joliet, 27 Fed. 899; Stein v. State, 37 Ala. 123 Capital City Water Co. v. State, 105 Ala. 406, 29 L. R. A. 743; City of Montgomery v. Montgomery Waterworks Co., 77 Ala. 248; Grand Junction Water Co. v. City of Grand Junction, 14 Colo. App. 424. If by the contract the supply is taken from a certain river, no objection can be made to the fact that the water is at times discolored when the river is high, provided the usual method of filtering water in large quantities is used.

City of Burlington v. Burlington Water Co., 86 Iowa, 266. "The real matter of complaint is that the defendant fails and refuses to filter the water and the evidence shows that the default is a substantial and continuing one; and the question is, what is the remedy? The defendant's counsel claim specific performance of a contract of this kind should not be decreed, because a court of equity will not take supervision of the enforcement of the obligation of the defendant in the performance of continuous duties involving personal labor and care which the court cannot superintend. We think that it is competent for courts to enforce obedience to the defendant's undertakings, and that in the case at bar it is the only effectual remedy. The defendant under its contract with the city has its water pipes laid in the streets, its plant is established and private consumers of water have, at large expense, tapped the pipes and conducted the water into their houses for domestic uses. There is no adequate redress for a failure to filter the water except to compel the defendant to perform its obligation to do so. An action for damages would be wholly inadequate and a forfeiture of the exclusive right to maintain waterworks in the city would be equally futile. It would involve the erection of new works,—an undertaking not to be thought of as long as equity affords a remedy against the defendant in the nature of an action for specific performance."

Danaher v. City of Brooklyn, 119 N. Y. 241, 7 L. R. A. 592. A municipal corporation is not a guarantor of the chemical purity of the water in free public wells maintained by it.

Buckingham v. Plymouth Water Co., 142 Pa. 221. A water company

also the manner of such service;[1208] and a breach of the contract may arise by a failure in any one or all of these respects. The contract may have been invalid originally and water still supplied in accordance with its provisions, and, where there has also been a breach of a valid contract through the alleged failure to comply with its provisions, it has usually held that a municipality cannot avail itself of the use of a valuable commodity and refuse payment because of the alleged invalidity of the contract or a failure to comply with the contract provisions at other times.[1209] The

is not required to exercise more than reasonable care to ascertain and maintain the purity of the water and prevent contamination.

Brymer v. Butler Water Co., 172 Pa. 489. The water need not be chemically pure, if it is reasonably pure and wholesome, it will comply with the contract provision.

Borough of Du Bois v. Du Bois Water Co., 176 Pa. 430, 34 L. R. A. 92, and United States Waterworks Co. v. City of Du Bois, 176 Pa. 439, hold that if the contract is for a supply of water from a particular source, the municipality cannot complain if the supply from such source proves inadequate. Green v. Ashland Water Co., 101 Wis. 258, 43 L. R. A. 117.

Frivolous objections to the quality of water will not be sustained when made for the purpose of depreciating the value of a private plant or when the municipality is estopped by its conduct. See the following: Creston Waterworks Co. v. City of Creston, 101 Iowa, 687; Burlington Waterworks Co. v. City of Burlington, 43 Kan. 725; Cherryvale Water Co. v. City of Cherryvale, 65 Kan. 219; Wiley v. Inhabitants of Athol, 150 Mass. 426, 6 L. R. A. 342; City of Grand Rapids v. Grand Rapids Hydraulic Co., 66 Mich. 606; Aurora Water Co. v. City of Aurora, 129 Mo. 540; Lamar Water & Elec. Light Co. v. City of Lamar, 140 Mo. 145, and Bennett Water Co. v. Borough of Millvale, 202 Pa. 616. Wilkes-Barre v. Spring Brook Water Supply Co., 4 Lack. Leg. N. 367; City of Halifax v. Soothill Upper Local Board, 30 Law T. (N. S.) 513.

[1208] Los Angeles Water Co. v. City of Los Angeles, 55 Cal. 176; City of Grand Haven v. Grand Haven Waterworks Co., 99 Mich. 106; Light, Heat & Water Co. v. City of Jackson, 73 Miss. 598; Wilson v. City of Charlotte, 110 N. C. 449.

[1209] National Waterworks Co. v. Kansas City (C. C. A.) 62 Fed. 853, 27 L. R. A. 827; City of Austin v. Bartholomew, 107 Fed. 349; City of Montgomery v. Montgomery Waterworks, 79 Ala. 233; Bienville Water Supply Co. v. City of Mobile, 112 Ala. 260, 33 L. R. A. 59; City of Greenville v. Greenville Waterworks Co., 125 Ala. 625; Higgins v. City of San Diego, 118 Cal. 524; Burlington Waterworks Co. v. City of Burlington, 43 Kan. 725; Nicholasville Water Co. v. Nicholasville (Ky.) 38 S. W. 430; State v. City of Great Falls, 19 Mont. 518; State v. City of Philipsburg, 23 Mont. 16; Light, Heat & Water Co. v. City of Jackson, 73 Miss. 598; Port Jervis Waterworks Co. v. Village of Port Jervis, 151 N. Y. 111; McEntee v.

acceptance of the plant or use of water is usually held to constitute an estoppel as against the public corporation in an action to recover the value of services actually rendered.[1210] This subject will be further discussed in those sections relating to the granting of exclusive franchises by a municipality for the rendering of a service or for the use of its streets for a particular purpose. The question of the performance of such a contract easily divides itself into a treatment, first, of the condition arising when a single contract for a supply of water for public use has been made, and second, those conditions arising when the municipality has made and granted an exclusive franchise or license to a private water company or private persons for the supply of water not only to the municipality itself but to the individual members of the community.

§ 470. Performance and enforcement of contract for water supply.

In the performance and enforcement of a water supply contract, the rights of the parties will be determined by those rules of law which would apply under similar circumstances and between private parties.[1211] The law, however, cannot ignore the fact that

Kingston Water Co., 165 N. Y. 27; Wilson v. City of Charlotte, 108 N. C. 121; Monroe Waterworks Co. v. City of Monroe, 110 Wis. 11, 85 N. W. 685; Racine Water Co. v. City of Racine, 97 Wis. 93.

[1210] Cunningham v. City of Cleveland (C. C. A.) 98 Fed. 657. The fact that the private company is not a corporation either de facto or de jure will not prevent a recovery from the city on the part of those entitled to be paid for the services rendered. Illinois Trust & Sav. Bank v. Arkansas City (C. C. A.) 76 Fed. 271, 34 L. R. A. 518; City of Eau Claire v. Payson (C. C. A.) 109 Fed. 676; City of Denver v. Denver Union Water Co., 26 Colo. 413; Winfield Water Co. v. City of Winfield, 51 Kan. 104. But this case holds that there must be a fair opportunity for examination and rejection before acceptance can be inferred from use of the water. Sykes v. City of St. Cloud, 60 Minn. 442; Lamar Water & Elec. Light Co. v. City of Lamar, 140 Mo. 145, 39 S. W. 768; Neosho City Water Co. v. City of Neosho, 136 Mo. 498; Spring Brook Water Co. v. City of Pittston, 203 Pa. 223; City of Brenham v. Brenham Water Co., 67 Tex. 561. But see Farmers' Loan & Trust Co. v. City of Galesburg, 133 U. S. 156; State Trust Co. v. City of Duluth, 104 Fed. 632; Smith Canal Co. v. City of Denver, 20 Colo. 84; City of Dawson v. Dawson Waterworks Co., 106 Ga. 696; People v. Sisson, 75 App. Div. 138, 77 N. Y. Supp. 376; Edwards County v. Jennings, 89 Tex. 618.

[1211] Foster v. City of Joliet, 27 Fed. 899, affirmed by divided court in U. S. Sup. Ct., 30 Law. Ed. 942. A contract to furnish artesian well

the basis of the validity of a water supply contract as executed by a public corporation is the exercise of a power having for its purpose and result the health of the community. This circumstance may lead in some cases to a somewhat stricter enforcement of the contract then might, perhaps, be otherwise made, and in some cases it has been held a mandatory duty on the part of public authorities to enforce such a contract and compel its proper performance by the water supply company.[1212] The exclusive and conclusive nature of such a contract will be considered later in those sections on exclusive franchises.

§ 471. Estoppel.

In common with other contracts or transactions, the parties may be estopped to claim forfeitures or to ask for a rescission of the contract because of a waiver, acquiescence in existing conditions, or participation in or a reception of the benefits.[1213] The fact that one of the parties to the transaction is a public corporation and limited in its powers raises the principle that the other party is bound to know the extent of its powers and cannot claim

water is not satisfied by a supply of equally good or better water from other sources. Santa Ana Water Co. v. Town of San Buenaventura, 65 Fed. 323. A ratification by the legislature of an informal contract will not ratify an undisclosed fraud in connection with its execution. Los Angeles Water Co. v. City of Los Angeles, 88 Fed. 720. An informal contract within the power of the legislature may be ratified by it. Brady v. City of Bayonne, 57 N. J. Law, 379. Wilson v. City of Charlotte, 110 N. C. 449. Under an agreement to supply water at a certain pressure "if required," there is no obligation to maintain such pressure until after it is determined by the city. Columbia Water Power Co. v. City of Columbia, 5 S. C. (5 Rich.) 225. A mere failure to complete waterworks within the prescribed time in the absence of material injury is no ground for a rescission of a water supply contract. Under the question of ratification. See, also, Squire v. Preston, 82 Hun (N. Y.) 88; Borough of Milford v. Milford Water Co., 124 Pa. 610, 3 L. R. A. 122.

[1212] City of Winfield v. Winfield Water Co., 51 Kan. 70, 32 Pac. 663.

[1213] National Waterworks Co. v. Kansas City (C. C. A.) 62 Fed. 853, 27 L. R. A. 827; Illinois Trust & Sav. Bank v. Arkansas City (C. C. A.) 76 Fed. 271, 34 L. R. A. 518; Neosho City Water Co. v. City of Neosho, 136 Mo. 498; Monroe Waterworks Co. v. City of Monroe, 110 Wis. 11. But see Farmers' Loan & Trust Co. v. City of Galesburg, 133 U. S. 156; Winfield Water Co. v. City of Winfield, 51 Kan. 104; Light, Heat & Water Co. v. City of Jackson, 73 Miss. 598; State v. City of Crete, 32 Neb. 568.

an estoppel where the municipality plainly exceeds its powers in executing or in entering into the contract.[1214] In respect to this rule the courts hold that a public corporation is liable for water actually furnished to it and used by it notwithstanding irregularities in the making of the contract or in its performance. A public corporation cannot be allowed to receive the benefits of a contract and then relieve itself from the unpleasant obligation of paying for those benefits by the advancement of technical or even substantial grounds.[1215] It cannot receive the benefits of the transaction and ignore its duty to pay for them.

[1214] Smith v. Town of Westerly, 19 R. I. 437.

[1215] Illinois Trust & Sav. Bank v. Arkansas City Water Co., 67 Fed. 196; Bartholomew v. City of Austin (C. C. A.) 85 Fed. 359; Cunningham v. City of Cleveland (C. C. A.) 98 Fed. 657. A municipality cannot evade payment for water used because the company furnishing it was without a valid corporate existence.

City of Ft. Madison v. Ft. Madison Water Co. (C. C. A.) 114 Fed. 292; City of Montgomery v. Montgomery Waterworks Co., 79 Ala. 233; Id., 77 Ala. 248; City of Greenville v. Greenville Waterworks Co., 125 Ala. 625; Higgins v. City of San Diego, 118 Cal. 524; Id., 131 Cal. 294; Nicholasville Water Co. v. City of Nicholasville, 18 Ky. L. R. 592, 36 S. W. 549; Id., 38 S. W. 430. A city incurs a liability for water received by it and used for proper purposes even though the water company was operating under a void franchise and the contract between it and the city was also for that reason void and further, though the constitution prohibited a city from paying "any claim created against it under any agreement or contract made without express authority of law."

Burlington Waterworks Co. v. City of Burlington, 43 Kan. 725. A municipality cannot evade the payment of hydrant rentals even though the original ordinance authorizing the contract was passed through bribery. Lake Charles Ice, Light & Waterworks Co. v. City of Lake Charles, 106 La. 65. A legitimate debt cannot be avoided through the extension of the city limits. Sykes v. City of St. Cloud, 60 Minn. 442; State v. City of Great Falls, 19 Mont. 518; Port Jervis Waterworks Co. v. Village of Port Jervis, 71 Hun, 66, 24 N. Y. Supp. 497.

Ephrata Water Co. v. Borough of Ephrata, 16 Pa. Super. Ct. 484.

United States Waterworks Co. v. Borough of Du Bois, 176 Pa. 439; City of Brenham v. Brenham Water Co., 67 Tex. 561. A recovery can be had for water furnished prior to the time when a contract was repudiated by the municipality. See, also, cases cited § 469, note. But there are some cases which hold that where a contract is expressly prohibited, it cannot be relied upon to determine the compensation to be paid though generally even such cases allow a recovery for the water furnished based on a quantum meruit. See Smith Canal Co. v. City of Denver, 20 Colo. 84; City of Dawson v. Dawson Waterworks Co., 106 Ga. 696; Prince v. City of Quin-

§ 472. Public expenditures in connection with a supply of light.

If there are doubts as to the advisability and legality of a public corporation engaging in the business of supplying water either for its own use or that of private consumers, there is much graver doubt in respect to a supply of light.[1216] The operation of a lighting plant involves more complicated industrial operations "including the purchase of raw material, the employment of many skilled workmen and the use of technical manufacturing processes constantly subject to improvement," as well as the use

cy, 128 Ill. 443; People v. Sisson, 75 App. Div. 138, 77 N. Y. Supp. 376. See, also, State Trust Co. v. City of Duluth, 104 Fed. 632. The rule does not apply to services gratuitously rendered. Boise City Artesian Hot & Cold Water Co. v. Boise City, 123 Fed. 232.

[1216] Village of Ladd v. Jones, 61 Ill. App. 584; Spaulding v. Inhabitants of Peabody, 153 Mass. 129, 26 N. E. 421, 10 L. R. A. 397; Christensen v. City of Fremont, 45 Neb. 160; Baily v. City of Philadelphia, 184 Pa. 594, 39 L. R. A. 837. But see City of Crawfordsville v. Braden, 130 Ind. 149, 28 N. E. 849, 14 L. R. A. 268. "There can be little or no doubt that the power to light the streets and public places of a city is one of its implied and inherent powers as being necessary to properly protect the lives and property of its inhabitants and as a check on immorality. * * * Wherever men herd together in villages, towns or cities, will be found more or less of the lawless or vicious, and crime and vice are plants which flourish best in the darkness. So far as lighting the streets, alleys and public places of a municipal corporation is concerned, we think that, independently of any statutory power, the municipal authorities have inherent power to provide for lighting them. If so, unless their discretion is controlled by some express statutory restriction, they may, in their discretion, provide that form of light which is best suited to the wants and the financial condition of the corporation. It is well settled that the discretion of municipal corporations, within the sphere of their powers, is not subject to judicial control, except in cases where fraud is shown, or where the power or discretion is being grossly abused, to the oppression of the citizen. We can see no good reason why they may not also, without statutory authority, provide and maintain the necessary plant to generate and supply the electricity required. Possessing authority to do the lighting, that power carries with it incidentally, the further power to procure or furnish whatever is necessary for the production and dissemination of the light."

Rushville Gas Co. v. City of Rushville, 121 Ind. 206, 6 L. R. A. 315. See notes on the subject generally in 8 L. R. A. 487; 10 L. R. A. 398; 11 L. R. A. 729; 14 L. R. A. 268; 30 L. R. A. 542, and 44 L. R. A. 427, and note on the duty of a city in lighting its streets, 2 Mun. Corp. Cas. 500.

of complicated machinery. It involves not only the supply and distribution of the commodity but also its manufacture, and the statement made in connection with the establishment of waterworks is also essentially true that judicial or impartial relations cannot be sustained where the controlling power has an interest in the object of control either as a "beneficiary, an owner or a user of its services." The supreme court of the United States[1217] has said in discussing the validity of an exclusive franchise for lighting, that "It is true as suggested in argument that the manufacture and distribution of illuminating gas by means of pipes or conduits placed under legislative authority in the streets of a

[1217] New Orleans Gas Co. v. Louisiana Light Co., 115 U. S. 650. See, also, Jacksonville Elec. Light Co. v. City of Jacksonville, 36 Fla. 229, 30 L. R. A. 540; City of Crawfordsville v. Braden, 130 Ind. 149, 14 L. R. A. 268; Keokuk Gaslight & Coke Co. v. City of Keokuk, 80 Iowa, 137; State v. City of Hiawatha, 53 Kan. 477; New Orleans Gaslight Co. v. City of New Orleans. 42 La. Ann. 188; Opinion of Justices, 150 Mass. 593, 8 L. R. A. 487. "We have no doubt that if the furnishing of gas and electricity for illuminating purposes is a public service, the performance of this service can be delegated by the legislature to cities and towns for the benefit of themselves and their inhabitants and that such cities and towns can be authorized to impose taxes for this purpose upon their inhabitants and to establish reasonable rates which the inhabitants who use the gas or electricity can be compelled to pay. The fundamental question is, whether the manufacture and distribution of gas or electricity to be used by cities and towns for illuminating purposes is a public service. * * * Artificial light is not perhaps, so absolutely necessary as water, but it is necessary for the comfortable living of every person. Although artificial light can be supplied in other ways than by the use of gas or electricity, yet the use of one or both for lighting cities and thickly settled towns is common, and has been found to be of great convenience, and it is practically impossible for every individual to manufacture gas or electricity for himself. If gas or electricity is to be generally used in a city or town, it must be furnished by private companies or by the municipality, and it cannot be distributed without the use of the public streets, or the exercise of the right of eminent domain." Citizens' Gaslight Co. v. Inhabitants of Wakefield, 161 Mass. 432, 31 L. R. A. 457; Mitchell v. City of Negaunee, 113 Mich. 359, 38 L. R. A. 157; Black v. City of Chester, 175 Pa. 101; Seitzinger v. Borough of Tamaqua, 187 Pa. 539; Smith v. City of Nashville, 88 Tenn. 464, 7 L. R. A. 469. See, also, 30 Am. St. Rep. 225. Joyce, Elec. Law, §§ 231 et seq. But see City of Detroit v. Hosmer, 79 Mich. 384, and Wade v. Borough of Oakmont, 165 Pa. 479.

town or city is a business of a public character. Under proper management, the business contributes very materially to the public convenience while in the absence of efficient supervision it may disturb the comfort and endanger the health and property of the community. It also holds important relations to the public through the facilities furnished by the lighting of streets with gas for the detection and prevention of crime. An English historian contrasting the London of his day with the London of the time when its streets supplied only with oil lamps were scenes of nightly robberies says that 'The adventurers in gas lights did more for the prevention of crime than the government had done since the days of Alfred.' Municipal corporations constitute a part of the civil government of the state and their streets are highways which it is the province of government by appropriate means to render safe. To that end the lighting of streets is a matter of which the public may assume control." The last sentence from this quotation unquestionably states the extent to which public corporations should go in respect to a supply of light.[1218] This subject as well as that pertaining to a supply of water can be logically divided into two parts. First, that affecting the right of a public corporation to establish and operate a plant for the lighting of its public buildings and streets, and second, that which may limit or affect the right of such a corporation to supply private consumers.

§ 473. Nature of the power.

The power to erect and operate a lighting plant or to contract for a supply of light with private manufacturers is never included among the implied powers belonging to a public corporation. It must be expressly, positively and legally granted and

[1218] The authorities, however, are not at all unanimous in holding that a duty rests upon a municipal corporation to light its public thoroughfares. The power it is considered is permissive rather than compulsory even under statutes directly authorizing such action. See Gaskins v. City of Atlanta, 73 Ga. 746; City of Freeport v. Isbell, 83 Ill. 440; Randall v. Eastern R. Co., 106 Mass. 276; Baily v. City of Philadelphia, 184 Pa. 594, 39 L. R. A. 837. But see Halsey v. Rapid Transit St. R. Co., 47 N. J. Eq. 340, 19 L. R. A. 663. "They must be lighted at night to make their use sufficient and convenient and to prevent lawlessness and crime." Palmer v. Larchmont Elec. L. Co., 158 N. Y. 231, 43 L. R. A. 672.

in unmistakable terms.[1219] It cannot be inferred from a general grant of power to provide for the comfort, the safety and the welfare of the inhabitants of a particular locality.[1220] When ex-

[1219] Thompson Houston Elec. Co. v. City of Newton, 42 Fed. 723; Santa Ana Water Co. v. Town of San Buenaventura, 65 Fed. 323, and Board of Finance of Jersey City v. Jersey City, 57 N. J. Law, 452, 31 Atl. 625, hold inferentially that the legislature may ratify an act on the part of the municipality at the time of the doing of which it did not possess the legal authority.

Windsor v. City of Des Moines, 110 Iowa, 175, 81 N. W. 476; State v. Board of Liquidation, 51 La. Ann. 1849; Mealey v. City of Hagerstown, 92 Md. 741, 48 Atl. 746; Belding Land & Imp. Co. v. City of Belding, 128 Mich. 79, 87 N. W. 113; Black v. Common Council of Detroit, 119 Mich. 571; Arbuckle-Ryan Co. v. City of Grand Ledge, 122 Mich. 491; Howell v. City of Millville, 60 N. J. Law, 95. A grant of authority to pass an ordinance for the lighting of streets does not convey by implication the power to construct and maintain an electric lighting plant.

Hendrickson v. City of New York, 160 N. Y. 144; Engstad v. Dinnie, 8 N. D. 1, 76 N. W. 292. An appropriation for the construction of an electric light plant including other items is covered by Rev. Code, § 2262, requiring such an appropriation to specify "the amount appropriated for each purpose." See, also, Titusville Elec. Light & Power Co. v. City of Titusville, 196 Pa. 3; Stehmeyer v. City Council of Charleston, 53 S. C. 259, 31 S. E. 322. In regard to the organization of street lighting districts under the N. J. and N. Y. laws, see Allison v. Corker, 67 N. J. Law, 596, 52 Atl. 362, 60 L. R. A. 564; Howell v. City of Millville, 60 N. J. Law, 96; Lawrence v. Smith, 24 Misc. 333, 52 N. Y. Supp. 724; In re Village of Le Roy, 23 Misc. 53, 50 N. Y. Supp. 611.

Hendrickson v. City of New York, 160 N. Y. 144. A contract made by one municipality prior to its consolidation with another for a long term of years extending beyond the time when the consolidation is to take place is void as against public policy and especially does this rule apply where from all the circumstances it is apparent that the contract was not made in good faith.

[1220] Spaulding v. Inhabitants of Peabody, 153 Mass. 129, 26 N. E. 421. "Towns are subordinate divisions of a state and they vary greatly in the number of their inhabitants and in the amount of their taxable property. It is wholly for the legislature to determine, within the limitations of the constitution, the powers which towns shall possess; and when it appears that the custom of the legislature has been specifically to define from time to time the purposes for which towns may raise money by the taxation of their inhabitants and when the legislature can at any time grant additional powers if they are deemed necessary a somewhat strict construction of existing statutes is reasonable and in accordance with the presumed intention of the legislature. * * * 'Towns have been kept rigidly within this rule by the legislature and the court.' * * * Gas

pressly granted, it is generally regarded as a continuing power and one which carries with it the right to use such agencies as may render the power effective.[1221] These agencies include, com-

has now been used for a long time in thickly settled communities, and has been bought for that purpose; yet there is nothing in the statutes indicating that towns may construct and maintain gas works for the purpose of lighting their streets except the general words that they may erect and maintain street lamps; and the construction put upon the statutes in practice has been that towns under the authority conferred by the general laws have not undertaken themselves to construct and maintain gas works for the * * * manufacture of gas or electricity and the distribution of them through the streets of towns and cities, for the purpose of furnishing light is one of too much importance to be attached as a mere incident to the power given to erect and maintain street lamps; and we think that if the legislature had intended that towns generally should have authority to erect and maintain such works, the authority would have been plainly expressed in the statutes, with such limitations and accompanied by such restrictions as the legislature might think it prudent to establish. We see no indications in the existing statute that the legislature intended to make provision for the exercise of any such authority by the towns of the commonwealth. If we assume that the only action now contemplated by the town of Peabody is the erection and maintenance of electric works for the purpose of lighting its streets in the manner shown by the evidence, still we are of opinion that the vote is beyond 'the legal right and power' of the town." Sullivan v. City of Holyoke, 135 Mass. 273. Though such a power has been implied from the right to enforce police regulations. See Hay v. City of Springfield, 64 Ill. App. 671. The grant of the power to light the streets includes the right to acquire a lighting plant by purchase or construction provided that the constitutional limitation of indebtedness is not exceeded.

Rockebrandt v. City of Madison, 9 Ind. App. 227, 36 N. E. 444; Rushville Gas Co. v. City of Rushville, 121 Ind. 212, 6 L. R. A. 315; Tuttle v. Brush Elec. Illuminating Co., 50 N. Y. Super. Ct. (18 J. & S.) 464. A discretionary power is implied as to the manner of lighting streets. Lynchburg & R. St. R. Co. v. Dameron, 95 Va. 545. The power to erect or otherwise acquire an electric light plant does not carry with it the implied authority to guarantee the payment of bonds issued by a private corporation engaged in the business of manufacturing and selling electricity. Ellinwood v. City of Reedsburg, 91 Wis. 131.

[1221] City of Crawfordsville v. Braden, 130 Ind. 149, 28 N. E. 849, 14 L. R. A. 268; Belding Land & Imp. Co. v. City of Belding, 128 Mich. 79, 87 N. W. 113; State v. Missouri, K. & T. R. Co., 164 Mo. 208, 64 S. W. 187; Schefbauer v. Township Committee of Kearney, 57 N. J. Law, 588, 31 Atl. 454; Lynchburg & R. St. R. Co. v. Dameron, 95 Va. 545, 28 S. E. 951. Even under a liberal grant of power, a municipality has no right

monly, the facilities afforded and furnished by private enterprise. This branch of the subject will be discussed in those sections relating to the granting of exclusive franchises for the use of the public highways. The power when granted usually provides that the public corporation itself may exercise it by the construction of such a plant[1222] or by making a contract with private persons for the manufacture and the supply of the commodity.[1223] Or, the corporation may exercise the power by

to guarantee the bonds of a private corporation organized for the purpose of constructing and operating an electric lighting plant.

[1222] Thompson Houston Elec. Co. v. City of Newton, 42 Fed. 723; Jacksonville Elec. Light Co. v. City of Jacksonville, 36 Fla. 229, 30 L. R. A. 540. In Florida, a municipality is authorized to erect and maintain an electric light plant for lighting the public streets and places of a city and also for supplying the inhabitants with light for private use where the power was conferred by charter to provide for the prevention and extinguishment of fires, for lighting the city by gas or other illuminating material or in any manner; to make appropriations for lighting the streets and public buildings, and to pass all ordinances necessary for the health, convenience and safety of the citizens to accomplish the object of the city's incorporation.

Hay v. City of Springfield, 64 Ill. App. 671; City of Crawfordsville v. Braden, 130 Ind. 149; Councilmen of Frankfort v. Capital Gas & Elec. Light Co., 16 Ky. L. R. 780, 29 S. W. 855. A municipal corporation may sell its gas plant to a private concern. Hudson Elec. Light Co. v. Inhabitants of Hudson, 163 Mass. 346, 40 N. E. 109. Instead of constructing its own plant it may purchase under authority of law from private individuals when already constructed and in operation. Mitchell v. City of Negaunee, 113 Mich. 359, 38 L. R. A. 157; Meyers v. Hudson County Elec. Co., 60 N. J. Law, 350; Linn v. Chambersburg Borough, 160 Pa. 511, 25 L. R. A. 217; Black v. City of Chester, 175 Pa. 101.

[1223] City of Denver v. Hubbard, 17 Colo. App. 346, 68 Pac. 993; City of Hartford v. Hartford Elec. Light Co., 65 Conn. 324; Lott v. City of Waycross, 84 Ga. 681; City of Chicago v. Galpin, 183 Ill. 399; Nelson v. City of La Porte, 33 Ind. 258; Seward v. Town of Liberty, 142 Ind. 551; City of Newport v. Newport Light Co., 84 Ky. 166; City of Detroit v. Hosmer, 79 Mich. 384; Christensen v. City of Fremont, 45 Neb. 160; Oakley v. Atlantic City, 63 N. J. Law, 127, 44 Atl. 651; Harlem Gaslight Co. v. City of New York, 33 N. Y. 309; Bronx Gas & Elec. Co. v. City of New York, 17 Misc. 433, 41 N. Y. Supp. 358; Richmond County Gaslight Co. v. Town of Middletown, 59 N. Y. 228; Blank v. Kearny, 44 App. Div. 592, 61 N. Y. Supp. 70. City of Wellston v. Morgan, 59 Ohio St. 147. Such a contract is void when made for a period in excess of that fixed by statute but only for such excess time.

Black v. City of Chester, 175 Pa. 101; Seitzinger v. Borough of Tama-

granting to private individuals an exclusive franchise or license for the construction of a lighting plant and the carrying on of the business of supplying light.[1224] The original authority usually gives to the public corporation discretionary and volitional powers as to the method which it shall adopt for effecting the particular result desired.[1225] Whether such a corporation has the power, after having once entered into a contract with a private concern or after having once granted a franchise or license, to construct itself such a plant and enter into competition with the private enterprise will depend upon the language of the contract, franchise or license. If it is exclusive in its terms and lawfully made, its obligations will be protected by the Federal Constitution against any impairment;[1226] and, on the other hand,

qua, 187 Pa. 539; El Paso Gas, Elec. Light & Power Co. v. City of El Paso, 22 Tex. Civ. App. 309, 54 S. W. 798. But see Hendrickson v. City of New York, 160 N. Y. 144, discussing the right of a municipality afterwards incorporated into greater New York to contract for street lighting; the contract not to take effect until after the consolidation and to run for a considerable period thereafter. Townsend Gas & Elec. Light Co. v. Hill, 24 Wash. 469, 64 Pac. 778.

[1224] Parfitt v. Kings County Gas & Illuminating Co., 12 Misc. 278, 33 N. Y. Supp. 1111. See the subject fully discussed and authorities cited under those sections post relating to exclusive franchises.

[1225] State v. City of Hiawatha, 53 Kan. 477; Mitchell v. City of Negaunee, 113 Mich. 359, 71 N. W. 646, 38 L. R. A. 157; Christensen v. City of Fremont, 45 Neb. 160, 63 N. W. 364; Howell v. City of Millville, 60 N. J. Law, 95, 36 Atl. 691. But the granted power to provide for "lighting the streets" does not convey the power by implication to rent and maintain an electric light plant, nor from act of May 22, 1894, granting the power to provide for "lighting of public streets and places in the cities, towns, townships, boroughs, and villages of the state" can this power be inferred. Black v. City of Chester, 175 Pa. 101.

[1226] Southwest Missouri Light Co. v. City of Joplin, 113 Fed. 817. "That a contract was made I have no doubt. What was the contract? Complainant was to erect the plant at its sole expense and do so in the way above enumerated. It was to operate its plant at its sole expense. It was 'to supply private lights for the use of the inhabitants of the city and its suburbs,' in the language of the statute. * * * The complainant was obligated to erect its works, place its poles and string its wires. Its only compensation, and the only way it could be reimbursed, was to charge the private consumers. And it was to charge the private consumers the ordinance rates. What consumers did the ordinance contemplate? All those needing the lights, and able and willing to pay the ordinance rates. Such was the contract. Has

if it clearly appears from the language of the franchise or license that no such exclusive privileges were ever given or intended to be given, then the fact of the grant of the license or franchise or the making of the contract will not be conclusive upon the public corporation and it may engage in the business or construct and operate a similar plant.[1227]

it been impaired? The contract was to extend for twenty years. But if the city can now erect its plant, and place its poles, and string its wires by the side of complainant's, and charge the same, it is not speculative to say, that for the same service complainant will do no business. Every inhabitant of Joplin is a partner with all the others, and every man of sense, for the same service at the same price, will patronize his own concern, and thereby increase the profits in which he will participate in one form or another. And then complainant will have a mere naked contract on paper; with the poles standing in the street and its power house idle. That is not only an impairment, but a wiping out of its contract. My own views are, * * * this should not be allowed." Citing Walla Walla Water Co. v. City of Walla Walla, 60 Fed. 957; Westerly Waterworks v. Town of Westerly, 75 Fed. 181.

[1227] St. Paul Gaslight Co. v. City of St. Paul, 181 U. S. 142. Or under such discretionary power electricity furnished by one company may be substituted for a gas supply by another company without any impairment of the contract with the gas company.

Thompson Houston Elec. Co. v. City of Newton, 42 Fed. 723. "It is entirely possible that the proposed action of the city may cause loss to the complainant. But there is no ground justifying action by the court short of holding that, by the mere action of the city in authorizing the complainant to establish its plant without any grant of exclusive rights, the city thereby deprived itself of the right to erect an electric plant for the benefit of its citizens; and this extreme ground I am not prepared to take."

Titusville Elec. Light & Power Co. v. City of Titusville, 196 Pa. 3; Jacksonville Elec. Light Co. v. City of Jacksonville, 36 Fla. 229, 30 L. R. A. 540; Thompson Houston Elec. Co. v. City of Newton, 42 Fed. 723. "By chapter eleven, acts 22nd, General Assembly, Iowa, it was enacted that cities should have power to establish and maintain electric light plants or to authorize the erection of the same, 'but no such works shall be erected or authorized until a majority of the voters of the city or town, at a general or special election, by vote, approve the same,' and by section three of the act it was provided that the city should have power to issue bonds for the purpose of establishing electric plants, subject to the restriction that the total amount of indebtedness for all purposes should not exceed five per cent. of the assessed value of the taxable property within the city. The theory of the complainant is that under this statute the city had the option given it in regard to electric plants, and that it could originally have erected the same by vote of the people, but having elect-

§ 474. Acquirement of property for construction of lighting plant.

It is quite generally held that, assuming the existence of authority for the acquirement of a lighting plant, the taking of private property for its construction or that of any of its accessories, including the laying of mains or pipes, is for a public purpose, and the right of eminent domain, if a municipality is especially authorized to exercise it, can be used.[1228] The rule is without exception that the streets of a municipality can be used for laying gas mains, pipes or conduits without the payment of additional compensation to abutting property owners.[1229] But it is also true that this exemption does not apply to the use of country roads for such a purpose. The laying of such facilities in these creates an additional burden for which the adjoining owner can collect damages.[1230]

ed to authorize private parties so to do, it is estopped from afterwards entering the field as a competitor; that while the complainant has not an exclusive right under its agreement with the city and cannot object to the city authorizing other private companies or persons to erect and maintain electric plants in the city, yet complainant has the right to enjoin the city from undertaking the work, because the city can, through the exercise of its taxing power over the property in the city, including that owned by complainant, raise money for the running of the plant, instead of being compelled to provide the same by charging for the use of the light and thus the city can practically drive complainant out of the field and destroy the value of its plant, which was erected in the city by an agreement with the municipal authorities. There is great force in the suggestion thus made. It is doubtless true that, if the city enters the field by the erection of its own plant, it will have an advantage over the complainant; yet it does not follow that the court can interpose and restrain the city from erecting the contemplated plant. As already stated, the city did not grant any exclusive rights to complainant and the latter, when it erected its plant, took the chance as to future competition. * * * The statute confers the right so to do upon the city; and I can see no ground justifying the court in interposing by injunction and preventing the city from establishing its proposed plant."

[1228] Lewis, Em. Dom. § 129. "Gas is not, like water, a necessity in the sense of being absolutely indispensable, but it has become a practical necessity in all urban communities. The right to lay pipes in the streets of cities and villages for the distribution of gas has never been questioned, but has often, indirectly, received judicial sanction."

[1229] McDevitt v. People's Natural Gas Co., 160 Pa. 367; Elliott, Roads & St. (2d Ed.) p. 415.

[1230] Consumers' Gas Trust Co. v. Huntsinger, 14 Ind. App. 156; Huffman v. State, 21 Ind. App. 449; Kincaid v. Indianapolis Natural Gas Co.,

§ 475. Charges for light supply; regulations.

A public corporation, if possessing the power to construct and operate a lighting plant, unquestionably has the right to make such charges for a use of this commodity as will not only pay the fixed charges and operating expenses, but also afford a substantial profit.[1231] If the corporation engage not only in the business of supplying its own wants in this respect, but also those of private consumers, it clearly is exercising in such case its business and proprietary powers.[1232] The cases hold that, under these circumstances, it is acting purely and simply in its capacity as a private corporation, and as such it is subject to all of these principles and rules of law which control and protect persons in the operation of a similar plant.[1233] These rules and principles of law, as will be remembered, affect private persons in a manner and to an extent never applied to the sovereign or to one of its political agencies. The obligations in respect to services afforded, the liability for damages sustained through the commission of a tort, and the liability of the property to be seized under judicial process and sold for a payment of debts, each and all exist as against the public corporation when, under any ordinary circumstances, they would not.

§ 476. Performance of a contract.

A public corporation contracting with a private person or corporation for a supply of light for its public use will not, as a rule, be permitted to set up its lack of authority in this respect

124 Ind. 577, 8 L. R. A. 602; Hamilton County Com'rs v. Indianapolis Natural Gas Co., 134 Ind. 209; Windfall Natural Gas, Min. & Oil Co. v. Terwilliger, 152 Ind. 364; Bloomfield & R. Natural Gaslight Co. v. Calkins, 62 N. Y. 386; Sterling's Appeal, 111 Pa. 35. "Laying and maintaining a pipe line at the ordinary depth under the surface necessarily imposes an additional burden on the land not contemplated either by the owner or by the public authorities when the land was appropriated for the purpose of a public road. It is a burden, moreover, which, to some extent at least, abridges the rights of the landowner in the soil traversed by the road; and hence, it is a taking within the meaning of the constitutional provision."

[1231] State v. Cincinnati Gaslight & Coke Co., 18 Ohio St. 262; City of Indianapolis v. Indianapolis Gaslight & Coke Co., 66 Ind. 396.

[1232] Opinion of Justices, 150 Mass.

[1233] Norwich Gaslight Co. v. Norwich City Gas Co., 25 Conn. 19

or alleged informalities or defects in the contract for the sole purpose of avoiding the payment for light used by it. The courts have held in some cases that granting the invalidity of the contract there will still exist an implied contract on the part of the public corporation to pay a reasonable price for whatever commodity it may have used.[1234]

§ 477. Public wharves and ferries.

Because of the geographical location of certain public corporations, it may be either convenient or necessary for them to acquire and control both public wharves and ferries. These properties, it has been held, can be acquired by them either by virtue of their proprietary or business powers, or because of the necessity for a public control of these facilities.[1235] A public wharf has

592, 8 L. R. A. 487; Bullmaster v. City of St. Joseph, 70 Mo. App. 60. See authorities cited in § 556; also authorities cited and a discussion of the subject in section 131 of Tiedeman, State & Fed. Control of Persons & Prop. (2d Ed.) On National, State and Municipal Monopolies.

[1234] Brush Elec. Light & Power Co. v. City Council of Montgomery, 114 Ala. 433, 21 So. 960. "The contract obliged the plaintiff to furnish and maintain and the defendant to pay for 100 lights only, without regard to the purposes for which they were used,—whether for lighting the streets or for that purpose and for the lighting of the public buildings. The undisputed fact is that a larger number was furnished and maintained, of which the city had the use and benefit, and the more important question is whether a contract on the part of the defendant to pay for them may be implied. * * * Corporations not by the statutes creating or governing them restrained or limited to a particular mode of contracting, may be bound by implied contracts. Keeping within the line of the capacity to contract conferred, by the law of their creation, implications will be indulged against them whenever under like circumstances, they would be indulged against natural persons fully sui juris. * * * The defendant had notice that compensation for the use of them was demanded as matter of right and had opportunity to refuse or continue their further use. Refusing to designate the lights which should be removed or discontinued, reducing the number to one hundred, or its equivalent, and notifying the plaintiff not to remove or discontinue any of them, common justice requires that a promise to pay for the benefits it was claiming and receiving should be implied." But see El Paso Gas, Elec. Light & Power Co. v. City of El Paso, 22 Tex. Civ. App. 309, 54 S. W. 798.

[1235] Harbor Master & Port Wardens v. Southerland, 47 Ala. 511; Coal-Float v. City of Jeffersonville, 112 Ind. 15, 13 N. E. 115; First Municipality v. Pease, 2 La. Ann. 536; City of Baltimore v. White, 2 Gill

been defined as "A public wharf, in the full sense of the term, is one which is owned by the state or one of its local subdivisions and held by it or its lessee for the accommodation of public business; or one which, although erected by a private individual, has been erected upon condition that it shall be used by the public."[1236] If wharves and ferries are acquired or constructed through the latter reason, the courts are agreed that in common with the exercise of municipal or governmental powers, before it can be legally done, there must have been the delegation of the authority from the state or the sovereign power.[1237] The right to construct wharves, control them and make charges for their use will not be implied from a general grant of authority. If a public corporation acquire such through the expenditure of funds not derived through the power of taxation, or in its capacity as a private corporation and as private property, express legislative authority is still necessary to the legality of such action.[1238] If,

(Md.) 444. The exercise of the power may be delegated. Horn v. People, 26 Mich. 224.

[1236] Gregory v. Jersey City, 34 N. J. Law, 390, following and citing Ketchum v. City of Buffalo, 14 N. Y. (4 Kern.) 356; People v. Lowber, 28 Barb. (N. Y.) 65.

City of St. Louis v. Wiggins Ferry Co., 88 Mo. 615; Bell v. City of New York, 77 App. Div. 437, 79 N. Y. Supp. 347.

[1237] Minturn v. Larue, 23 How. (U. S.) 435. A grant to the trustees of a town to lay out ferries, etc., and to authorize the construction of the same does not necessarily convey an exclusive power. The Geneva, 16 Fed. 874; Webb v. City of Demopolis, 95 Ala. 116, 21 L. R. A. 62; Town of Newport v. Batesville & B. R. Co., 58 Ark. 270; Snyder v. Town of Rockport, 6 Ind. 237; City of Muscatine v. Keokuk N. L. Packet Co., 45 Iowa, 185. Under the grant of power "to build wharves and regulate the landing, wharfage and dockage," the right to establish and construct wharves and collect a reasonable compensation for their use will be implied.

Spengler v. Trowbridge, 62 Miss. 46. But the grant of the right to "erect, repair and regulate public wharves and docks" will not confer on a city the power to construct a harbor. Verplanck v. City of New York, 2 Edw. Ch. (N. Y.) 220; Marshall v. Guion, 4 Denio (N. Y.) 581; Thompson v. City of New York, 11 N. Y. (1 Kern.) 115; Alexander v. Wilmington & R. R. Co., 3 Strob. (S. C.) 594; State v. City Council of Charleston, 4 Rich. Law (S. C.) 286; Christie v. Town of Malden, 23 W. Va. 667.

[1238] Fennimore v. City of New Orleans, 20 La. Ann. 124. Wiswall v. Hall, 3 Paige (N. Y.) 313; Thompson v. City of New York, 11 N. Y. (1 Kern.) 115; Christie v. Town of Malden, 23 W. Va. 667.

in the acquirement of these facilities or their construction, enlargement or operation, private property is taken, just compensation must be made to the owners.[1239]

Charges for use of such facilities. The right of a public corporation owning such facilities acquired through the expenditures of public moneys to make charges for their use is not always clear or unquestioned.[1240] It has been held under some circumstances that political corporations have no right to levy addi-

[1239] Avery v. Fox, 1 Abb. 246, Fed. Cas. No. 674; City of San Pedro v. Southern Pac. R. Co., 101 Cal. 333, 35 Pac. 993. "The plaintiff is a municipal corporation of the sixth class. * * * As such municipal corporation, it is only one of the agencies of the state to aid it in the discharge of its political duties, and although the lands upon which the defendants were driving the piles are within the corporate limits of the plaintiff, the plaintiff has not, for that reason any proprietary interest in these lands, nor is it the owner of the soil or clothed with any riparian rights. Its right to construct a wharf rests upon the provision * * * by which it has authority to construct, maintain and operate on any lands bordering on any navigable bay within the corporate limits of such city or contiguous thereto, wharves, piers, etc. The authority given in this section, does not however, clothe the plaintiff with an absolute right to construct a wharf at any point on its water front which it may select, irrespective of the rights of others; but it is intended to confer upon it the same authority to do the acts therein enumerated which a natural person would possess and to give to its acts a sanction which they would not otherwise have. A municipal corporation can exercise only such powers as are conferred upon it by the legislature, and in the absence of the authority above conferred the plaintiff would not be authorized under any circumstances to erect or maintain a wharf; but the authority thus given does not authorize it to prevent the erection of a wharf by another person, who has a right therefor, or who does not infringe upon any of plaintiff's rights." Laflin v. City of Chicago, 48 Ill. 449; Grant v. City of Davenport, 18 Iowa, 179; Belcher Sugar Refining Co. v. St. Louis Grain Elevator Co., 10 Mo. App. 401.

[1240] City of Chester v. Hagan, 116 Fed. 223; Murphy v. City of Montgomery, 11 Ala. 586; People v. Broadway Wharf Co., 31 Cal. 34; Keokuk Northern Line Packet Co. v. City of Quincy, 81 Ill. 422; Snyder v. Town of Rockport, 6 Ind. 237; City of Muscatine v. Hershey, 18 Iowa, 39; City of Muscatine v. Keokuk N. L. Packet Co., 45 Iowa, 185; Carrollton R. Co. v. Winthrop, 5 La. Ann. 36; Ellerman v. McMains, 30 La. Ann. 190. The grant to a municipal corporation by the legislature of the right to collect wharfage becomes vested and cannot be arbitrarily impaired or abrogated by a subsequent legislative act.

tional taxes upon the public for the use of these properties.[1241] The right, however, to make and enforce regulations for their use is not withheld.[1242] When the right is granted or assumed to make a charge for the use of the facilities, the rule seems to be that such charges and the regulations as well in respect to them must be reasonable and uniform in their application. The state or any of its delegated agencies cannot discriminate in these respects.[1243]

§ 478. Power to sell or lease wharfage privileges.

Where the property has been acquired by a public corporation through the exercise of any governmental power, it cannot be disposed of without legislative authority to a private individual under such terms as will destroy or diminish the right of the public generally to use the facilities without discrimination either as to service or votes; the principle being that one applying to the disposition of all property acquired by a public corporation in its capacity as such, namely, that it has acquired and holds it as trustee for the public.[1244]

The majority of the authorities seem to hold that under whatever conditions or authority acquired, a public corporation develops and operates its wharfage privileges in its capacity as a private or quasi private corporation.[1245] The usual method of handling these properties is either through private individuals or corporations who develop and operate them subject to the right

[1241] Russell v. Empire State, 1 Newb. 542, Fed. Cas. No. 12,145.

[1242] City of New York v. Rice, 4 E. D. Smith (N. Y.) 604; Galveston Wharf Co. v. City of Galveston, 63 Tex. 14.

[1243] Ellerman v. McMains. 30 La. Ann. 190; Wharf Case, 3 Bland (Md.) 383. See, also, Cannon v. City of New Orleans, 87 U. S. (20 Wall.) 577.

[1244] Roberts v. City of Louisville, 92 Ky. 95, 13 L. R. A. 844; City of St. Louis v. Wiggins Ferry Co., 88 Mo. 615; Bacon v. Mulford, 41 N. J. Law, 59; Atlantic City Waterworks Co. v. Smith, 47 N. J. Law, 473; Knickerbocker Ice Co. v. Forty-Second St. & G. St. Ferry R. Co., 39 Misc. 27, 78 N. Y. Supp. 838; Fuller v. Edings, 11 Rich. Law (S. C.) 239.

[1245] Farnham, Waters, § 123a. "But the right to construct wharves is not held by the municipal corporation in its public or governmental capacity; the erection and maintenance of such structures are merely a business enterprise in regard to which the municipality acts in its private capacity."

of the public corporation to control and regulate the manner of service and the rates to be charged.[1246] This plan is regarded as the most feasible as well as expedient because, otherwise, large sums of money would be necessarily expended by the public corporation which, in many cases, could not be made because of some constitutional limitation or provision, and also because of the general principle which obtains that it is not advisable for public corporations to engage in the development of privileges or of property or to engage in enterprises which properly should be left to private individuals or corporations, so long as the power is ever present and inherent in them to prevent discrimination and extortion either in respect to the manner or time of service or the rates charged.

§ 479. Payment of debts.

The payment of debts is considered not only a public purpose but a praiseworthy one, and the use of public moneys for the liquidation of debts of whatever form is a proper expenditure of such funds.[1247] It is a duty which not only devolves upon the public corporation, but also one, which it has been held, the sovereign power can compel where there is a failure to perform this duty.[1248] To further emphasize the duty and necessity for such action, the courts have held many times that the grant of the power to incur a debt carries with it the implied power to levy taxes sufficient for its liquidation.[1249]

[1246] Leathers v. Aiken, 9 Fed. 679; Bain v. The Minnie L. Gerow, 48 Fed. 836; First Municipality v. Pease, 2 La. Ann. 538; City of St. Louis v. St. Louis & N. O. Transp. Co., 84 Mo. 156.

[1247] See authorities under §§ 172 and 222.

[1248] Cooley, Taxation (2d Ed.) pp. 685, 687; City of New Orleans v. Clark, 95 U. S. 644; People v. McCreery, 34 Cal. 432; Dunnovan v. Green, 57 Ill. 63; Decker v. Hughes, 68 Ill. 33; Decatur County Com'rs v. State, 86 Ind. 8; Lycoming County v. Union County, 15 Pa. 166; City of New Orleans v. Estate of Burthe, 26 La. Ann. 497; Youngblood v. Sexton, 32 Mich. 406; Bridges v. Sullivan County Sup'rs, 92 N. Y. 570.

[1249] See authorities under § 303. Von Hoffman v. City of Quincy, 71 U. S. (4 Wall.) 535; Rees v. City of Watertown, 86 U. S. (19 Wall.) 107; United States v. City of New Orleans, 98 U. S. 381; United States v. Macon County, 99 U. S. 582; Ralls County v. United States, 105 U. S. 733; Devereaux v. City of Brownsville, 29 Fed. 742; Peoria, D. & E. R. Co. v. People, 116 Ill.

§ 480. Public education and health.

The preservation of the public health[1250] and the education of the people[1251] have each been considered public purposes of the highest character and such as to warrant the legal expenditure of public funds. In fact, it might be said that in many localities the greater portions of the funds raised for debts incurred are for these purposes. Their importance justifies a separate treatment in a subsequent chapter relating to the duties of public corporations.

§ 481. Charities and corrections.

The subject of charities and corrections involves a discussion of the law relating to the indigent, defective and criminal classes. It is the duty of the state acting through itself or by delegated agencies to care for the unfortunate and defective, either morally, physically or financially, and the expenditure of public moneys for these purposes will be considered proper.[1252] In a later chapter will be considered at length the cases relating to these classes.

§ 482. Aid to railways.

The granting of aid to railways by the incurring of a floating indebtedness or the issuing of negotiable bonds has been considered in a preceding section.[1253] The question of the right of a public corporation to donate or to give moneys from its public treasury to aid in the construction of steam railways in, through, or near such public corporations, will be considered here. The

401; State v. Police Jury of Jefferson, 34 La. Ann. 673; Sibley v. City of Mobile, 3 Woods, 535, Fed. Cas. No. 12,829.

[1250] State v. Wordin, 56 Conn. 216. "Of absolute necessity this power inheres in every organized community; otherwise there would be only organized suicide. * * * The people of this state have not by the constitution parted with any portion of this power which was in them nor have they put any limitation upon themselves as to the exercise of it. It is now as fully in the legislature as at the beginning it was in the people."

[1251] Vanover v. Davis, 27 Ga. 354; Alleghany Public School Com'rs v Alleghany County Com'rs, 20 Md 449; Taylor v. Thompson, 42 Ill 9 Burr v. City of Carbondale, 76 Ill 455.

[1252] Vionet v. First Municipality 4 La. Ann. 42; People v. Fitch, 15 N. Y. 14, 38 L. R. A. 591; Wilkesbarre City Hospital v. County of Luzerne, 84 Pa. 55.

[1253] See § 176, ante.

same remarks will apply to such a grant or gift as were made in connection with the incurring of indebtedness for the same purpose, namely, that the power or legal right is one which never should have been granted and has proven in its exercise unfortunate to the last degree, although such aid is not given as frequently as formerly. It is not included in the implied power of a corporation but must be expressly given.[1254] The legality of the grant of such a power is established by the greater weight of authority,[1255] and the cases decided of late have been those considering and passing upon the manner of the exercise of such a power assuming its legality. The statutes, in order to restrict and control its exercise, specify in great detail the manner of its exercise. It is needless to add that these statutory provisions

[1254] Thomas v. Lee County, 70 U. S. (3 Wall.) 327; Town of Enfield v. Jordan, 119 U. S. 680, disproving Welch v. Post, 99 Ill. 471. Where the power is conferred "on any village, city, county or township" to make a donation to a railroad company, such terms include an incorporated town, and the term "subscriptions" as used includes donations as well.

City of South St. Paul v. Lamprecht Bros. Co. (C. C. A.) 88 Fed. 449; Stanly County Com'rs v. Coler (C. C. A.) 113 Fed. 705, reversing on rehearing, judgment in 96 Fed. 284. In this case it was held that the grant of the power "to subscribe stock to any railroad company or companies when necessary to aid in the completion of any railroad in which the citizens of the county may have an interest" conferred power on counties to subscribe for stock, in the manner prescribed, in any railroad company, not only those whose line had been partially completed at that time but also any which had been duly incorporated to build a projected road in which the citizens of the county had a general interest because of the supposed benefits to be derived from it. Gibbons v. Mobile & G. N. R. Co., 36 Ala. 410; Crooke v. Daviess County Com'rs, 36 Ind. 320; Williamson v. City of Keokuk, 44 Iowa, 88; Whiting v. Sheboygan & F. L. R. Co., 25 Wis. 167.

[1255] The Illinois cases hold that donations and subscriptions in aid of railroads by municipal corporations under then existing laws and prior to the adoption of the constitution of 1870 are within the saving clause of that article which inhibits all municipal subscriptions or donations to railroads or other private corporations. See Chicago, D. & V. R. Co. v. Smith, 62 Ill. 268; Town of Middleport v. Aetna Life Ins. Co., 82 Ill. 562. See article on "Municipal Aid" in vol. 20 Am. & Eng. Enc. Law (2d Ed.) p. 1086 and cases therein cited. Butler v. Dunham, 27 Ill. 474; Petty v. Myers, 49 Ind. 1; Stewart v. Polk County Sup'rs, 30 Iowa, 9; Renwick v. Davenport & N. W. R. Co., 47 Iowa, 511; Augusta Bank v. City of Augusta, 49 Me. 507.

should be considered mandatory and are not to be regarded under any conditions or circumstances as directory merely.[1256]

They require in nearly all cases, not only affirmative action[1257] but also, supplementary and necessary to valid action, a determination by the legal voters,[1258] at an election duly called and held,[1259] that such gift or appropriation is desired and feasible. The notice of the election[1260] and the manner and time held,[1261] and the necessity for a required percentage of those acting or voting,[1262] are matters of statutory detail varying in the different states. The importance of their enumeration lies simply in the fact that where certain requirements are designated the law must be strictly followed before a legal grant or appropriation of public moneys will be had.[1263]

[1256] Stein v. City of Mobile, 24 Ala. 591; English v. Chicot County, 26 Ark. 454; Cotten v. Leon County Com'rs, 6 Fla. 610; Winston v. Tennessee & P. R. Co., 60 Tenn. (1 Baxt.) 60.

[1257] People v. Spencer, 55 N. Y. 1, following People v. Smith, 45 N. Y. 773; People v. Hulburt, 46 N. Y. 110; People v. Knowles, 47 N. Y. 415.

[1258] Pattison v. Yuba County Sup'rs, 13 Cal. 175; Hobart v. Butte County Sup'rs, 17 Cal. 23; Cedar Rapids & M. R. R. Co. v. Boone County, 34 Iowa, 45.

[1259] Town of Abington v. Cabeen, 106 Ill. 200; Louisville & N. R. Co. v. Davidson County Ct., 33 Tenn. (1 Sneed) 637.

[1260] People v. Chapman, 66 Ill.137, following McWhorter v. People, 65 Ill. 290.

[1261] Talbot v. Dent, 48 Ky. (9 B. Mon.) 526; State v. Wirt County, 37 W. Va. 808.

[1262] State v. City of Kokomo, 108 Ind. 74. "Without undertaking to determine what other qualifications are required by resident or disinterested freeholders upon whom the powers and duties prescribed in the several statutes referred to are conferred, we have no doubt that in ascertaining the number of resident freeholders in a city, a majority of whom are required to petition before its common council can acquire jurisdiction to act upon the subject of making a donation, all resident freeholders are to be counted. The common council could not be compelled to act except upon the petition of a majority of the resident freeholders of the city. Until such petition was presented, the council had no jurisdiction to act. The term 'resident freeholders' must be understood in its ordinary meaning. When so understood and applied it means all persons who reside within the city and who are the owners of an estate in lands within the city amounting to a freehold interest."

[1263] Town of Reading v. Wedder, 66 Ill. 80. A change of the name of a railroad company to which aid has been granted will not invalidate such aid. "But it is urged that the vote was to take stock in the Chicago and Plainfield Railroad Com-

The authority sometimes is given, not for the direct granting of aid in any of the various ways suggested, but for subscriptions to the capital stock or securities of private corporations.[1264] In the

pany, whilst the bonds were issued to the Chicago, Pekin and Southwest Railroad Company. We have seen that the act of 1869 amended the charter and changed the name of this road. It was not a fundamental change. On the contrary it was the same company with a different name, with the right to change its location, so as to run to Pekin, at least but three or four miles from the southeast corner of Peoria County. The general purpose and direction of the road were the same; the stockholders, directors and officers the same, and we may safely infer that the amendments to the charter were accepted, as the bonds seem to have been made payable to the company by that name; nor have counsel for appellant pointed out in what manner the company as now organized differs in any particular, beyond slight amendments, from the company as at first organized. The mere change of names does not and cannot change things or their properties; nor does the change of the name of a thing imply any such change of properties." People v. Santa Anna Sup'rs, 67 Ill. 57; Crooke v. Daviess County Com'rs, 36 Ind. 320; Douglas County Sup'rs v. Walbridge, 38 Wis. 179.

[1264] Campbell v. City of Kenosha, 72 U. S. (5 Wall.) 194; Council Bluffs & St. J. R. Co. v. Otoe County, 81 U. S. (16 Wall.) 667; Henry County v. Nicolay, 95 U. S. 619; Clay County v. Society for Savings, 104 U. S. 579; Moultrie County v. Fairfield, 105 U. S. 370; Kankakee County v. Aetna Life Ins. Co., 106 U. S. 668; Howard County v. Paddock, 110 U. S. 384; Opelika v. Daniel, 59 Ala. 211; Jacks v. City of Helena, 41 Ark. 213; City of Bridgeport v. Housatonic R. Co., 15 Conn. 475; Cairo & St. L. R. Co. v. City of Sparta, 77 Ill. 505. "The legislature cannot compel a municipal corporation to subscribe towards the stock of a railroad company against its consent and the wishes of the inhabitants." Lafayette, M. & B. R. Co. v. Geiger, 34 Ind. 185; City of Mt. Vernon v. Hovey, 52 Ind. 563; Indiana N. & S. R. Co. v. Attica, 56 Ind. 474; Williamson v. City of Keokuk, 44 Iowa, 88; City of Atchison v. Butcher, 3 Kan. 104; Leavenworth County Com'rs v. Miller, 7 Kan. 479; Mercer County v. Kentucky River Nav. Co., 71 Ky. (8 Bush) 300; Cumberland & O. R. Co. v. Judge of Washington County, 73 Ky. (10 Bush) 564; Justices of Clarke County v. Paris, W., & K. River Turnpike Co., 50 Ky. (11 B. Mon.) 143; Vicksburg, S. & T. R. Co. v. Parish of Ouachita, 11 La. Ann. 649; Hannibal & St. J. R. Co. v. Marion County, 36 Mo. 294; State v. Bates County Ct., 57 Mo. 70; Taylor v. Newberne Com'rs, 55 N. C. (2 Jones) 141; Cass v. Dillon, 2 Ohio St. 607; State v. Village of Perrysburg, 14 Ohio St. 472; Knox County Com'rs v. McComb, 19 Ohio St. 320; Com. v. McWilliams, 11 Pa. 61; Louisville & N. R. Co. v. Davidson County Ct. 33 Tenn. (1 Sneed) 637; Harcourt v. Good, 39 Tex. 455; Town of Danville v. Montpelier & St. J. R. Co., 43 Vt. 144; Goshorn v.

great majority of cases this practically amounts to the granting of aid. It must be expressly given.[1265] The exercise of this authority is limited not only by the question of its existence, but also, in common with the granting of aid, by statutory details controlling and regulating the time and manner of its exercise. A submission of the question to the legal voters of the district is usually necessary,[1266] and the time and manner of the election must con-

Ohio County Sup'rs, 1 W. Va. 308; Clark v. Janesville, 10 Wis. 135; Hall v. Baker, 74 Wis. 118.

[1265] Thomson v. Lee County, 70 U. S. (3 Wall.) 327; Marsh v. Fulton County, 77 U. S. (10 Wall.) 676; East Oakland Tp. v. Skinner, 94 U. S. 255; Allen v. City of Louisiana, 103 U. S. 80; Wells v. Pontotoc County Sup'rs, 102 U. S. 625; Kelly v. Town of Milan, 127 U. S. 139; Norton v. Town of Dyersburg, 127 U. S. 160; Katzenberger v. City of Aberdeen, 16 Fed. 745; Mississippi, O. & R. R. R. Co. v. City of Camden, 23 Ark. 300; French v. Teschemaker, 24 Cal. 518. See, also, the authorities cited in the preceding note which hold directly or indirectly the principle stated in the text. Oroville & V. R. Co. v. Plumas County Sup'rs, 37 Cal. 354. City of Bridgeport v. Housatonic R. Co., 15 Conn. 475. The legislature may rectify an unauthorized act of a public corporation in subscribing to the capital stock of a railroad company. Johnson v. Stark County, 24 Ill. 75; McWhorter v. People, 65 Ill. 290; Campbell v. Paris & D. R. Co., 71 Ill. 611; Pitzman v. Freeburg, 92 Ill. 111; Gaddis v. Richland County, 92 Ill. 119; City of Aurora v. West, 9 Ind. 74; Lewis v. Bourbon County Com'rs, 12 Kan. 186; City & County of St. Louis v. Alexander, 23 Mo. 483; Bank of Rome v. Village of Rome, 18 N. Y. 38; Sharpless v. City of Philadelphia, 21 Pa. 147; Com. v. Taylor, 36 Pa. 263; Nichol v. City of Nashville, 28 Tenn. (9 Humph.) 252; City of San Antonio v. Jones, 28 Tex. 19.

In Iowa it is held in the following cases that counties have no power to subscribe for railroad stock and then issue bonds in payment of stock so taken by them. Stokes v. County of Scott, 10 Iowa, 166; State v. County of Wapello, 13 Iowa, 388; Myers v. County of Johnson, 14 Iowa, 47; Smith v. County of Henry, 15 Iowa, 385; McClure v. Owen, 26 Iowa, 243; Wapello County v. Burlington & M. R. Co., 44 Iowa, 585.

Putnam v. City of New Albany, 4 Biss. 365, Fed. Cas. No. 11,481. A subscription to railroad stock which was illegal as originally made may be ratified by a subsequent act of the legislature. See, also, the following cases for instances of ratification by subsequent legislative acts. First Municipality v. Orleans Theatre Co., 2 Rob. (La.) 209; Winn v. City Council of Macon, 21 Ga. 275; State v. City of Charleston, 10 Rich. Law (S. C.) 491; Com. v. Councils of Pittsburgh, 41 Pa. 278.

[1266] Van Hostrup v. Madison City, 68 U. S. (1 Wall.) 291. Or the excise of the authority may be dependent "on the petition of two-thirds of the citizens." Thomson v. Lee County, 70 U. S. (3 Wall.) 327; St.

form to the statutory authority.[1267] A defective execution of the

Joseph Tp. v. Rogers, 83 U. S. (16 Wall.) 644; Henry County v. Nicolay, 95 U. S. 619; Aspinwall v. Daviess County Com'rs, 22 How. (U. S.) 364; Chicot County v. Lewis, 103 U. S. 164; Tipton County v. Rogers Locomotive & Mach. Works, 103 U. S. 523; Walnut Tp. v. Wade, 103 U. S. 683. The word "inhabitants" as used in an act authorizing towns and cities to subscribe for railroad stock means "legal voters."

Louisiana v. Taylor, 105 U. S. 454; People v. County of Tazewell, 22 Ill. 147; Illinois Midland R. Co. v. Town of Barnett, 85 Ill. 313; Evansville, I. & C. Straight Line R. Co. v. City of Evansville, 15 Ind. 395. The same result may be accomplished by a petition of two-thirds of the residents of the city.

Thompson v. City of Peru, 29 Ind. 305. The petition of a majority of the resident freeholders in a city is not necessary to authorize a subscription to the capital stock of railroads.

Lafayette, M. & B. R. Co. v. Geiger, 34 Ind. 185; Bowling Green & M. R. Co. v. Warren County Ct., 73 Ky. (10 Bush) 711; Madison County Ct. v. Richmond, I & T. F. R. Co., 80 Ky. 16; Portland & O. R. Co. v. Inhabitants of Standish, 65 Me. 63; City of St. Louis v. Alexander, 23 Mo. 483; Bank of Rome v. Village of Rome, 18 N. Y. 38; Starin v. Town of Genoa, 23 N. Y. 439; Hill v. Forsythe County Com'rs, 67 N. C. 368.

Mercer County v. Pittsburgh & E. R. Co., 27 Pa. 389. If the statute require the amount of the proposed subscription to be first recommended by a board of designated officers, such recommendation must be definite as to the amount; they cannot delegate their discretion.

McCallie v. Town of Chattanooga, 40 Tenn. (3 Head) 317. Where the power is given directly to the mayor and aldermen of a municipal corporation, the question of subscribing to the capital stock of a railroad corporation need not be submitted to a vote of the inhabitants of the city.

Winston v. Tennessee & P. R. Co., 60 Tenn. (1 Baxt.) 60; State v. Blackstone, 63 Wis. 362. Instead of an election, a petition of the taxpayers of the municipality may be necessary to authorize a subscription to the stock of a railroad corporation.

[1267] People v. Dutcher, 56 Ill. 144. "Amboy being a township organized under the general township law, the presumption would be, unless a contrary intention was expressed, that the election should be held in the mode prescribed for its government. Where legislation is adopted in reference to the action of an incorporated body and no mode is prescribed in which it shall be performed, the presumption must be indulged that it is intended that the body shall act through its officers and in the course usually adopted and authorized by the law governing the action of the body. And this being the rule, when the legislature has authorized this township as a corporate body to hold an election, and has prescribed no mode, a majority of the court hold that it was designed to authorize it to be in the manner township elections are required to be held in the election of their officers, and not under the gen-

power often results in a similar condition so far as the legality of aid granted is concerned as the entire absence of it.[1268]

In spite of the strictures and criticisms upon the granting of aid directly or indirectly to railroad corporations, there is much to be said in favor of this action as an economic proposition. The largest and best growth and development of any part of the country is absolutely and completely dependent upon the facilities for marketing its products. If these are insufficient or entirely lacking, such a result will not be effected and in proportion to the increase of these facilities and the opportunity to market products at reasonable rates will be found the greatest natural development. With this follows a great increase in the value of all property and in the commercial and industrial activities of the people. From this condition, again, will naturally follow an increased ability to raise the necessary sums by taxation for the purpose of meeting public expenses and performing governmental duties.

§ 483. Public investments.

The authority sometimes is granted public corporations to invest their surplus funds in the stocks or bonds of private corporations.[1269] This right is not usually considered as the equivalent of granting aid to such enterprises. If the exercise of the power in this regard is not strictly guarded and limited, however, public officials may, through a desire to aid some local or private enterprise, make unwise or losing investments of public mon-

eral election laws. And it appears that this election was conducted in conformity to the law of its organization." Harding v. Rockford, R. I. & St. L. R. Co., 65 Ill. 90.

[1268] Bell v. Mobile & O. R. Co., 71 U. S. (4 Wall.) 598. The same principle will apply to an irregular exercise of the power. English v. Chicot County, 26 Ark. 454; Williams v. Town of Roberts, 88 Ill. 11. This case also holds that the legislature has no power to ratify such an act. Atchison, T. & S. F. R. Co. v. Jefferson County Com'rs, 17 Kan. 29; Com. v. Councils of Pittsburgh, 43 Pa. 391. But the performance of certain conditions may be waived by the public corporation.

[1269] Wilson v. Mitchell, 43 Fla. 107, 30 So. 703; Traver v. Merrick County Com'rs, 14 Neb. 327; McKenzie v. Wooley, 39 La. Ann. 944; Pennsylvania R. Co. v. City of Philadelphia, 47 Pa. 189; Cook v. Sumner Spinning & Mfg. Co., 33 Tenn. (1 Sneed) 698. The authority must be expressly granted, it cannot be implied from the power to tax as ordinarily conferred on municipal corporations.

eys entrusted to them. To prevent this and guard against loss, public officials are usually limited and restricted in their power to make investments except in certain designated securities.[1270] These are usually limited to the mortgage bonds of a corporation or of stock upon which dividends have been declared for a prescribed number of consecutive years.

[1270] State v. Nemaha County Com'rs, 10 Kan. 569; Lewis v. Bourbon County Com'rs, 12 Kan. 186. "The statute reads: 'Section 1. The board of county commissioners of any county, to, into, through, from or near which, whether in this or any other state, any railroad is or may be located, may subscribe to the capital stock of any such railroad corporation in the name and for the benefit of such county, not exceeding in amount * * * but no such bonds shall be issued until the question shall first be submitted to a vote of the qualified electors of the county,' etc. This statute grants to the commissioners an extraordinary power. The constitutionality of such legislation has been questioned though sustained. Its wisdom has been denied even when its constitutionality has been sustained. To prevent abuse of this power, a specific and express authority from the voter is required. The manner of proceeding to obtain this authority is prescribed. Without legislative sanction, the assent of a majority of the voters would not bind the county, nor make valid bonds issued in pursuance thereof. The assent of a majority binds the county no further than the legislature has provided it shall, and a statutory power so liable to abuse should not, by construction, be enlarged beyond the plain warrant of the language used by the legislature. What is the county board empowered to do? It may make a subscription to the capital stock of a railroad corporation. A subscription is a contract. A contract requires two parties. There can be no subscription of stock without a corporation to receive the subscription. The county was not authorized to pledge its funds to aid in building a railroad. It could not bind itself to give so much for a road. The railroad project might be aided, it is true, but only by virtue of the fact that the corporation had obtained a responsible subscriber for a large amount of its stock. But before the board could make a subscription to the capital stock of any railroad corporation, the question must first be submitted to a vote of the qualified electors. What question? Manifestly the question of making the subscription,—entering into the contract with the railroad corporation. The whole question—not a fragent of it; the question of authority to make the contract not a contract. The whole authority delegated to the board by the first clause of the section rests upon the expressed assent of the voters. It is an entire thing; it is the consummation of a contract; and to it, as an entirety, the people must assent. It may be said that the language used contemplates the submission of only the question of issuing bonds. * * * But the issue of bonds is the last act of the

The granting of aid to strictly private enterprises has never been tolerated by any court; such use of the public moneys is regarded as illegal, and statutes or charter provisions attempting to grant such authority have been held without exception, when the question has been raised, unconstitutional and void.[1271] If another rule of law were adopted, the greatest opportunity would be given for the corrupt misuse and waste of public moneys. No proposition of law in connection with the subject of public corporations is more thoroughly settled and with better reason than this.[1272]

board,—the consummation of the contract. Bonds are to issue only in payment of stock already subscribed. If the language limits the question to that of issuing bonds, it limits it to that which implies a subscription already made, a contract already entered into, and therefore an existing and named corporation, the recipient of the subscription, and the party to the contract." Missouri River, Ft. S. & G. R. Co. v. Miami County Com'rs, 12 Kan. 230.

[1271] Cooley, Taxation (2d Ed.) p. 115; Citizens Sav. & Loan Ass'n v. City of Topeka, 87 U. S. (20 Wall.) 655; City of Parkersburg v. Brown, 106 U. S. 487; Commercial Nat. Bank v. Iola, 2 Dill. 353, Fed. Cas. No. 3,061, affirmed, 87 U. S. (20 Wall.) 655; Scammon v. City of Chicago, 44 Ill. 269; English v. People, 96 Ill. 566; Warren County Agricultural Joint Stock Co. v. Barr, 55 Ind. 30; Opinion of Justices, 58 Me. 590; Allen v. Jay, 60 Me. 124; Luques v. Inhabitants of Dresden, 77 Me. 186; People v. Township Board of Salem, 20 Mich. 452; Silsbee v. Stockle, 44 Mich. 561; Weismer v. Douglas, 64 N. Y. 91; Town of Wauwatosa v. Gunyon, 25 Wis. 271; Attorney General v. City of Eau Claire, 37 Wis. 400. See, also, authorities cited under §§ 301, 302, 303, ante.

[1272] See, also, authorities cited at length in §§ 414-417, ante. Lewis v. City of Shreveport, 3 Woods, 205, Fed. Cas. No. 8,331, affirmed, 108 U. S. 282; Heslep v. City of Sacramento, 2 Cal. 580; Bissell v. City of Kankakee, 64 Ill. 249; Mather v. City of Ottawa, 114 Ill. 659; Hanson v. Vernon, 27 Iowa, 28; Hooper v. Emery, 14 Me. 375; Brewer Brick Co. v. Inhabitants of Brewer, 62 Me. 62; Jenkins v. Inhabitants of Andover, 103 Mass. 94; Coates v. Campbell, 37 Minn. 498; Bloodgood v. Mohawk & H. R. Co., 18 Wend. (N. Y.) 9; Sharpless v. City of Philadelphia, 21 Pa. 147; Hammett v. City of Philadelphia, 65 Pa. 146. The question of the character of a certain purpose, whether public or private, is for judicial determination.

Scott v. Alexander, 23 S. C. 120. See Bayle v. City of New Orleans, 23 Fed. 843, involving the validity of an appropriation of public moneys for the purpose of transporting the old Liberty bell from Philadelphia to New Orleans for a centennial exhibition in the latter place. See, also, cases cited in preceding note. Ohio Val. Iron Works v. Town of Moundsville, 11 W. Va. 1.

§ 484. Claims.

Independent of, and in addition to, the various obligations and purposes above given, and to which the public moneys can be legally appropriated and used, is the further one authorizing expenditures, for the payment of legally established claims against public corporations.

Claims are naturally divided into two classes, those involving the presentment and payment of what can be termed liquidated or absolute demands, and those involving the settlement and allowance of unliquidated claims. The former class including negotiable bonds and securities, warrants, orders, judgments and other fixed, definite and certain demands against public corporations,[1273] the validity of which is usually already established and which, if not, is determined by principles already discussed under the sections treating these questions. The other class of claims, and that which will be considered in succeeding sections, relate to those which are either unliquidated in amount or those where it is not certain what is due or how much is owing and which are based upon some contract provision either express or implied for the rendition of a service, either personal in its character or involving the supply of some commodity; claims which neither one of the parties to the contract can alone render certain. The unliquidated claims of this class have usually for their basis a tort.

[1273] Morgan v. City of Beloit, 74 U. S. (7 Wall.) 613; Lincoln County v. Luning, 133 U. S. 529; City of New Orleans v. Fisher, 180 U. S. 185; Vincent v. Lincoln County, 62 Fed. 705. Judgments. Campbellsville Lumber Co. v. Hubbert (C. C. A.) 112 Fed. 718; Shipman v. District of Columbia, 18 Ct. Cl. 291; Caldwell v. Dunklin, 65 Ala. 461; Goyne v. Ashley County, 31 Ark. 552; Sawyer v. Colgan, 102 Cal. 283, 36 Pac. 580; Jolly v. Woodworth, 4 Idaho, 496, 42 Pac. 512; City of Chicago v. People, 98 Ill. App. 517; Flint & P. M. R. Co. v. Board of State Auditors, 102 Mich. 500, 60 N. W. 971; Guilder v. City of Otsego, 20 Minn. 74 (Gil. 59); Taylor v. Chickasaw County Sup'rs, 70 Miss. 87, 12 So. 210; Horner v. Coffey, 25 Miss. 434. The private property of a person, or resident of a town, cannot be taken to satisfy a judgment against the town. Ayres v. Thurston County, 63 Neb. 96, 88 N. W. 178; State v. Lander County Com'rs, 22 Nev. 71, 35 Pac. 300; Parker v. Saratoga County, 106 N. Y. 392, 13 N. E. 308. Claims which must be presented to the county board for audit and allowance do not include bonds and notes duly issued and payable.

State v. Daggett, 28 Wash. 1, 68 Pac. 340. It is not necessary that salaries of city officers fixed by the

§ 485. Basis of claim.

Such claims are based upon either a contract obligation or upon an alleged tort. If upon a contract, they may either follow from a violation of some of its provisions expressly made,[1274] or, if not expressly made, from one arising by implication.[1275] An implied contract obligation usually exists where supplies[1276] or services[1277] have been performed and accepted or used by the public corporation without an express contract having been made therefor.

Claims based upon contract provisions depend entirely for their validity upon the legality of the contract,[1278] and a determina-

charter should be audited under a charter provision requiring the audit of all demands against the city.

[1274] Fuller v. Colfax County, 33 Neb. 716, 50 N. W. 1044; In re Dasent, 2 N. Y. Supp. 609; People v. Green, 63 Barb. (N. Y.) 390; Oshkosh Waterworks Co. v. City of Oshkosh, 109 Wis. 208, 85 N. W. 376. An amendment to a city charter requiring the presentation of claims as a condition precedent to the right of action does not impair the obligation of a contract entered into prior to the adoption of such amendment.

[1275] Hamilton County Com'rs v. Newlin, 132 Ind. 27, 31 N. E. 465.

[1276] Brown v. City of New York, 55 How. Pr. (N. Y.) 8; Heidelberg v. St. Francois County, 100 Mo. 69; Nelson v. City of New York, 53 Hun, 630, 5 N. Y. Supp. 688; Wright v. City of Philadelphia, 14 Phila. (Pa.) 170; La France Fire Engine Co. v. Town of Mt. Vernon, 11 Wash. 203, 39 Pac. 367; Hoffman v. Clark County, 61 Wis. 5.

[1277] Burke v. Bean, 79 Ala. 97. Printers fee for advertising the sale of land for taxes. Dehm v. City of Havana, 28 Ill. App. 520; City of Ellsworth v. Rossiter, 46 Kan. 237, 26 Pac. 674. After services have been fully performed and accepted, original irregularities in the employment will not prevent a city from paying for them what they are reasonably worth.

Auditor General v. Bay County Sup'rs, 106 Mich. 662; State v. Butler County, 164 Mo. 214, 64 S. W. 176; Douglas County v. Taylor, 50 Neb. 535; North. Pac. Lumbering & Mfg. Co. v. City of East Portland, 14 Or. 3; Mahanoy Tp. v. Comry, 103 Pa. 362; State v. Snohomish County Com'rs, 18 Wash. 160; Yates v. Taylor County Ct., 47 W. Va. 376, 35 S. E. 24.

[1278] Edwards & Walsh Const. Co. v. Jasper County, 117 Iowa, 365, 90 N. W. 1006. Where work is accepted by a public corporation under a contract illegal because it contains a provision requiring the contractor to employ laborers residing in the city, it cannot in an action on the paving certificates issued in payment of such work set up as a defense the illegal contract. "There was a provision in the paving contract to the effect that all the laborers employed by plaintiff, except overseers and skilled men, should be citizens of the city of Newton. This provision is relied upon to invalidate the contract. * * *

tion of this question involves, of course, a consideration of the authority of the public corporation to engage in or enter into such contract obligation.[1279] Again, the manner of its execu-

There is no claim that any damage resulted either to the city or to the property owners by reason of increased cost in the doing of the work or otherwise. Having had the benefits of the work it does not lie in the mouth of the county or city to say that it will not pay therefor on account of this provision of the contract." Following People v. Coler, 166 N. Y. 1, 59 N. E. 716, 52 L. R. A. 814.

[1279] United States v. Reed (C. C. A.) 69 Fed. 841; Marengo County v. Lyles, 101 Ala. 423; English v. Chicot County, 26 Ark. 454; Armstrong v. Truitt, 53 Ark. 287; Linden v. Case, 46 Cal. 172. The audit and allowance of a claim not legally chargeable against the county does not change its character and make it valid.

Irwin v. Yuba County, 119 Cal. 686; Jolly v. Woodward, 4 Idaho, 496, 42 Pac. 512. The publishing of a delinquent tax list is a proper charge as against the county. Webb v. Baird, 6 Ind. 13; Gemmill v. Arthur, 125 Ind. 258; Feldenheimer v. Woodbury County, 56 Iowa, 379; Turner v. Woodbury County, 57 Iowa, 440; Smith County Com'rs v. Osborne County Com'rs, 29 Kan. 72.

Stone v. Dispatch Pub. Co., 21 Ky. L. R. 1473, 55 S. W. 725. A claim for copies of a daily paper furnished members of the legislature containing the proceedings of the General Assembly, is a valid demand against the state.

Atchison v. Lucas, 83 Ky. 451. An officer de facto acting as jailer has a proper claim against the county for the expense of feeding prisoners while holding office.

Garrard County Ct. v. McKee, 74 Ky. (11 Bush) 234. In considering the question of appeal, transactions of a county founded upon a grant of power constituting it a quasi public corporation must be distinguished from those done in its capacity as a public corporation.

Lovejoy v. Inhabitants of Foxcroft, 91 Me. 367, 40 Atl. 141. Where moneys are borrowed under charter authority and after proper action by the town, it is liable although the money as received was embezzled by the town treasurer.

Bessey v. Inhabitants of Unity Plantation, 65 Me. 342; Stowell v. Jackson County Sup'rs, 57 Mich. 31. The expense of boarding and lodging jurors in a criminal case is a valid claim.

Hart v. Genesee County Sup'rs, 105 Mich. 209, 63 N. W. 67; Ransom v. Gentry County, 48 Mo. 341; State v. Babcock, 22 Neb. 38, 33 N. W. 711; City of Kearney v. Downing, 59 Neb. 549, 81 N. W. 509. Claims for coal furnished for the relief of the poor are not valid when the service is not rendered under the circumstances and conditions required by law.

People v. Leavenworth, 90 Hun, 48, 35 N. Y. Supp. 445; Richmond County Sup'rs v. Ellis, 59 N. Y. 620; Rockefeller v. Taylor, 69 App. Div. 176, 74 N. Y. Supp. 812, reversing 28 Misc. 460, 59 N. Y. Supp. 1038; Reilly v. City of Philadelphia, 60 Pa. 467; Thoreson v. State Board of Examiners, 19 Utah, 18; Bunch's Ex'r v. Fluvanna County, 86 Va. 452;

tion, whether it was entered into and executed by the proper officers of the corporation,[1280] and, assuming the legality of the obligation in all of the preceding respects, whether or not such officials were duly authorized in a particular instance to bind the corporation in respect to a particular matter.[1281]

The other class of claims considered most frequently against public corporations are those arising or sounding in tort and are based upon the liability of the public corporation as a result of its failure to perform some supposed duty in respect to which the sovereign has consented to the assumption of a liability.[1282]

Kollock v. City of Stevens Point, 37 Wis. 348; Land, Log & Lumber Co. v. McIntyre, 100 Wis. 245, 75 N. W. 964. Although a county has received a benefit from supplies furnished or services rendered, if it has no legal right to engage in the transaction, no remedy is available by the claimant.

[1280] State Trust Co. v. City of Duluth, 104 Fed. 632. A mere employe of a municipality is not authorized to enter into a contract with a water company for flushing sewers. Macon County Sup'rs v. Newell, 81 Ill. 387; Madison County Com'rs v. Burford, 93 Ind. 383; Feldenheimer v. Woodbury County, 56 Iowa, 379; Roberts v. Pottawatomie County Com'rs, 10 Kan. 29; Salt Creek Tp. v. King Iron Bridge & Mfg. Co., 51 Kan. 520; Rulon v. Inhabitants of Woolwich, 55 N. J. Law, 489; People v. Board of Auditors of Floyd, 73 Hun, 615, 26 N. Y. Supp. 564; Hubbard v. Town of Williamstown, 66 Wis. 551; Vogel v. City of Antigo, 81 Wis. 642, 51 N. W. 1008, following Kelley v. City of Madison, 43 Wis. 638; Ruggles v. City of Fond du Lac, 53 Wis. 436; Bradley v. City of Eau Claire, 56 Wis. 168, and distinguishing Sheel v. City of Appleton, 49 Wis. 125. The words "claims or demands" refer only to such as arise ex contractu.

[1281] Jack v. Moore, 66 Ala. 184; Henry v. Cohen, 66 Ala. 382; Cass County Com'rs v. Crockett, 111 Ind. 316, 12 N. E. 486; Morgan County Com'rs v. Holman, 34 Ind. 256. Medical services rendered by a physician to township paupers by request of the proper township trustee constitute a valid claim against the township.

Bradley v. Delaware County, 57 Iowa, 552; Hendricks v. Chautauqua County Com'rs, 35 Kan. 483; State v. Fagan, 55 Kan. 150, 40 Pac. 314; Follensbee v. St. Clair County Sup'rs, 67 Mich. 614, 35 N. W. 257; People v. Wood, 59 Hun, 616, 12 N. Y. Supp. 436; Wittmer v. City of New York, 50 App. Div. 482, 64 N. Y. Supp. 170; Union County v. Slocum, 16 Or. 237, 17 Pac. 876; Mansel v. Fulmer, 175 Pa. 377; Chesterfield County v. Hall's Ex'r, 80 Va. 321.

[1282] Lewis v. State, 96 N. Y. 71, 48 Am. Rep. 607; Sipple v. State, 99 N. Y. 284. "It must be conceded that the state can be made liable for injuries arising from the negligence of its agents or servants only by force of some positive statute assuming such liability. It is claimed by the respondent that such an as-

The greater number of claims are not those above indicated but those which are based upon a "personal injury." It is the author's opinion that the prosecution of such claims and demands has been carried to an unreasonable extent, and the custom and habit of

sumption has been made by section 1, chapter 321, Laws of 1870. This gives authority to the board of claims 'to hear and determine all claims against the state of any and all persons and corporations for damages alleged to have been sustained by them from the canals of the state, or from their use and management, or resulting or arising from the negligence or conduct of any officer of the state having charge thereof, or resulting or arising from any accident or other matter or thing connected with the canals.' * * * The act was conceived in the plainest principles of justice and was intended to afford a substantial and not a delusive remedy to parties who might be injured by the careless and negligent conduct of those who were intrusted by the state with the execution of its work. The canal was a state enterprise and was managed and controlled by its servants and reason and justice require when it engages in public enterprises from which a revenue is expected to be derived, and in the prosecution of which private property is required to be taken, and individual interests jeopardized, that it should compensate those whose property rights are thereby invaded. The object in view was the protection of the citizen and not the exemption from liability of the state; and it is quite evident that the state thereby intended to assume with reference to the management of the canals, the same measure of liability incurred by individuals and corporations engaged in similar enterprises and to afford to parties injured the same redress which they would have against individuals and corporations for similar injuries. The use of the terms 'the negligence or conduct of any officer of the state having charge thereof' were obviously descriptive and intended to embrace all those persons in the employ of the state entrusted with the performance of duties relating to the canals and from a neglect or omission to perform which damages might occur to individuals. It is unreasonable to suppose that the state intended to confine its liability to cases arising from the negligence of those officers only having the duty of general supervision to perform and deny relief in cases where damages arose from the neglect of others having practical control of its operations. It is unquestionably the duty of all state officers to scrutinize closely the authority under which claims are made upon the public treasury and defeat such as are not clearly warranted by law; but it is unbecoming the dignity and honor of a great state to attempt to evade the fulfillment of its obligations according to their spirit and meaning or to stint the payment of a proposed indemnity by a constrained or illiberal construction of the language in which its promise is framed. The act is broad and comprehensive in its language and should be construed in the spirit which inspired its enactment."

bringing personal injury claims and actions against public corporations has largely resulted from the frequency with which these claims are pressed as against private corporations and private individuals. Litigation of this character is also the result, largely, of the activity of some members of the bar who do not, occasionally, hesitate to employ methods not beyond reproach in the presentment and prosecution of such claims and actions. It is time that the courts checked or attempted to check such litigation. The alleged liability is based upon a supposed failure of the corporation to properly care for an individual. The character of public corporations should not be disregarded or lost sight of. They are not organizations for the personal gain of its members; they are governmental agents merely, organized for the benefit and advantage of the community at large, to carry out some one or more of the proper functions of government which never had or never can include supplying to an individual the attributes of ordinary care, caution or common sense; they derive all of their funds including those which they are or may be required to pay in settlement of fictitious claims from the taxation of personal and property interests within their jurisdiction. The care which the state or any of its delegated agencies is required or supposed to exercise in the physical protection of the individual while following ordinary and personal avocations is very slight. The policy of permitting the allowance of these claims against public corporations, if continued, will lead to their bankruptcy, and, conversely, tend to destroy the self-reliance and responsibility of every member of the community.[1283] The

[1283] Since writing the text, the author has had the opportunity of examining a report of the Civic Federation of Chicago under date of July 27th, 1903, which contains many interesting statements supporting the contention of the text. From this the following extracts are taken: "The Civic Federation has interested itself in the matter of suits against the city growing out of personal injury claims. In a report of the executive committee, it finds that there are nearly three thousand of such suits pending, nearly all for damages for alleged injuries from defective sidewalks. There are now judgments against the city aggregating nearly $4,000,000, drawing five and six per cent. interest, resulting from personal injury claims. There has been an alarming increase in the number of actions brought, amounting to more than one hundred per cent. during the last five years. Whatever the responsibility for the rapidly growing abuse it is menacing the city with bankruptcy. The law-

subject as treated here will not attempt to state the principles or give the conditions which establish a legal liability. These will be considered later in those sections discussing the liability of public corporations.

yers who may be said to have developed the business in Chicago to its present alarming proportions are supplemented by a class of physicians who are also recognized as specialists in this line. Working together these two classes of professionals have become experts, managing their cases with skill and audacity, having all the advantage over the city in the collection of evidence and in almost every instance securing either a confession of judgment or a verdict. Usually the suit is brought from one to two years after the accident occurs. The law department of the city has meager data on which to prepare its defense. It frequently happens that there has been a change of officials in the department and that the former incumbents are arrayed with the prosecution, armed with information obtained from the department files. It is estimated in the city attorney's office—basing the calculation on past experience—that the cases now pending will eventually mulct the city in the amount of $4,500,000 or $5,000,000 (this in addition to the $4,000,000 of judgments now standing).

"Attorneys who have had much experience in the city's defense expressed the opinion that a large percentage of the suits are spurious, being brought for slight injury, or no injury at all, while in other cases the injuries are such as to warrant only very small damages. In many instances the defense finds it advisable to confess judgment rather than risk having a verdict rendered for an exorbitant sum. What is most needed is the passage of a law similar to that which was introduced in the Forty-second General Assembly by Mr. Ryan, and in the Forty-third General Assembly by Mr. Smulski, requiring that in every case of accident from defective sidewalks, etc., the plaintiff must make a full and detailed statement within thirty days of the accident, which, together with the attending physicians report and other information, must be filed with the city attorney, and limiting the time for bringing suit for damages to one year from the date of such filing. The passage of these bills was defeated by those interested in the growing business of damage litigation."

The following extracts from the report of John F. Smulski, City Attorney of Chicago, for the year ending December 31st, 1903, are interesting and point a moral as well as adorn a tale:

"This is the most serious problem confronting the city of Chicago at the present time as it has gradually developed into a tremendous drain on the city treasury. The increase in damage suits during the past ten years has been so great as to give just cause for alarm and to warrant the most drastic measures to curb the evil. From a total of forty-six claims pending against the city in 1893, this class of business has grown until on January 1st, 1903, there were 2,526 suits pending against the city and on January 1st,

§ 486. Authority for presentation.

Claims urged against public corporations may be those offered either under some special statutory provision[1284] or those for the presentment of which there is no such authority; they include both those sounding in tort and those arising ex contractu. The

1904, in spite of the earnest efforts of this department in attempting to dispose of suits by settlement and trials, the total number of suits pending against the city is 2,876 and the damages asked are $38,666,952." And further on page six it is said: "Another cause for this great increase in personal injury suits during the past ten years may be found in the increased activity of certain lawyers and physicians who make it a special business to stir up litigation of this nature and who have in very many cases entered into a practical partnership arrangement with each other." "There exists in this city today, not only a large number of lawyers who make a specialty of this class of cases but a number of corporations and adjusting agencies organized for the sole purpose of prosecuting claims of this kind. These agencies have a corps of solicitors, intimate relations with certain physicians all over the city and within a few hours after an accident occurs, their representative is on the spot and has secured a case against the city. It will be seen that in a great number of cases, suits are started against the city on the same day as the accident or the day immediately following. In a number of cases, suits have been started against the city even before the police report of the accident has reached the city attorney. These facts, at least, show organization." "Fraudulent cases may be divided into two classes: First, cases where no accident has ever occurred, and second, cases where a fall may have occurred but no injury sustained—one being manufactured for the occasion. * * * Under existing circumstances, cases of the first kind are only too easily worked up; a deformed or invalid person to act as plaintiff, a bad sidewalk, a few unscrupulous witnesses, a dishonest lawyer and physician; an average jury generally in sympathy with the plaintiff and the city is in a fair way to be mulcted out of thousands of dollars in damages." "There being now outstanding against the city the sum of $4,979,700.81 in judgments, the annual payment of interest amounts to $250,000."

[1284] May v. County of Cass, 30 Fed. 762; Irwin v. Yuba County, 119 Cal. 686; Walton v. Riley, 85 Ky. 413, 3 S. W. 605. Art. 2, § 36, Ky. Const., requiring a submission to the people at a general election of a proposition authorizing the incurring of a debt, does not include claims against counties or other subordinate divisions of the state. Davidson v. City of Muskegon, 111 Mich. 454; State v. Smith, 89 Mo. 408; State v. Appleby, 25 S. C. 100; People v. Queens County Sup'rs, 62 Hun, 619, 16 N. Y. Supp. 705; In re Town of Hempstead, 36 App. Div. 321, 55 N. Y. Supp. 345; Bartlett v. Eau Claire County, 112 Wis. 237, 88 N. W. 61.

statutes and charters of the different states and cities providing for the presentment and payment of "claims and demands" vary and no general principle can be stated which would control; their construction depends upon that given by the courts in particular cases.[1285]

§ 487. Presentment.

Public opinion has realized to a certain degree the extent and character of claims against public corporations based upon personal injuries, and, in order to check them, statutes have been passed in some states providing for the presentment, allowance

[1285] Rankin v. Jauman, 4 Idaho, 394, 39 Pac. 1111; City of Galesburg v. Benedict, 22 Ill. App. 1111. The presentment of a claim on account of a personal injury is not a condition precedent to the commencement of an action.

People v. Saginaw County Sup'rs, 35 Mich. 91; Allen v. Board of State Auditors, 122 Mich. 324, 81 N. W. 113, 47 L. R. A. 117. The word "claim" as used in Const. art. 8, § 4, providing for the adjustment and audit of all claims against the state does not include a gratuity paid a citizen as a recompense for false imprisonment for the alleged commission of a crime. See, also, Roberts v. State, 160 N. Y. 217, which holds under the facts of that case that a claim for damages sustained by an improper conviction and imprisonment for the alleged crime of burglary was not a valid one.

Moran v. City of St. Paul, 54 Minn. 279; State v. Wallichs, 12 Neb. 234; Eastman v. City of Concord, 64 N. H. 263, 8 Atl. 822; People v. Monroe County Sup'rs, 18 Barb. (N. Y.) 567; People v. Trustees of Village of Penn Yan, 2 App. Div. 29, 37 N. Y. Supp. 535; Hallinan v. Village of Ft. Edward, 26 Misc. 422, 57 N. Y. Supp. 126; City of Syracuse v. Hubbard, 64 App. Div. 587, 72 N. Y. Supp. 802; Rockefeller v. Taylor, 69 App. Div. 176, 74 N. Y. Supp. 812, reversing 28 Misc. 460, 59 N. Y. Supp. 1038. The audit of claims as a legal charge against the town does not establish the validity of the claim.

Dube v. Peck, 22 R. I. 443, 467, 48 Atl. 477. A claimant may, by the action, waive his right to the claim. Kellogg v. Winnebago County Sup'rs, 42 Wis. 97. A claim for taxes illegally collected need not be presented first to the county board of supervisors before the right of action accrues.

Forest County v. Langlade County, 76 Wis. 605, 45 N. W. 598; Ruggles v. City of Fond du Lac, 53 Wis. 436. The recovery of taxes wrongfully collected is not included within the provisions of the city charter requiring as a condition precedent to the maintenance of an action on the contract the presentment of a claim to the city council. See, also, cases cited under the last note, § 479. The question of whether the words "claim" or "damage" includes damages and claims based on a tort as well as those arising ex contractu has received a varying construction. Lincoln County v. Oneida County, 80 Wis. 267.

and payment of all claims including those of the character above indicated.[1286] These statutes have been adopted not only for the purpose of checking the payment of personal injury claims, but also for the purpose of controlling and regulating claims made against public corporations based upon the rendition of some service or the supply of some commodity. These provisions have been found necessary to prevent the allowance of excessive or fictitious claims through collusion with corrupt or by taking advantage of ignorant or careless public officials,[1287] and are considered mandatory in their character.[1288]

§ 488. Time of presentment.

Provisions regulating the time of presentment of a claim have as their basis the protection of the municipality by requiring a prompt presentation of a claim in order that it may be better passed upon in respect to its legality and soundness.[1289] An investi-

[1286] Rose v. Estudillo, 39 Cal. 270. But such an act, if including existing claims, is unconstitutional because impairing the validity of a contract. Adams v. City of Modesto (Cal.) 61 Pac. 957; Hamilton County Com'rs v. Tipton County Com'rs, 23 Ind. App. 330; McFarland v. City of Muscatine, 98 Iowa, 199, 67 N. W. 233; Giles v. City of Shenandoah, 111 Iowa, 83, 82 N. W. 466; Mackie v. West Bay City, 106 Mich. 242, 64 N. W. 25. A charter provision in respect to the auditing of accounts against a city held not to apply to a suit for damages on personal injuries. See, also, as holding the same, Davidson v. City of Muskegon, 111 Mich. 454, 69 N. W. 670; Ludington Water Supply Co. v. City of Ludington, 119 Mich. 480, 78 N. W. 558; Whitney v. City of Port Huron, 88 Mich. 268; Ayer v. Town of Somersworth, 66 N. H. 476, 30 Atl. 1119. The claim may be made and filed by an agent or attorney of the complainant. Borst v. Town of Sharon, 24 App. Div. 599, 48 N. Y. Supp. 996. The necessity for statutory requirements in these respects cannot be waived by municipal officers.

[1287] State v. Scates, 43 Kan. 330.

[1288] Chicago & A. R. Co. v. People, 190 Ill. 20; People v. Manning, 37 App. Div. 141, 55 N. Y. Supp. 781; Green v. Richland County Com'rs, 27 S. C. 9, 2 S. E. 618. South Carolina Gen. St. § 623, providing for a method of allowance of claims by county commissioners held not mandatory in its terms but permissive only in respect to the submission of evidence. State v. Smith, 89 Mo. 408, 14 S. W. 557.

[1289] Nicol v. City of St. Paul, 80 Minn. 415, 83 N. W. 375. "The object of giving notice of the injury to the mayor or clerk of the city, undoubtedly was to enable the city by the common council, its governing body, to cause an investigation to be made. It is to be noted that no express duty is enjoined by the charter upon the officer to whom the

gation can be more readily made and the correctness of the facts ascertained at the time or as soon thereafter as possible of the rendition of a service or the happening of an accident.[1290] Witnesses can be more readily found; their recollection of the facts

notice must be given. He is not required to make any investigation or cause it to be done. In the absence of any express directions or practice sanctioned by the common council it would be the duty of such officer to call the attention of the council to such notice. The statement of counsel as to the purposes of the general statute is incomplete. Its object in requiring notice of the injury and claim for damages to be given to the governing body of the municipality is not alone to afford an opportunity to settle the claim if a just one, without litigation. Its manifest object was to enable the municipality, by its governing body, to promptly investigate or cause it to be done, as to the time, place and circumstances of the alleged injury, while the witnesses are obtainable and the facts fresh in their recollection, and to settle such claim if found meritorious after such investigation." Whitney v. City of Port Huron, 88 Mich. 268, 50 N. W. 316; Neissen v. City of St. Paul, 80 Minn. 414, 83 N. W. 376; Freligh v. Directors of Saugerties, 70 Hun, 589, 24 N. Y. Supp. 182.

[1290] Lee v. Village of Greenwich, 48 App. Div. 391, 63 N. Y. Supp. 160. "If the notice is designed to answer any useful purpose by way of calling the attention of the authorities to the actual facts and conditions which existed at the time and place and which caused the accident and so aid them in forming a judgment as to settlement, it is plain that such a notice as to accidents of this nature should be as to 'time' and 'place' specific, and not general and should be as definite and exact as the claimant can reasonably make it. Such a notice is conclusive upon the claimant in any action afterwards brought for injuries sustained. The time and place cannot be shifted to suit conditions on other days and at other places. It seems to me that this is not such a notice as the law required. 'On or about' a certain day, in such a case is altogether too uncertain and indefinite. Proof, under such a notice, might be given as to the condition of the sidewalk on any day within a range of many days and the exact date of the accident might be shifted to suit the claimant and to suit the record as to the weather and the proof as to the condition of the sidewalk on any particular day within that wide range of "on or about." Neither is the place mentioned in the notice sufficiently definite. Here it is stated to be anywhere on a walk concededly about one-half mile in length for it is not stated on which side of this 100 rod avenue it occurred. It leaves the authorities to guess or search out just where was the place of the accident. They have no power to compel more definite information and they are called upon to examine a half-mile of sidewalk; and in reaching a reasonable conclusion as to whether the claim is a just one and should be audited or settled, and costs of an action avoided, they must necessarily de-

will be clearer and more positive. The time of a presentment of a claim may be also limited. These provisions usually require the presentment of claims to certain designated officials within a certain prescribed time from and after the date of an accident or injury,[1291] or the rendition of a service claimed,[1292] and further prescribe that unless this is done and in the manner designated the claim cannot be urged as a valid one against the corporation,[1293] or, if presented, must be disallowed without an opportu-

termine that the entire sidewalk was or was not at the particular time in every spot free of ice, or accumulation of ice and snow which should have been sooner removed. This, it seems to me, is unreasonable, and practically defeats entirely the purpose of the required notice. There is nothing in the notice filed with the clerk of the village in this case from which the time and place could with any reasonable certainty have been discovered or fixed and for this reason I do not think the claimant has shown a substantial compliance with the requirements of the statute."

[1291] Dement v. DeKalb County, 97 Ga. 733. The bringing of an action against a county within the time limited is a sufficient presentation of the claim sued on.

Herdman v. Woodson County Com'rs, 6 Kan. App. 513, 50 Pac. 946; City of Covington v. Voskotter, 80 Ky. 219; Chase v. Inhabitants of Surry, 88 Me. 468. The notice must be received by the public corporation within the time prescribed by statute; its mailing within that time is not sufficient.

Broffee v. City of Grand Rapids, 127 Mich. 89, 86 N. W. 401. Such a charter provision is not retroactive. Powers v. City of St. Paul, 36 Minn. 87; Bullock v. Town of Durham, 64 Hun, 380, 19 N. Y. Supp. 635. Such statutes cannot be made retroactive.

Yaw v. State, 127 N. Y. 190, 27 N. E. 829; Folts v. State, 118 N. Y. 406; Oshkosh Waterworks Co. v. City of Oshkosh, 106 Wis. 83, 81 N. W. 1040. A claim is "presented" when filed with the city clerk. Hildman v. City of Phillips, 106 Wis. 611.

[1292] Lincoln County v. Luning, 133 U. S. 529. Such a statutory provision applies only to unallowed demands or claims; not bonds or coupons. State v. Cass County Com'rs, 60 Neb. 566, 83 N. W. 733. A claim is filed when delivered to the county clerk although he fail to indorse upon it the time of filing San Miguel County Com'rs v. Pierce, 6 N. M. 324, 28 Pac. 512; Merchants' & Traders' Nat. Bank v. City of New York, 97 N. Y. 355; Parmenter v. State, 135 N. Y. 154; Royster v. Granville County Com'rs, 98 N. C. 148, 3 S. E. 739.

[1293] Winters v. Ramsey, 4 Idaho, 303, 39 Pac. 193; Sowter v. Town of Grafton, 65 N. H. 207, 19 Atl. 572; Benedict v. State, 120 N. Y. 228; Pitt County School Directors v. Town of Greenville, 130 N. C. 87, 40 S. E. 847. Such requirements are jurisdictional; they cannot be waived. State v. Colleton County

nity for appeal or re-review.[1294] The general statutes of limitation may also apply to the presentment of claims.[1295] To prevent injustice, however, it is often provided that a failure to present a claim within the time required by law will not operate as a bar to its further prosecution if certain reasons can be established or shown for such failure; such are commonly those based either upon the ignorance of the parties,[1296] their absence from the community, or some physical or mental disqualification or other unavoidable cause.[1297]

Com'rs, 31 S. C. 81, 9 S. E. 692; Goldsworthy v. Town of Linden, 75 Wis. 24, 43 N. W. 656.

[1294] See, also, generally the authorities cited under § 494, post. Carroll v. Siebenthaler, 37 Cal. 193; San Miguel County Com'rs v. Pierce, 6 N. M. 324, 28 Pac. 512.

[1295] Nelson v. Merced County, 122 Cal. 644, 55 Pac. 421; Cass County Com'rs v. Crockett, 111 Ind. 316, 12 N. E. 486; May v. State, 133 Ind. 567, 33 N. E. 352; Greeley v. Cascade County, 22 Mont. 580; Miller v. City of Socorro, 9 N. M. 416, 54 Pac. 756; McDougall v. State, 109 N. Y. 73, 16 N. E. 78; Norton v. City of New York, 16 Misc. 303, 38 N. Y. Supp. 90. The provisions of the general statute extending the limitation of actions in the case of infants to one year after disability ceases, it is held do not apply to a specific provision requiring the filing of a notice of intention within six months after the injury has been received.

Bissell v. State, 70 App. Div. 238, 73 N. Y. Supp. 1105; Corkings v. State, 99 N. Y. 491; Gates v. State, 128 N. Y. 221; Parmenter v. State, 135 N. Y. 154; Woods v. Madison County Sup'rs, 136 N. Y. 403. The effect of the statute of limitations may, however, be waived by the proper authorities, Shelby County v. Bickford, 102 Tenn. 395.

Young Bond & Stock Co. v. Mitchell County, 21 Tex. Civ. App. 638, 54 S. W. 284; Dinwiddie County v. Stuart, 28 Grat. (Va.) 526. The statute of limitations will not run against a claim duly presented to the proper officers though they may have taken no official action upon it.

[1296] Kelsea v. Manchester, 64 N. H. 570, 15 Atl. 206; Bolles v. Dalton, 59 N. H. 479.

[1297] Saunders v. City of Boston, 167 Mass. 595. One is not excused by reason of physical incapacity from giving notice to the city of injuries resulting from an accident caused by a defective sidewalk when such injury is merely a sprained ankle. Barclay v. City of Boston, 167 Mass. 596; Sargent v. Town of Gilford, 66 N. H. 543, 27 Atl. 306; Hayes v. Town of Rochester, 64 N. H. 41; Currier v. City of Concord, 68 N. H. 294. A failure to inform claimant that her notice was insufficient will not be considered an unavoidable cause so as to permit her to file a sufficient notice after the time fixed by the statute had elapsed.

Williams v. Village of Port Chester, 72 App. Div. 505, 76 N. Y. Supp. 631; Gonyeau v. Town of Milton, 48 Vt. 172.

§ 489. Manner of presentment.

The manner of presentment is usually prescribed by statutory or charter provision, either by petition or notice to certain officials or official bodies.[1298] The form may be established by rule, custom or law, and if this condition exists the cases usually hold that a claim presented in any other manner should not be con-

[1298] City of Connersville v. Connersville Hydraulic Co., 86 Ind. 184; Carberry v. Inhabitants of Sharon, 166 Mass. 32, 43 N. E. 912. A notice signed by the claimant's husband and which stated "that we will be obliged to make a claim on your town for damages" is a sufficient notice by the claimant. But a notice by the husband of claimant written by her authority but stating that he claims damages is held insufficient to maintain an action for injuries to the wife in the case of Keller v. Inhabitants of Winslow, 84 Me. 147.

Robey v. Prince George's County Com'rs, 92 Md. 150, 48 Atl. 48. Judicial officers cannot be compelled to perform clerical or ministerial duties.

Engstrom v. City of Minneapolis, 78 Minn. 200; Peterson v. Village of Cokato, 84 Minn. 205, 87 N. W. 615. Service of the notice required must be made on the proper official at the place where he transacts the official business pertaining to his office.

State v. Hallock, 20 Nev. 326, 22 Pac. 123; Stanton v. Town of Taylor, 64 Hun, 633, 19 N. Y. Supp. 43. Code of Civil Proc. § 3245, requiring the presentment of a claim "for payment to the chief fiscal officer" is sufficiently complied with by a presentation to the supervisors of the town where there is no town treasurer.

Murphy v. City of Buffalo, 38 Hun (N. Y.) 49. If a claim is presented to the clerk of the common council, a statutory provision requiring it to be "presented to the common council for audit" is sufficiently complied with.

Krall v. City of New York, 44 App. Div. (N. Y.) 259; In re Agar, 21 Misc. 145, 47 N. Y. Supp. 477; Burford v. City of New York, 26 App. Div. 225, 49 N. Y. Supp. 969. The service of a required notice by mail is insufficient; it must be delivered at the office in which the notice is required by law to be filed. See, also, Gates v. State, 128 N. Y. 221, holding the same.

Hallinan v. Village of Ft. Edwards, 26 Misc. 422, 57 N. Y. Supp. 26. Where the law requires the presentation of a claim for payment to the "chief fiscal officer of the corporation," it is complied with by presenting to the treasurer of the board of water commissioners a claim against that board for constructing a system of waterworks.

Baine v. City of Rochester, 85 N. Y. 523. It is immaterial that the officer is without power to either adjust or pay the claim; if the statute requires the presentment to an officer, its terms must be complied with.

Coleman v. City of Fargo, 8 N. D. 69, 76 N. W. 1051; Glatfelter v. Com., 74 Pa. 74; Maloney v. Cook, 2 R. I. 471; Bacon v. City of Antigo, 103 Wis. 10, 79 N. W. 31. A provision requiring the presentment

sidered.[1299] A verification of the claim is generally required,[1300] and the absence of this may be a material fact to be considered in determining the legality or the justice of the alleged claim.

The language of the petition or form if not prescribed by statute is not that ordinarily required to be used in the preparation

of a claim for personal injuries to a city council is sufficiently complied with by filing it with the city clerk for presentation to the city council.

See, also, the following cases: Brewster v. City of Hornellsville, 35 App. Div. N. Y. 626; City of Salina v. Kerr, 7 Kan. App. 223; City of Hutchinson v. Van Cleve, 7 Kan. App. 676; Canfield v. City of Jackson, 112 Mich. 120; Snyder v. City of Albion, 113 Mich. 275; Atherton v. Village of Bancroft, 114 Mich. 241; Selden v. Village of St. Johns, 114 Mich. 698; Chadbourne v. Town of Exeter, 67 N. H. 190; Davis v. Town of Rumney, 67 N. H. 591; City of Ft. Worth v. Shero, 16 Tex. Civ. App. 487; Benson v. City of Madison, 101 Wis. 321.

[1299] Barrett v. City of Mobile, 129 Ala. 179, 30 So. 36; Hope v. Board of Liquidation, 41 La. Ann. 535, 6 So. 819; Hegele v. Polk County, 92 Iowa, 701, 61 N. W. 393; City of Syracuse v. Reed, 46 Kan. 520, 26 Pac. 1043. Claims should be presented to the city council in writing and allowed in the manner prescribed by statute. Noonan v. City of Lawrence, 130 Mass. 161; Miles v. City of Lynn, 130 Mass. 398; Lord v. City of Saco, 87 Me. 231; Cropper v. Mexico City, 62 Mo. App. 385. A statutory requirement that claims shall be presented in writing to the city council does not apply to one arising *ex delicto*. See also, as holding the same, Evans v. City of Joplin, 84 Mo. App. 296; Mears v. City of Spokane, 22 Wash. 323; Herring-Hall-Marvin Co. v Kroeger, 23 Tex. Civ. App. 672, 57 S. W. 980; Van Loan v. Village of Lake Mills, 88 Wis. 430; Northern Trust Co. v. Snyder, 113 Wis. 516, 89 N. W. 460.

[1300] McCormack v. Tuolumne County, 37 Cal. 257; Rock Creek Tp. v. Codding, 42 Kan. 649; Moriarty v. Morris County Com'rs, 51 Kan. 199. The failure to file the affidavit required by Kan. Gen. St. 1889, c. 107, § 108, will result in a disallowance of the claim. City of Ottawa v. Black, 10 Kan. App. 439, 61 Pac. 985. The verification by an agent of the claimant is sufficient.

Crittenden v. City of Mt. Clemens, 86 Mich. 220, 49 N. W. 144; Mead v. City of Lansing, 56 Mich. 601; Lay v. City of Adrian, 75 Mich. 438. Such a requirement does not apply to a suit for damages for personal injuries. Gillette-Herzog Mfg. Co. v. Aitkin County Com'rs, 69 Minn. 297, 72 N. W. 123; Powder River Cattle Co., v. Custer County Com'rs, 95 Mont. 145, 22 Pac. 383. Such a requirement applies to a claim for the repayment of taxes paid under protest.

Langstaff v. Daly, 49 N. J. Law, 403, 8 Atl. 526; Berry v. Daly, 50 N. J. Law, 356, 13 Atl. 6; James P. Hall Incorporated Co. v. Jersey City, 62 N. J. Eq. 489, 50 Atl. 603; Magee v. City of Troy, 48 Hun, 383, 1 N. Y. Supp. 24; Warrin v. Baldwin, 105 N. Y. 534, 12 N. E. 49; Sherman v. Village of Oneonta, 66

and drawing of formal pleadings.[1301] The purpose of a petition or notice is to have placed before public officials, charged with certain prescribed duties, the facts and circumstances forming the basis of an alleged claim, so definite, certain and in detail that they can the better and more justly pass upon it.[1302] The cases,

Hun, 629, 21 N. Y. Supp. 137. That provision for the filing of claims verified by the claimant does not apply to an action ex delicto.

Patterson v. City of Brooklyn, 6 App. Div. 127, 40 N. Y. Supp. 581; Pearson v. City of Seattle, 14 Wash. 438, 44 Pac. 884. An unverified claim is sufficient where no verification is required. Miller v. Crawford County, 106 Wis. 210; Myers v. Appleby, 25 S. C. 100; City of Enterprise v. Fowler, 38 Kan. 415, 16 Pac. 703.

But see Mobile County v. Sands, 127 Ala. 493, 29 So. 26; Perry County v. Conway County, 52 Ark. 430, 6 L. R. A. 665; State v. Cass County Com'rs, 60 Neb. 566, 83 N. W. 733, and Downie v. Freeholders of Passaic County, 54 N. J. Law, 223, 23 Atl. 954.

[1301] Dubois County Com'rs v. Wertz, 112 Ind. 268, 13 N. E. 874; Blackford County Com'rs v. Shrader, 26 Ind. 87; Tippecanoe County Com'rs v. Everett, 51 Ind. 543; Orange County Com'rs v. Ritter, 90 Ind. 362, overruling 87 Ind. 356; Howard County Com'rs v. Jennings, 104 Ind. 108, 3 N. E. 619; Powers v. City of St. Paul, 36 Minn, 87. The notice should be in writing.

Clay County v. Chicksaw County, 76 Miss. 418, 24 So. 975; Shepard v. Easterling, 61 Neb. 882, 86 N. W. 941. A claim should be presented in writing and verified by affidavit. Quinn v. Town of Sempronius, 33 App. Div. 70, 53 N. Y. Supp. 325; LaFlamme v. City of Albany, 158 N. Y. 699; Maxwell v. Saluda County, 55 S. C. 382, 33 S. E. 457.

[1302] Colusa County v. Welch, 122 Cal. 428, 55 Pac. 243; Roberts v. People, 9 Colo. 458, 13 Pac. 630; Breen v. Town of Cornwall, 73 Conn. 309, 47 Atl. 322; Wood v. Borough of Stafford Springs, 74 Conn. 437, 51 Atl. 129; Clyne v. Bingham County, 7 Idaho, 75, 60 Pac. 76; Cole v. Harrison County Com'rs, 3 Ind. App. 13, 28 N. E. 1031; Epenter v. Montgomery County, 98 Iowa, 159, 67 N. W. 93. The validity of the claim is not affected by the fact that claimant included in his itemized statement a demand not authorized by that particular method. Dale v. Webster County, 76 Iowa, 370. It is not necessary, however, in such a statement to include proof of death or a specification of the facts constituting the alleged negligence.

City of Enterprise v. Fowler, 38 Kan. 415, 16 Pac. 703; City of Ottawa v. Black, 10 Kan. App. 439, 61 Pac. 985; White v. Inhabitants of Vassalborough, 82 Me. 67; Pendergast v. Inhabitants of Clinton, 147 Mass. 402, 18 N. E. 75; Brown v. City of Owosso, 126 Mich. 91, 85 N. W. 256; Wheeler v. City of Detroit, 127 Mich. 329, 86 N. W. 822; Gardner v. Newaygo County Sup'rs, 110 Mich. 94; Old Second Nat. Bank v. Town of Middletown, 67 Minn. 1, 69 N. W. 471; Robin v. Bartlett, 64 N. H. 426, 13 Atl. 645; Noble v. City of Portsmouth, 67 N. H. 183, 30 Atl. 419; Ayer v. Town

therefore, hold that such petitions or notices must be clear, certain, definite and full in their recitals of facts, and if lacking in any of these respects, the notice should be considered insufficient, and the claim should be disallowed.[1303]

§ 490. Audit and allowance of claims.

Statutory or charter provisions for the presentment of claims generally provide a tribunal of certain designated officers or official bodies to whom claims should be presented and by whom

of Somersworth, 66 N. H. 476; James P. Hall Incorporated Co. v. Jersey City, 62 N. J. Eq. 489, 50 Atl. 603; Lee v. Village of Greenwich, 48 App. Div. 391, 63 N. Y. Supp. 160; Minick v. City of Troy, 83 N. Y. 514; Werner v. City of Rochester, 149 N. Y. 563; Trost v. City of Casselton, 8 N. D. 534; City of Philadelphia v. Sutter, 30 Pa. 53; Burdick v. Richmond, 16 R. I. 502, 17 Atl. 917; Thomas v Douglas County, 13 S. D. 520; City of Dallas v. Myers, (Tex. Civ. App.) 64 S. W. 683; Willard v. Town of Sherburne, 59 Vt. 361; Piper v. City of Spokane, 22 Wash. 147, 60 Pac. 138; Cantwell v. City of Appleton, 71 Wis. 463, 37 N. W. 813; Laird v. Town of Otsego, 90 Wis. 25.

[1303] Crenshaw County v. Fleming, 109 Ala. 554, 19 So. 906. If a claim is disallowed because the service was not performed in a required manner, the county cannot urge as a ground of defense in a subsequent action that the claim as presented for allowance was not sufficiently definite and specific. Kelso v. Teale, 106 Cal. 477, 39 Pac. 948; Christie v. Sonoma County Sup'rs, 60 Cal. 164; Epenter v. Montgomery County, 98 Iowa, 159; Atchison County Com'rs v. Tomlinson, 9 Kan. 167. The account or claim should be made out in separate items and the nature of each stated.

McLean v. City of Boston, 180 Mass. 69, 61 N. E. 758. An insufficient notice may be followed by one which is sufficient under the statute and this will not be rendered invalid by the giving of the first and insufficient notice.

Young v. Inhabitants of Douglas, 157 Mass. 383, 32 N. E. 354; Fortin v. Inhabitants of Easthampton, 142 Mass. 486; Gardner v. Newaygo County Sup'rs, 110 Mich. 94, 67 N. W. 1091; Tattan v. City of Detroit, 128 Mich. 650, 87 N. W. 894; State v. Smith, 89 Mo. 408; Chatters v. Coahoma County Sup'rs, 73 Miss. 351; Sowter v. Town of Grafton, 65 N. H. 207; In re Pinney, 17 Misc. 24, 40 N. Y. Supp. 716; Baldwin v. Freeholders of Middlesex, 58 N. J. Law, 285; In re White, 51 App. Div. 175, 64 N. Y. Supp. 726; Brownfield v. Houser, 30 Or. 534; Green v. Richland County Com'rs, 27 S. C. 9, 2 S. E. 618; State v. Knight, 31 S. C. 81, 9 S. E. 692; Pickens County v. Day, 45 S. C. 161; Reed v. Town of Calais, 48 Vt. 7; Nourse v. Town of Victory, 51 Vt. 275; Holcomb v. Town of Danby, 51 Vt. 428; Farnsworth v. Town of Mt. Holly, 63 Vt. 293.

Mears v. City of Spokane, 22 Wash. 323. A notice that the injuries were caused by defects and obstructions in the sidewalk was held in this case insufficient where

the action is to be taken.[1304] These have for their purpose the examination of the account or claim having in view, first, the

the injury was occasioned by an accumulation of snow and ice.

Outagamie County v. Town of Greenville, 77 Wis. 165, 45 N. W. 1090; Cairncross v. Village of Pewaukee, 78 Wis. 66, 10 L. R. A. 473; Pier v. Oneida County, 93 Wis. 463; Miller v. Crawford County, 106 Wis. 210. The provisions of such a statute are mandatory and jurisdictional. Gagan v. City of Janesville, 106 Wis. 662. A notice which alleges as the cause of the injury the stepping into a hole in a sidewalk will not support an action for damages resulting from the slipping of a loose board in a sidewalk.

[1304] Gamewell Fire-Alarm Tel. Co. v. City of New York, 31 Fed. 312; Speer v. Kearney County Com'rs, 88 Fed. 749. A temporary board of commissioners may, under statutory authority, have power to audit claims on account of legitimate county expenses and to issue warrants in payment.

Worthen v. Roots, 34 Ark. 356; Ames v. City and County of San Francisco, 76 Cal. 325, 18 Pac. 397. The rule will not apply to the salary of the gas inspector. Ex parte Widber, 91 Cal. 367, 27 Pac. 733; McFarland v. McCowen, 98 Cal. 329, 33 Pac. 113; Smith v. San Bernardino County Sup'rs, 99 Cal. 262. If officers refuse or neglect to perform the duty with which they are charged in this respect, a writ of mandamus will lie.

Stevens v. Truman, 127 Cal. 155. The rule does not apply to the city and county of San Francisco. See, also, holding the same, Bloom v. City and County of San Francisco, 64 Cal. 503.

State v. Babcock, 22 Neb. 38, 33 N. W. 711; Ragoss v. Cuming County, 36 Neb. 375, 54 N. W. 683. Action by such a body, unless appealed from, is conclusive and cannot be attacked collaterally except for fraud.

Buck v. City of Lockport, 6 Lans. (N. Y.) 251; People v. Fulton County Sup'rs, 74 Hun, 251, 26 N. Y. Supp. 610. Where an official body has the power to pass upon a particular claim, it can be referred by them to a committee of their number with power to act.

People v. City of Amsterdam, 90 Hun, 488, 36 N. Y. Supp. 59. A sub-committee to whom a claim is referred should give the claimant an opportunity to present his case, offer evidence and answer objections made against the allowance of his claim. See, also, the case of Pickens County v. Day, 45 S. C. 161, 22 S. E. 772, which passes upon the right of a claimant to introduce evidence before an auditing board.

People v. Saratoga County Sup'rs, 45 App. Div. 42, 60 N. Y. Supp. 1122. It is not necessary that an auditing committee examine witnesses on behalf of the claimant. They may rely on the personal knowledge of individual members. See, also, holding the same, People v. Vanderpoel, 35 App. Div. 73, 54 N. Y. Supp. 436.

Adams v. Town of Wheatfield, 46 App. Div. 466, 61 N. Y. Supp. 738; Foster v. Angell, 19 R. I. 285, 33 Atl. 406; Tinsley v. Union County, 40 S. C. 276, 18 S. E. 794. A county board in passing on claims is not required to act or sit as a court in respect to the hearing or presentation of evidence. State v. Apple-

fact of a rendition of a service or the existence of a condition;[1305] and second, the correctness and accuracy of the amount of the claim and whether payments have been made and, if so, to what extent.[1306] In short, the examination and audit has for its purpose, from what can be termed a bookkeeping and business standpoint, the correctness of the claim.[1307] It is scarcely necessary to add that claims should be presented to the proper officials and that a presentment to those not legally charged with the performance of this public duty will not result in the establishment of a valid and legal claim as against a public corporation.[1308]

Time of allowance. The time of the allowance may also be important in ascertaining whether a similar result has been reached. A prompt adjustment and determination of claims should be and usually is required by statute; the purpose being

by, 25 S. C. 100. A commission appointed to investigate and pass upon the indebtedness of a county, not regarded as a judicial body.

[1305] Ingram v. Colgan, 106 Cal. 113, 38 Pac. 315, 39 Pac. 437, 28 L. R. A. 187; Hickey v. Oakland County Sup'rs, 62 Mich. 94; State v. Hinkson, 7 Mo. 353; James P. Hall Incorporated Co. v. Jersey City, 62 N. J. Eq. 489, 50 Atl. 603.

[1306] Santa Cruz County v. McPherson, 133 Cal. 282, 65 Pac. 574; Morgan v. Buffington, 21 Mo. 549; State v. Cathers, 25 Neb. 250; State v. Moore, 37 Neb. 507; Maxwell v. Saluda County, 55 S. C. 382, 33 S. E. 457.

[1307] People v. Delaware County Sup'rs, 45 N. Y. 196; People v. Vanderpoel, 35 App. Div. 73, 54 N. Y. Supp. 436; People v. Westchester County, 57 App. Div. 135, 67 N. Y. Supp. 981. The audit and allowance of an itemized claim without a consideration of each item is improper. People v. Fulton County Sup'rs, 74 Hun, (N. Y.) 251; People v. Town Auditors of Elmira, 82 N. Y. 80.

[1308] Auditors of Cottonwood v. People, 38 Ill. App. 239. A town meeting has no power to audit a claim. Wesson v. Com., 144 Mass. 60, 10 N. E. 762; Inhabitants of Milford v. Com., 144 Mass. 64, 10 N. E. 516; Schneider v. Blades, 108 Mich. 3, 65 N. W. 559; Ryan v. Dakota County, 32 Minn, 138. After once having passed upon a claim, county commissioners exhaust their powers, and it cannot be reconsidered by them. See, also, as holding the same, Arthur v. Adam, 49 Miss. 404. But under a statutory provision in Nebraska it is held in State v. Baushausen, 49 Neb. 558, that the board can reconsider its action.

Jones v. Lee County Sup'rs, (Miss.) 12 So. 341; State v. Merrell, 43 Neb. 575; Wilson v. State, 53 Neb. 113, 73 N. W. 456; Brown v. Grafton County, 69 N. H. 130, 36 Atl. 874; Baldwin v. Freeholders of Middlesex, 58 N. J. Law, 285, 33 Atl. 197; McCrea v. Chahoon, 54 Hun, 577, 8 N. Y. Supp. 88; Jackson v. Collins, 62 Hun, 618, 16 N. Y. Supp. 651; People v. City of Amsterdam, 90 Hun, 488, 36 N. Y. Supp. 59; People v. Trustees of Penn

that suggested above in connection with the securing of evidence and the intelligent passing upon alleged claims.

If a claim is allowed, the action is usually discretionary in its character and of quasi judicial nature,[1309] but this does not place

Yan, 2 App. Div. 28, 37 N. Y. Supp. 535; People v. Fielding, 36 App. Div. 401, 55 N. Y. Supp. 530; Jones v. Bladen County Com'rs, 73 N. C. 182.

Coleman v. City of Fargo, 8 N. D. 69, 76 N. W. 1051. A requirement that the claim must be presented to the board of audit is sufficiently complied with by filing the claim with the city auditor.

Whalen v. Bates, 19 R. I. 274, 33 Atl. 224. A claim presented to the mayor and one branch of the city council is not a sufficient compliance with statutes requiring the presentation of a claim to the city council. McKenna v. Bates (R. I.) 35 Atl. 580. Oshkosh Waterworks Co. v. City of Oshkosh, 109 Wis. 208, 85 N. W. 376; Walton v. McPhetridge, 120 Cal. 440, 52 Pac. 731.

[1309] St. Paul Gas Light Co. v. City of St. Paul, 181 U. S. 142. The action of a city comptroller in auditing claims is advisory merely; and the passage of an ordinance prohibiting him from acting upon claims arising under the contract does not impair its obligation.

Green v. Fresno County, 95 Cal. 329, 30 Pac. 544; Cahill v. Colgan (Cal.) 31 Pac. 614; Lewis v. Colgan (Cal.) 44 Pac. 1081. The performance of quasi judicial acts in connection with the examination and allowance of claims does not make an official body a judicial one.

Alameda County, v. Evers, 136 Cal. 132, 68 Pac. 475. Action by the proper officials in auditing and allowing claims is not subject to collateral attack.

Falk v. Strother, 84 Cal. 544; McFarland v. McCowen, 98 Cal. 329; Lamberson v. Jefferds, 118 Cal. 363; Garfield County Com'rs v. Leonard, 3 Colo. App. 576; Beeney v. Irwin, 6 Colo. App. 66, 39 Pac. 900; Fitzgerald v. Harms, 92 Ill. 372.

Warren County Com'rs v. Gregory, 42 Ind. 32. "The board of county commissioners, in acting upon claims against the county act in a judicial capacity and their decisions are conclusive and binding alike upon the county and the claimant unless appealed from, or unless an independent action is brought against the county when the claim has been disallowed."

Myers v. Gibson, 147 Ind. 452; State v. Scates, 43 Kan. 330. An allowance in good faith under a mistake or error of the law of an illegal claim against a county is not ground for a proceeding against officials for a forfeiture of office.

Barry County v. Manistee County Sup'rs, 33 Mich. 497; Arthur v. Adam, 49 Miss. 404. An order of the county board of supervisors allowing and directing the payment of a claim against the county has the force and effect of a judgment and is valid until reversed by an appellate court. It cannot be subsequently rescinded by such board. Boone County v. Armstrong, 23 Neb. 764, 37 N. W. 626; State v. Churchill, 37 Neb. 702; Richardson County v. Hull, 24 Neb. 536, 39 N. W. 608, affirmed 28 Neb. 810, 45 N. W. 53; State v. Vincent, 46 Neb. 408; Trites v. Hitch-

it beyond the re-review of judicial bodies, as a usual rule.[1310] Claims against public corporations to be enforceable must be legally chargeable against them and neither the allowance, the audit,

cock County, 53 Neb. 79, 73 N. W. 215; Taylor v. Davey, 55 Neb. 153, 75 N. W. 553; Dean v. Saunders County, 55 Neb. 759, 76 N. W. 450. A county board may reconsider its action in allowing or rejecting a claim upon giving proper notice to the parties affected.

State v. La Grave, 22 Nev. 417, 41 Pac. 115. The audit and approval of a claim by the proper officers does not, however, establish it as a legal demand; the account must be properly chargeable in the first instance.

People v. Board of Education of New York, 26 App. Div. 208, 49 N. Y. Supp. 915; Richmond County Sup'rs v. Ellis, 59 N. Y. 620. The allowance of an illegal claim is not, however, conclusive upon a subsequent official body.

People v. Broome County Sup'rs, 65 N. Y. 222. An auditing board acts in a legislative, not in a judicial capacity, and may repeal or reconsider its action in allowing the claim when such action is ascertained to be incorrect. See, also, as holding the same, People v. Saratoga County Sup'rs, 45 App. Div. 42, 60 N. Y. Supp. 1122.

Bank of Staten Island v. City of New York, 68 App. Div. 231, 74 N. Y. Supp. 284. Such an audit and allowance unless appealed from is conclusive and not subject to collateral attack. Boner v. Adams, 65 N. C. 639; Jones v. Lucas County Com'rs, 57 Ohio St. 189. The power possessed by a board of county commissioners under the statutes to pass upon claims against a county gives them no exclusive rights to allow an illegal claim. Bank of Idaho v. Malheur County, 30 Or. 420, 35 L. R. A. 141; State v. Ferriss (Tenn. Ch.) 56 S. W. 1039; Callaghan v. Salliway, 5 Tex. Civ. App. 239, 23 S. W. 837; State v. Headlee, 18 Wash. 220; Appel v. State, 9 Wyo. 187, 61 Pac. 1015. But see Foy v. Westchester County, 60 App. Div. 412, 69 N. Y. Supp. 887.

But see the following: Huntington County Com'rs v. Heaston, 144 Ind. 583, 41 N. E. 457, 42 N. E. 651; De Kalb County Com'rs v. Auburn Foundry and Mach. Works, 14 Ind. App. 214, 42 N. E. 689; Carroll County Com'rs v. Pollard County, 17 Ind. App. 470 46 N. E. 1012; Cumberland County Sup'rs v. Edwards, 76 Ill. 544; Randolph County Com'rs v. Henry County Com'rs, 27 Ind. App. 378, 61 N. E. 612; Bean v. Carroll County Sup'rs, 51 Iowa, 53; Stamp v. Cass County, 47 Mich. 330; Abernathy v. Phifer, 84 N. C. 711, and Union County v. Hyde, 26 Or. 24, 37 Pac. 76.

[1310] Cuthbert v. Lewis, 6 Ala. 262; Barnhill v. Woodard, 26 Ind. App. 482, 59 N. E. 1085; Morse v. Norfolk County, 170 Mass. 555, 49 N. E. 925; Hoxsey v. Woodruff, 39 N. J. Law, 72; Bott v. Wurts, 63 N. J. Law, 289; In re Town of Eastchester, 53 Hun, 181, 6 N. Y. Supp. 120. But this principle will not prevent a proceeding under the N. Y. laws providing "for the summary investigation of unlawful or corrupt expenditures by officials of towns or incorporated villages and for restraining the same." See People v. Sutphin, 53 App. Div. 613, 66 N. Y.

nor the payment of an illegal claim, can create any legal liability.[1311]

The power possessed by certain officials or official bodies to pass upon and allow or reject claims presented in the proper manner would necessarily include the minor right of compromising[1312] the claim, and the amount as finally agreed upon becomes then a legal claim against the corporation which can be paid through the levy of a tax for this special purpose or from general funds.[1313]

Supp. 49; Osterhoudt v. Rigney, 98 N. Y. 230; People v. Barnes, 114 N. Y. 317.

People v. People, 81 Hun. 383, 30 N. Y. Supp. 878; People v. Ulster County Sup'rs, 32 Hun (N. Y.) 607; People v. Feeney, 43 App. Div. 376, 60 N. Y. Supp. 103.

But see State v. Warren County Com'rs, 136 Ind. 207, 35 N. E. 1100, where it is held mandamus will lie to compel county commissioners to approve a proper claim of the township trustee for services rendered, and also People v. Clinton County Sup'rs, 64 Hun, 636 19 N. Y. Supp. 642.

[1311] Linden v. Case, 46 Cal. 172; Cumberland County Sup'rs v. Edwards, 76 Ill. 544; Richmond County Sup'rs v. Ellis, 59 N. Y. 620; Municipal Security Co. v. Baker County, 33 Or. 338, 54 Pac. 174; Endion Imp. Co. v. Evening Tel. Co., 104 Wis. 432. See, also, authorities cited under last note, § 478.

[1312] St. Charles St. R. Co. v. Board of Assessors, 51 La. Ann. 459, 25 So. 90; Campbell v. Inhabitants of Upton, 113 Mass. 67; O'Brien v. City of New York, 25 Misc. 219, 55 N. Y. Supp. 50; City of Austin v. McCall (Tex. Civ. App.) 67 S. W. 192. But a contract for the compromise of claims entirely void cannot be enforced.

But see Com. v. Tilton, 23 Ky. L. R. 753, 63 S. W. 602, as holding that under Ky. Const. § 52, a county court has no power to compromise any part of the indebtedness with a sheriff of the county. City of Louisville v. Louisville R. Co. 24 Ky. L. R. 538, 68 S. W. 840.

[1313] Vose v. Inhabitants of Frankfort, 64 Me. 229; Endion Imp. Co. v. Evening Tel. Co., 104 Wis. 432. The compromise of an illegal claim cannot create any liability. Again, it is urged that the matter was compromised. The statute prescribed certain fees for each publication made according to law. The right of the publisher to compensation for his work does not rest upon contract, but results by operation of law. He is entitled to the fees so prescribed and no more. His right thereto cannot be increased or diminished by contract. * * * There can be no compromise because there is nothing to compromise. The county board had no right or power to squander or give away the money of the county. In their administrative capacity the members of the county board act and exercise their power as public or special agents and they cannot exceed the power conferred upon them by law. They cannot bind the county by allowing and ordering a claim to be paid not legally chargeable to it. They have not unlimited choice as to the objects to which the money of the public shall be applied. They

The compromise of a disputed claim involves the exercise of judicial and discretionary powers, and, if these are exercised in good faith, such action cannot be reviewed by the courts.[1314]

§ 491. Rejection of claims and appeal.

The rejection[1315] of a claim by the proper officials gives the claimant, usually, within a designated period of time, the right to appeal either to some subordinate legislative or executive body or official[1316] or a judicial body proper.[1317] To authorize an ap-

are as strictly bound by the law as are the other defendants and bound to take notice of it and act within its provisions. Hence, it follows that the pretended claim of compromise has no foundation to rest upon. Any allowance of the publishers' claims beyond the limits hereinbefore named was wholly unauthorized and illegal and their payment was properly restrained."

[1314] Placer County v. Campbell (Cal.) 11 Pac. 602; Hendricks v. Chautauqua County Com'rs, 35 Kan. 483; Webb v. Bell, 22 App. Div. 314, 47 N. Y. Supp. 989. The facts of this case considered and held not a compromise but an attempt at auditing a claim.

[1315] Outagamie County v. Town of Greenville, 77 Wis. 171; Drinkwine v. City of Eau Claire, 83 Wis. 428; Miller v. Crawford County, 106 Wis. 210. Where an account is not itemized as required by statute and for this reason is not considered by the county board of supervisors, their action is not such as will authorize an appeal. "The manifest purpose of the statute requiring such statement was to protect the public funds and taxpayers of the county from the reckless, negligent or improvident action of county boards. We must hold that the language of the statute is mandatory and must be substantially complied with. Where the statement filed with the county board is insufficient or indefinite and uncertain, the board may, undoubtedly, require it to be made more definite and certain or to conform to the requirements of the statute before allowing or disallowing it in whole or in part. This court has held that where the account filed is in form and substance as required by the statute, it is sufficient as a complaint on appeal to the circuit court. The converse of the proposition would seem to be that if it is not, substantially, as required by the statute, then it would be insufficient as a complaint. In the case at bar the return states that 'the bills were disallowed * * * for the reason that the bills were not properly itemized.' Notwithstanding the use of the word 'disallowed,' yet it is obvious from its connection with what follows that the board did not pass, nor attempt to pass, upon the merits of the bills,—much less to disallow the same, but merely suspended action until such bills should be properly itemized. In other words, the bills not having been disallowed in whole or in part there was nothing to appeal from."

[1316] Falk v. Strother, 84 Cal. 544; Twohy v. Granite County Com'rs,

peal, however, it is necessary that the action of officers from whom the appeal is to be taken should be final.[1318] Upon an ap-

17 Mont. 461. Irregularities or informalities in the service of notices of appeal may be waived by the party affected. People v. Livingston County Sup'rs, 26 Barb. (N. Y.) 118; Monroe Bank v. State, 26 Hun (N. Y.) 581; People v. Sutphin, 53 App. Div. 613, 66 N. Y. Supp. 49; Chaphe v. State, 117 N. Y. 511.

[1317] Jeffersonian Pub. Co. v. Hilliard, 105 Ala. 576, 17 So. 112; Nelson v. Merced County, 122 Cal. 644; Gunnison County Com'rs v. McCormick, 1 Colo. App. 319, 29 Pac. 25; Randell v. City of Bridgeport, 62 Conn. 440; Ada County v. Gess, 4 Idaho, 611, 43 Pac. 71. The county itself may appeal from the action of a board of county commissioners in allowing a claim. Clinton County Com'rs v. Hill, 122 Ind. 215, 23 N. E. 779; Posey County Com'rs v. Stock, 11 Ind. App. 167; Fountain County Com'rs v. Wood, 35 Ind. 70; Blackford County Com'rs v. Shrader, 36 Ind. 87; Floyd County Com'rs v. Scott, 19 Ind. App. 227, 49 N. E. 395. County commissioners having disallowed a claim on appeal have the power to consent to the entry of a judgment against the county.

Wright v. Caskey, 26 Ind. App. 520, 60 N. E. 320; Marvin v. Fremont County, 11 Iowa, 463; Sterling v. Inhabitants of Cumberland County, 91 Me. 316; Van Wert v. School Dist. No. 8, 100 Mich. 332, 58 N. W. 1119; Dollar v. City of Marquette, 123 Mich. 184, 82 N. W. 33; Murphy v. Steele County Com'rs, 14 Minn. 67 (Gil. 51); Taylor v. Marion County, 51 Miss. 731; Marion County v. Woulard, 77 Miss. 343; Twohy v. Granite County Com'rs, 17 Mont. 461. Where a claim is allowed in part, an appeal may be taken from that action in respect to which the plaintiff feels aggrieved.

Town of Plymouth v. Grafton County, 68 N. H. 361; Fuller v. Colfax County, 33 Neb. 716, 50 N. W. 1044; State v. Cornell, 36 Neb. 143, 76 N. W. 459; Sheibley v. Dixon County, 61 Neb. 409, 85 N. W. 399; Foy v. Westchester County, 168 N. Y. 180. In the case of a disallowance of a claim, review by certiorari is the only remedy. Worth v. Stewart, 122 N. C. 258; Shattuck v. Kincaid, 31 Or. 379; Jennings v. Abbeville County, 24 S. C. 543; Civic Federation v. Salt Lake County, 22 Utah 6, 61 Pac. 222. Appeal, not mandamus, is the proper remedy upon rejection by the county commissioners of a claim against the county. Com. v. Beaumarchais, 3 Call (Va.) 122; Botetourt County v. Burger, 86 Va. 530, 10 S. E. 264; Bunch's Ex'r v. Fluvanna County, 86 Va. 452, 10 S. E. 532; Morath v. Gorham, 11 Wash. 577, 40 Pac. 129. The right of appeal granted to persons interested in a claim does not include taxpayers generally. Sheel v. City of Appleton, 49 Wis. 125; Pier v. Oneida County, 93 Wis. 463, 67 N. W. 702; Land, Log & Lumber Co. v. McIntyre, 100 Wis. 245; Jones v. Washburn County, 106 Wis. 391.

[1318] Gunnison County Com'rs v. McCormick, 1 Colo. App. 319, 29 Pac. 25; Clyne v. Bingham County, 7 Idaho, 75, 60 Pac. 76. An appeal will lie only from the action of the board as a whole on the entire

peal it is necessary that there should be a hearing or trial de novo from which it follows that the usual rules apply in respect to the introduction of evidence and other questions affecting the trial.[1319] Some authorities hold that an appeal or right of appeal is not an exclusive remedy, but concurrent, and that the claimant, upon a rejection of the claim, can, therefore, either appeal from this action under the statute or bring an independent suit.[1320] This right of appeal may be statutory, and unless thus granted, it will not exist.[1321] The action of officials to whom a claim is first presented for allowance or rejection may be conclusive.[1322] An appeal must be perfected and taken within the designated time

claim. State v. Slocum, 34 Neb. 368, 51 N. W. 969; People v. Westchester County, 53 App. Div. 339, 65 N. Y. Supp. 707; Pickens County v. Day, 45 S. C. 161, 22 S. E. 772.

[1319] Mahoney v. Shoshone County Com'rs, 8 Idaho, 375, 69 Pac. 108. Upon such an appeal it is here held that there must be a hearing and trial *de novo*. See, also, as holding the same, Clyne v. Bingham County, 7 Idaho, 75, 60 Pac. 76, and Garneau v. Moore, 39 Neb. 791, 58 N. W. 438.

Box Butte County v. Noleman, 54 Neb. 239; Gage County v. George E. King Bridge Co., 58 Neb. 827, 80 N. W. 56; Brown v. Plott, 129 N. C. 272, 40 S. E. 45; Monroe Waterworks Co. v. City of Monroe, 110 Wis. 11, 85 N. W. 685.

[1320] Wasson v. Hoffman, 4 Colo. App. 491; Decatur County Com'rs v. Wheeldon, 15 Ind. 147; Maxwell v. Fulton County Com'rs, 119 Ind. 20, 23, 19 N. E. 617, 21 N. E. 453; Blackford County Com'rs v. Shrader, 36 Ind. 87; Posey County Com'rs v. Stock, 11 Ind. App. 163, 36 N. E. 928; Armstrong v. Tama County, 34 Iowa, 309; Curtis v. Cass County, 49 Iowa, 421; Springer v. City of Detroit, 102 Mich. 300; Murphy v. Steele County Com'rs, 14 Minn. 67, (Gil. 51); Waltz v. Ormsby County, 1 Nev. 370; Barrett v. Stutsman County, 4 N. D. 175, 59 N. W. 964; Belmont County Com'rs v. Ziegelhofer, 38 Ohio St. 523. The rule stated in the text only is true where a claim is founded upon a contract. Judevine v. Town of Hardwick, 49 Vt. 180; Sommers v. City of Marshfield, 90 Wis. 59; Greeley v. Cascade County, 22 Mont. 580, 57 Pac. 274.

[1321] Armstrong v. Truitt, 53 Ark. 287, 13 S. W. 934. Ark. Const. art. 7, § 51 gives to resident taxpayers the right to appeal from "allowances" for or against public corporations. The award of a contract for the construction of county buildings is not such an "allowance" as contemplated by this provision. Owen v. State, 7 Neb. 108; Dixon County Com'rs v. Barnes, 13 Neb. 294; Sayre v. State, 123 N. Y. 291; Spencer v. State, 135 N. Y. 619. Construing N. Y. Laws, 1887, c. 507, providing for appeals "only on questions of law arising on the hearing or excess or insufficiency of an award." Robinson v. LaFollett, 46 W. Va. 565, 33 S. E. 288; Bell v. Waupaca County, 62 Wis. 214. The right of appeal may exist from action allowing a claim in part.

[1322] Hunt v. Broderick, 104 Cal. 313; Kroutinger v. Board of Examiners, 8 Idaho, 463, 69 Pac. 279.

to the proper official.[1323] Statutory rights and remedies are construed strictly, and if not availed of or used in the manner required by the party to whom they have been given, he cannot complain.[1324] If the proper steps and proceedings have not been instituted and at the time required, boards of review or official bodies cannot be directed or compelled by writs of mandamus or other process to perform their usual duties.[1325]

§ 492. Time and manner of payment.

Time of payment. Upon the allowance of a claim,[1326] its liquidation may further depend upon other charter or statutory pro-

An auditing board cannot be compelled by mandamus to re-examine a claim already acted upon. Cook County v. Ryan, 51 Ill. App. 190; Sterling v. Inhabitants of Cumberland County, 91 Me. 316, 39 Atl. 1003; Endriss v. Chippewa County, 43 Mich. 317; Scott County v. Leftwich, 145 Mo. 26, 46 S. W. 963; Klein v. Smith County Sup'rs, 58 Miss. 540; Sioux County v. Jameson, 43 Neb. 265; Gage County v. Hill, 52 Neb. 444, 72 N. W. 581; Trites v. Hitchcock County, 53 Neb. 79, 73 N. W. 215; People v. Green, 64 Barb. (N. Y.) 162; Lattin v. Town of Oyster Bay, 34 Misc. 568, 70 N. Y. Supp. 386; Bower v. State, 134 N. Y. 429. An appeal cannot be taken from the findings of fact by a subordinate board of claims based on a complaint without evidence. Construing Laws 1887, c. 507. See, also, Spencer v. State, 135 N. Y. 619, and Union County v. Hyde, 26 Or. 24. But see Chapman v. State, 104 Cal. 690; City and County of San Francisco v. Broderick, 111 Cal. 302; Spencer v. Sully County, 4 Dak. 474, 33 N. W. 97; Reppy v. Jefferson County, 47 Mo. 66; Port Jervis Waterworks Co. v. Village of Port Jervis, 151 N. Y. 111; Wheeler v. Newberry County, 18 S. C. 132; Eidemiller v. City of Tacoma, 14 Wash. 376; Sharp v. City of Mauston, 92 Wis. 629. See, also, § 490, ante.

[1323] Brush Electric Light & Power Co. v. City Council of Montgomery, 114 Ala. 433; Bass Foundry & Mach. Works v. Parke County Com'rs, (Ind.) 32 N. E. 1125. McGillivray v. Barton Dist. Tp., 96 Iowa, 629; Schneider v. Blades, 108 Mich. 3; Jarvis v. Chase County, 64 Neb. 74, 89 N. W. 624; Greeley County v. Gebhardt, 2 Neb. Unoff. 661, 89 N. W. 753. Service of notice of appeal. Pickens County v. Day, 45 S. C. 161, 22 S. E. 772; Baum v. Sweeny, 5 Wash. 712; Mason v. City of Ashland, 98 Wis. 313, 74 N. W. 357; Telford v. City of Ashland, 100 Wis. 238, 75 N. W. 1006.

[1324] San Miguel County Com'rs v. Pierce, 6 N. M. 324, 28 Pac. 512; McDonald v. City of New York, 42 App. Div. 263, 59 N. Y. Supp. 16; Oshkosh Waterworks Co. v. City of Oshkosh, 106 Wis. 83, 81 N. W. 1040; Drinkwine v. City of Eau Claire, 83 Wis. 428; Telford v. City of Ashland, 100 Wis. 238.

[1325] Lancaster County Com'rs v. State, 13 Neb. 523; Falk v. Strother, 84 Cal. 544.

[1326] Smith v. Salt Lake City, 83 Fed. 784. The allowance of a por-

visions in regard to the time of payment. Claims may, by such authority, be divided into classes of relative priority, the payment depending upon its character or class,[1327] or again, the statutes may provide in express terms for payment and further designate the fund from which claims shall be paid.[1328]

tion of a claim for extra work under a city contract and the payment of this allowance will not prejudice the claimant's right to demand more than the sum allowed. But see Yavapai County v. O'Neill, 3 Ariz. 363, 29 Pac. 430; Zirker v. Hughes, 77 Cal. 235, 19 Pac. 423; La Plata County Com'rs v. Morgan, 28 Colo. 322, 65 Pac. 41; Wightman v. Karsner, 20 Ala. 446. Claims allowed and audited at an unauthorized term of the county commissioners' court do not create any liability as against the county.

In re Taxpayers and Freeholders of Plattsburgh, 27 App. Div. 353, 50 N. Y. Supp. 356. A claim cannot be paid until it has been audited and allowed. People v. Rockland County Sup'rs, 31 App. Div. 557, 52 N. Y. Supp. 89. A claimant waives his right to prosecute that part of a claim disallowed by accepting payment for the claim as allowed. See, also, Looney v. Jackson County, 105 Ala. 597, 17 So. 105; Arbios v. San Bernardino County, 110 Cal. 553; Eakin v. Nez Perces County, 4 Idaho, 131, 36 Pac. 702, and Browne v. Livingston County Sup'rs, 126 Mich. 276, 85 N. W. 745.

[1327] City of Sherman v. Smith, 12 Tex. Civ. App. 580, 35 S. W. 295. The current expenses of the city should be paid first from its general funds in preference to the payment of a judgment for a tort. Board of Education v. Salt Lake Pressed Brick Co., 13 Utah, 211; Auerbach v. Salt Lake County, 23 Utah, 103, 63 Pac. 907. In speaking of the point mentioned in the text the court in this case said: "The deduction above referred to was doubtless asked on the theory that there are other warrant holders and that the plaintiff should share a proportionate loss occasioned by the fraudulent excess charged for the furniture as per the contracts of March and May. The answer to this is that it is admitted that the warrant in dispute was the first one issued for any of the furniture, the first presented for payment and the first one registered. In the absence of a rescission of the contract, the liability of the county became complete, for the claim represented by the warrant the moment furniture had been delivered and accepted of the fair market value of $15,000, and as we have seen it is admitted that $27,000 worth was delivered, accepted, and ever since used by the county. All the holders of subsequent warrants must, therefore, be presumed to have had notice of the prior claims for which the warrant in dispute was issued as the facts in relation thereto were matters of record. Under these circumstances, the maxim Qui prior est tempore potior est jure controls. This is so even though the equities between all the holders are equal."

[1328] Weaver v. City & County of San Francisco, 111 Cal. 319, 43 Pac. 972; Fresno Canal & Irr. Co. v. McKenzie, 135 Cal. 497, 67 Pac. 900; Houston County v. Kersh, 82 Ga. 252; Combs v. Crawford, 19 Ky. L.

Manner of payment. The right to a payment established, considered from the standpoint of time, further provisions may limit and restrict immediate payment because of lack of funds. Certain claims may by charter or statutory provisions be legally paid only from the proceeds of certain designated taxes set aside for such a purpose[1329] or from a special fund raised for a like purpose.[1330] The lack of moneys in any fund from which certain claims can be legally paid would necessarily defer liquidation.[1331] On the other

R. 1510, 43 S. W. 477; Cooper v. Wait, 21 Ky. L. R. 229, 51 S. W. 161; Worcester County Com'rs v. Melvin, 89 Md. 37. The legislature may arbitrarily provide for the payment of a claim and in such case it is not necessary that the county either audit it or pass upon its merits.

State v. Cook, 13 Mont. 465; State v. Bartley, 41 Neb. 277; In re Taxpayers and Freeholders of Plattsburgh, 27 App. Div. 353, 50 N. Y. Supp. 356; Clarke & Courts v. Greer County, 8 Okl. 425; Clarke & Courts v. San Jacinto County, 18 Tex. Civ. App. 204, 45 S. W. 315; Thomas & Co. v. City of Olympia, 12 Wash. 465; Stephens v. City of Spokane, 14 Wash. 298, 44 Pac. 541, 45 Pac. 31; Stoll v. Johnson County Com'rs, 6 Wyo. 231.

[1329] City of Chicago v. People, 48 Ill. 416; Dolese v. McDougall, 78 Ill. App. 629; City of Chicago v. McNichols, 98 Ill. App. 447; Porter v. City of Tipton, 141 Ind. 347; State v. Board of Liquidation of City Debt, 51 La. Ann. 1849, 26 So. 679; Creighton v. City of Toledo, 18 Ohio St. 447. A contractor cannot recover from a city the deficiency resulting from a failure to collect special taxes where, under his contract, he was to make certain local improvements and depended upon the collection of special assessments on property benefited for his pay.

North Pac. Lumbering & Mfg. Co. v. City of East Portland, 14 Or. 3; Keenan v. City of Portland, 27 Or. 544; Rhode Island Mortg. & Trust Co. v. City of Spokane, 19 Wash. 616; Whalen v. City of La Crosse, 16 Wis. 271.

[1330] Palmer v. Fitts, 51 Ala. 489; Goodykoontz v. Acker, 19 Colo. 360; Higgins v. City of San Diego, 131 Cal. 294, 63 Pac. 470; Freeman v. Hardeman, 67 Ga. 559; Johnson v. City of New Orleans, 46 La. Ann. 714, 15 So. 100; Fernandez v. City of New Orleans, 46 La. Ann. 1130, 15 So. 378; Wadsworth v. City of New Orleans, 48 La. Ann. 886; Campbell v. Polk County, 76 Mo. 57.

[1331] Goyne v. Ashley County, 31 Ark. 552. County warrants cannot be issued for such an amount which, at their current rate of discount, would be sufficient to pay a claim in full. Smith v. Broderick, 107 Cal. 644, 40 Pac. 1033; Weaver v. City & County of San Francisco, 111 Cal. 319, 43 Pac. 972; State v. Wayne County Council, 157 Ind. 356, 61 N. E. 715; State v. Monroe County Council, 158 Ind. 102, 62 N. E. 1000; Slusser v. City of Burlington, 42 Iowa, 378. The fact that there are insufficient moneys in the proper fund with which to pay a judgment does not release the city from liability.

Comm. v. Haly, 21 Ky. L. R. 666, 51 S. W. 430; State v. Burke, 37 La.

hand, if an appropriation has been made for the payment of specific claims after their presentment and allowance, if public officials then refuse to pay a claim, they can be compelled to do so by the proper proceedings.[1332]

§ 493. By whom and to whom paid.

The legal owner of a claim[1333] is usually the one designated to whom payment should be made. If the law permits, the claim may be assigned[1334] and the holder or assignee will then stand in

Ann. 434; Sterling v. Inhabitants of Cumberland County, 91 Me. 316; State v. Holt County, 135 Mo. 535; State v. Weir, 33 Neb. 35; National Lumber Co. v. City of Wymore, 30 Neb. 356, 46 N. W. 622. If a claim, however, is allowed "to be paid when there is money in the treasury to pay it with," such condition will not defeat it as a valid demand against the municipality. Bissell v. State 70 App. Div. 238, 73 N. Y. Supp. 1105.

[1332] Gray v. Abbott, 130 Ala. 322, 30 So. 346; Cahill v. Colgan (Cal.) 31 Pac. 614; City & County of San Francisco v. Broderick, 111 Cal. 302, 43 Pac. 960; White v. Hayden, 126 Cal. 621; Coleman v. Neal, 8 Ga. 560; People v. City Council of Cairo, 50 Ill. 154; Blair v. Hinrichsen, 151 Ill. 41, 25 L. R. A. 143; City of Greenfield v. State, 113 Ind. 597, 15 N. E. 241; State v. Olympic Club, 46 La. Ann. 935, 24 L. R. A. 452; State v. Minar, 13 Mont. 1, 31 Pac. 723; State v. Buffalo County Com'rs, 6 Neb. 454; State v. Scott's Bluff County, 64 Neb. 419, 89 N. W. 1063. The usual care in securing payment for claims by first obtaining a warrant must be followed by a judgment creditor.

People v. Hamilton County Sup'rs, 56 Hun, 459, 10 N. Y. Supp. 88; Werts v. Rogers, 56 N. J. Law, 480, 23 L. R. A. 354; People v. Coler, 58 App. Div. 131, 68 N. Y. Supp. 448; Board of Education v. State, 51 Ohio St. 537, 38 N. E. 614, 25 L. R. A. 770; Huddleston v. Noble County Com'rs, 8 Okl. 614; Brown v. Fleischner, 4 Or. 132; Hunter v. Mobley, 26 S. C. 192, 1 S. E. 670; Maxwell v. Bodie, 56 S. C. 402; McConnell v. Coleman County, 21 Tex. Civ. App. 453; State v. Headlee, 17 Wash. 637; Ratliffe v. Wayne County Ct., 36 W. Va. 202, 14 S. E. 1004; State v. Richter, 37 Wis. 275. Where an account has been audited by the proper officials and payment ordered, the duty of the county clerk is then imperative to make and sign an order upon the county treasurer for the payment of the amount allowed.

Sharp v. City of Mauston, 92 Wis. 629, 66 N. W. 803; Wisconsin Industrial School for Girls v. Clark County, 103 Wis. 651.

[1333] Cleveland County Com'rs v. Seawell, 3 Okl. 281. The acceptance of a warrant in payment of a claim properly allowed estops the claimant from asserting against the county his right to recover that portion of the claim disallowed. See, also, holding the same, Calkins v. State, 13 Wis. 389, and cases therein cited.

Massing v. State, 14 Wis. 502; Sholes v. State, 2 Chand. (Wis.) 182.

[1334] Banaz v. Smith, 133 Cal. 102,

the same relation in respect to all questions involved regarding its payment in place of the original claimant or assignor.[1335]

Claims usually draw interest if not paid, not from the date of allowance, but from and after the time when demand has been made upon the proper officers and refused although there are exceptions to this rule.[1336] Ordinarily, the liability of a public corporation for interest on its debts does not differ from that of private individuals. The amount may also include not only the face of the original claim as allowed with interest, but costs or

65 Pac. 309; Wadsworth v. City of New Orleans, 48 La. Ann. 886; James P. Hall Incorporated Co. v. Jersey City, 62 N. J. Eq. 489, 50 Atl. 603; Knippa v. Stewart Iron Works (Tex. Civ. App.) 66 S. W. 322. The assignment of a claim is illegal, however, to a member of that official board charged with the duty of passing upon it.

[1335] Delaware County Com'rs v. Diebold Safe & Lock Co., 133 U. S. 473; Brink v. Coutts, 87 Iowa, 199, 54 N. W. 207; Stimpson v. Inhabitants of Malden, 109 Mass. 313; Miller v. Town of Stockton, 64 N. J. Law, 614, 46 Atl. 619. Notice of the assignment should be given to the public authorities. Jones v. City of Albany, 62 Hun (N. Y.) 353. Such a provision of the charter of the city of Albany applies to claims for personal injuries also.

[1336] Vider v. City of Chicago, 164 Ill. 354; City of Peoria v. Fruin-Bambrick Const. Co., 169 Ill. 36, reversing 68 Ill. App. 277; Rosetta Gravel Pav. & Imp. Co. v. City of New Orleans, 50 La. Ann. 1173; State v. Hickman, 11 Mont. 541; Curley v. Chosen Freeholders of Hudson County, 66 N. J. Law, 401, 49 Atl. 471; Donnelly v. City of Brooklyn, 7 N. Y. Supp. 49; Parmenter v. State, 135 N. Y. 154; Grant County v. Lake County, 17 Or. 453; Shipley v. Hacheney, 34 Or. 303, 55 Pac. 971; Mueller v. Town of Cavour, 107 Wis. 599, 83 N. W. 944. Interest cannot be collected upon town warrants even after presentation and non-payment for lack of funds.

For exceptions to the rule, see City of Danville v. Danville Water Co., 180 Ill. 235; State v. Hickman, 11 Mont. 541, 29 Pac. 92. Interest begins to run from the date of the warrant issued in payment of the claim. People v. Clinton County Sup'rs, 64 Hun, 636, 19 N. Y. Supp. 642; Delafield v. Village of Westfield, 41 App. Div. 24, 58 N. Y. Supp. 277; Fredrichs v. City of New York, 27 Misc. 588, 58 N. Y. Supp. 285; Coughlin v. City of New York, 35 Misc. 446, 71 N. Y. Supp. 91; White v. Miller, 71 N. Y. 118, 27 Am. Rep. 13; Sloan v. Baird, 162 N. Y. 327. "The rule * * * is to the effect that in an action to recover unliquidated damages for a breach of a contract, interest is not allowable unless there is an established market value of the property or means accessible to the party sought to be charged of ascertaining, by computation or otherwise, the amount to which the plaintiff is entitled." Later cases cited extend this rule to other actions.

expenses incurred by the claimant in its prosecution.[1337] Ordinarily, however, these will not be included unless specially authorized by law. Public officials have no right, usually, to set off against a claim audited and allowed, the debt of a claimant due the public corporation.[1338] The allowance and payment by officials of an illegal claim presented does not prevent the public corporation from recovering back in the proper proceedings the moneys thus paid.[1339]

§ 494. Claims; enforcement by action.

That a claimant be legally entitled to enforce his claim by statutory action against a public corporation, certain steps may be necessary, as required,[1340] and the time fixed[1341] by law, and the failure to do this will operate as a bar to the prosecution of the action.[1342] Such a rule of law or statute has been found necessary

[1337] Kentucky Public Elevator Co. v. Colston, 22 Ky. L. R. 228, 56 S. W. 981; Barfield v. Gleason, 23 Ky. L. R. 1102, 64 S. W. 959; Randall v. Lyon County, 20 Nev. 35, 14 Pac. 583; People v. Ulster County Sup'rs, 43 Hun (N. Y.) 385. But where a claim is discounted at a bank, this loss cannot be charged to a county although it has made no provision for the payment of the debt.

[1338] Corbett v. Widber, 123 Cal. 154, 55 Pac. 764; Brink v. Coutts, 87 Iowa, 199, 54 N. W. 207; McGillivray v. District Tp. of Barton, 96 Iowa, 629, 65 N. W. 974; Stone v. Mayo, 21 Ky. L. R. 1559, 55 S. W. 700. Section 4701 of the Ky. St. provides, however, for such set-off.

[1339] Barnard v. District of Columbia, 20 Ct. Cl. 257; Huntington County Com'rs v. Heaston, 144 Ind. 583, 41 N. E. 457, 43 N. E. 651; Huntington County Com'rs v. Buchanan, 21 Ind. App. 178, 51 N. E. 939; Com. v. Carter, 21 Ky. L. R. 1509, 55 S. W. 701; Heald v. Polk County, 46 Neb. 28; Nelson v. City of New York, 131 N. Y. 4; Richardson v. State, 66 Ohio St. 108, 63 N. E. 593.

[1340] Schroeder v. Colbert County, 66 Ala. 137; Roberts v. Cleburne County, 116 Ala. 378.

[1341] Apache County v. Barth (Ariz.) 53 Pac. 187; Harrigan v. City of Brooklyn, 119 N. Y. 156. But Brooklyn charter provisions, Laws 1888, c. 583, tit. 22, § 30, it is here held do not apply to claims arising ex delicto.

[1342] San Diego County v. Riverside County, 125 Cal. 495; Weir Furnace Co. v. Independent School Dist., 99 Iowa, 115, 68 N. W. 584; Pierson v. Independent School Dist., 106 Iowa, 695, 77 N. W. 494; Giles v. City of Shenandoah, 111 Iowa, 83 82 N. W. 466; Young v. Inhabitants of Douglas, 157 Mass. 383; Wright v. Village of Portland, 118 Mich. 23, 76 N. W. 141. Such requirements may be waived. See, also, as holding the same Kriseler v. Le Valley, 122 Mich. 576, 81 N. W. 580, and Canfield v. City of Jackson, 112 Mich. 120, 70 N. W. 444.

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to protect public corporations from the prosecution of fictitious or stale claims.[1343]

of Middletown, 67 Minn. 1, 69 N. W. 471; Engstrom v. City of Minneapolis, 78 Minn. 200, 80 N. W. 962. Such a statutory provision is mandatory in its character. Clay County v. Chickasaw County, 76 Miss. 418, 24 So. 975. In order that a right to bring an action accrue, it is not necessary that the disallowance of the claim be formally entered in the records of the board of supervisors. See, also, generally all cases cited under this section. Lawrence County Sup'rs v. City of Brookhaven, 51 Miss. 68. The presentment of the claim to the board of supervisors and its disallowance by them must be averred in the declaration.

Marion County v. Woulard, 77 Miss. 343; Sargent v. Town of Gilford, 66 N. H. 543, 27 Atl. 306; Dayton v. City of Lincoln, 39 Neb. 74, 57 N. W. 754. Such requirements do not apply to a claim against a city of the first class for unliquidated damages in taking property for a public use.

Cavan v. City of Brooklyn, 2 N. Y. Supp. 21; Jones v. City of Albany, 62 Hun, 353, 17 N. Y. Supp. 232; In re Rooney's Estate, 26 Misc. 106, 56 N. Y. Supp. 855; Love v. Chatham County Com'rs, 64 N. C. 706; Jones v. Bladen County Com'rs, 73 N. C. 182; Sheridan v. City of Salem, 14 Or. 328, 12 Pac. 925. Such a requirement does not apply to claims for damages based upon a tort.

City of Philomath v. Ingle, 41 Or. 289, 68 Pac. 803; Fish v. Higbee, 22 R. I. 223, 47 Atl. 212. A statutory provision that claims against. "for any matter, cause or thing whatsoever" must be presented to the town council. · A right of action then accrues including claims based upon the payment of illegal taxes.

Presidio County v. Jeff Davis County, 13 Tex. Civ. App. 115, 35 S. W. 177. A statutory requirement of this character applies to the suit of one county against another to enforce against the latter a statutory liability for payment of its proportional share of the debts of the former. But see Brewster County v. Presidio County, 19 Tex. Civ. App. 638, 48 S. W. 213, holding that an action of the latter character is not a suit against the new county within the meaning of Rev. St. 1895, art. 790, relative to the presentment of a claim before the right of action accrues.

Bowie County v. Powell (Tex. Civ. App.) 66 S. W. 237. An action of trespass against the county does not come within art. 790, requiring the presentment of a claim to the commissioners' court for allowance as a condition precedent for the bringing of an action based upon it. Sheafe v. City of Seattle, 18 Wash. 298; Yates v. Taylor County, 47 W. Va. 376, 35 S. E. 24; Wright v. Town of Merrimack, 52 Wis. 466; Salladay v. Town of Dodgeville, 85 Wis. 318, 20 L. R. A. 541; Groundwater v. Town of Washington, 92 Wis. 56. See, also, People v. Gravel Road Co., 105 Mich. 9, and Short v. White Lake Tp., 8 S. D. 148.

[1343] Homan v. Franklin County, 98 Iowa, 692; Atchison, T. & S. F. R. Co. v. Kearny County Com'rs, 58 Kan. 19; Marks v. Village of West

The steps most ordinarily required by law include a presentment to the proper officials of the corporation[1344] and within the time prescribed or limited by law.[1345] The audit or examination

Troy, 69 Hun, 442, 23 N. Y. Supp. 422; Nills County v. Lampasas County, 90 Tex. 603.

[1344] May v. Cass County, 30 Fed. 762, following May v. Buchanan County, 29 Fed. 469; May v. Jackson County, 35 Fed. 710; Vincent v. Lincoln County, 62 Fed. 705. Such a requirement does not apply to bonds and coupons nor to a judgment on them; it refers only to unliquidated claims construed, Gen. St. Nev. §§ 1950, 1964, and 1966; Yavapai County v. O'Neill, 3 Ariz. 363, 29 Pac. 430; McCann v. Sierra County, 7 Cal. 121; Alden v. Alameda County, 43 Cal. 270. It is held here that such a rule applies even to a money judgment against a county. See, also, as holding the same, Johnson v. Wakulla County, 28 Fla. 720.

Sullivan County Com'rs v. Arnett, 116 Ind. 438. It is not necessary to file a claim for damages caused by a defective bridge before bringing suit. Crittenden v. City of Mt. Clemens, 86 Mich. 220, 49 N. W. 144; Snyder v. City of Albion, 113 Mich. 275, 71 N. W. 475. Such a charter provision it is here held does not apply to actions ex delicto. Old Second Nat. Bank v. Town of Middletown, 67 Minn. 1, 69 N. W. 471; Washington County Com'rs v. Clapp, 83 Minn. 512, 86 N. W. 775; Richardson County v. Hull, 24 Neb. 536, 39 N. W. 608. Such a requirement applies to a claim arising "when by mistake or wrongful act of the treasurer or other official, land has been sold (for taxes) contrary to the provisions of this act, the county is to save the purchaser harmless." Construing Gen. St. Neb., p. 924, § 71, and Comp. St. Neb. 1885, p. 240, § 37.

Hollingsworth v. Saunders County, 36 Neb. 141, 54 N. W. 79. Such a requirement does not apply to a claim for damages arising from tort. McDonnell v. City of New York, 4 Hun (N. Y.) 472; People v. Clinton County Sup'rs, 64 Hun (N. Y.) 636; Barrett v. Stutsman County, 4 N. D. 175; Trost v. City of Casselton, 8 N. D. 534. In an action brought subsequently, the prayer must conform to the facts as recited in the original notice served upon the municipality; construing Rev. Codes, § 2172, which provides that all claims against cities for personal injuries received from defective sidewalks must be presented in writing, duly verified and "describing the time, place, cause and extent of the damage or injury."

[1345] Morgan v. City of Des Moines, 54 Fed. 456; Davidson v. City of Muskegon, 111 Mich. 454, 69 N. W. 670. "It is also urged in this case on the part of the plaintiff that, as she filed her claim with the common council within the limited time after she attained her majority, she is not now barred from bringing her suit. The power of the legislature to enact a statute of limitations cannot now be questioned. It is entirely competent for the legislature to enact a general statute of limitations that would put adults and minors on the same footing with reference to the time in which actions must be brought and such would be the legal effect of a stat-

of the claim,[1346] its consideration by an official body charged with the duty[1347] and its final rejection or disallowance in whole or in part.[1348] Where these steps have been taken and the disal-

ute which contained no saving clause exempting infants from its operations." Citing Morgan v. City of Des Moines, 8 C. C. A. 569, 60 Fed. 208.

Springer v. City of Detroit, 102 Mich. 300; Lay v. City of Adrian, 75 Mich. 444; Sweet v. City of Buffalo, 92 Hun, 404, 36 N. Y. Supp. 760; Hiner v. City of Fond du Lac, 71 Wis. 74, 36 N. W. 632; McCue v. City of Waupun, 96 Wis. 625, 71 N. W. 1054; Seegar v. City of Ashland, 101 Wis. 515, 77 N. W. 880; Reed v. City of Madison, 83 Wis. 171, 17 L. R. A. 733; Mason v. City of Ashland, 98 Wis. 540.

[1346] Mason v. City of Muskegon, 111 Mich. 687, 70 N. W. 332; Dollar v. City of Marquette, 123 Mich. 184, 82 N. W. 33. The city council cannot require the claimant to appear personally with his witnesses and submit to an investigation of his claim. Raymond v. Stearns County Com'rs, 18 Minn. 60 (Gil. 40); Lawrence County Com'rs v. City of Brookhaven, 51 Miss. 68; McDonald v. City of New York, 42 App. Div. 263, 59 N. Y. Supp. 16. The failure of a public officer to perform a duty with which he is charged in respect to the presentment and audit of a claim does not deprive the claimant of his right to bring an action thereon. Sweeny v. City of New York, 69 App. Div. 80, 74 N. Y. Supp. 589; Hohman v. Comal County, 34 Tex. 36.

[1347] Gamewell Fire-Alarm Tel. Co. v. City of New York, 31 Fed. 312; Dundas v. City of Lansing, 75 Mich. 499, 5 L. R. A. 143. Three months held "a reasonable time" within the provisions of a city charter requiring the presentation of claims to the city council with a "reasonable time" thereafter for their investigation.

Ludington Water-Supply Co. v. City of Ludington, 119 Mich. 480, 78 N. W. 558. The charter provision here was to the effect that the city should not be subject to a suit on a claim until it had reasonable time to pass upon it.

Whitney v. City of Port Huron, 88 Mich. 268. Where one has presented a claim to a city council and no action has been taken for more than two months thereafter, this will be considered a reasonable time within a charter provision to the effect that no action against a city can be maintained until the claim has been presented and a reasonable time given in which to investigate.

Andrews v. School Dist. of McCook, 49 Neb. 420. A claim against a school district need not be presented to the officers for allowance before a suit can be maintained upon it. People v. Common Council of Amsterdam, 90 Hun, 488, 36 N. Y. Supp. 59; Jones v. City of Albany, 151 N. Y. 223. A charter provision "that no action shall be brought until the claim shall have been presented and after a reasonable time shall have elapsed within which such claim might have been passed upon by the common council" does not apply to claims or demands based upon a tort.

[1348] Sanborn v. United States, 135 U. S. 271; Brush Elec. Light & Power Co. v. City Council of Mont-

lowance of the claim is the result, the law may then authorize, but not before, its prosecution in a formal action brought before some legally organized judicial tribunal having jurisdiction.[1349] These

gomery, 114 Ala. 433, 21 So. 960. A city cannot be bound by the unauthorized declarations of a city clerk of the reasons for rejection of a claim by the city council. Rio Grande County Com'rs v. Bloom, 14 Colo. App. 187, 59 Pac. 417; Saunders v. City of Fitzgerald, 113 Ga. 619, 38 S. E. 978; Cobb County v. Adams, 68 Ga. 51. The failure or neglect to take action within a year will authorize an action. Jackson County Com'rs v. Nichols, 12 Ind. App. 315, 40 N. E. 277; Brown v. Gregory, 26 Mich. 422; Brown v. City of Owosso, 126 Mich. 91, 85 N. W. 256; Peterson v. Village of Cokato, 84 Minn. 205, 87 N. W. 615. Defects in the service of a notice are matters of defense and must be proved by the defendant.

Brown v. Otoe County Com'rs, 6 Neb. 111; People v. Board of Apportionment & Audit, 52 N. Y. 224; People v. Town Auditors of Hempstead, 49 App. Div. 4, 63 N. Y. Supp. 114.

A failure to allow may be regarded as a rejection of a claim. Barrett v. Stutsman County, 4 N. D. 175, 59 N. W. 964. The failure of the proper officials to take action within a reasonable time on a claim presented to them for their determination is considered as the equivalent of a rejection and the claimant may then bring an action.

Fenton v. Salt Lake County, 3 Utah, 423; Eureka Sandstone Co. v. Pierce County, 8 Wash. 236; Nickens v. Lewis County, 23 Wash. 125, 62 Pac. 763; the failure to take action on a claim held equivalent to a rejection.

Mason v. City of Ashland, 98 Wis. 540, 74 N. W. 357. The failure of the common council to pass upon a claim within a prescribed time is to be regarded as a disallowance of the claim. State v. Bardon, 103 Wis. 297, 79 N. W. 226. A failure to act on a claim within the time prescribed by the charter regarded as an equivalent to a disallowance. Seegar v. City of Ashland, 101 Wis. 515; Telford v. City of Ashland, 100 Wis. 238.

[1349] Roberts v. Cleburne County, 116 Ala. 378, 22 So. 545; Barret v. City of Mobile, 129 Ala. 179, 30 So. 36; San Diego County v. Riverside County, 125 Cal. 495, 58 Pac. 81; City of Huntington v. Griffith, 142 Ind. 280; Marsh v. Benton County, 75 Iowa, 469, 39 N. W. 713. Where such a demand has been made, in an action brought thereon, a greater amount cannot be recovered than the sum specified in the demand or claim.

Bradley v. Delaware County, 54 Iowa, 137; City of Des Moines v. Polk County, 107 Iowa, 525, 78 N. W. 249. Such a statutory provision does not apply to the compensation of police judges in vagrancy cases.

Finney County Com'rs v. Gray County Com'rs, 8 Kan. App. 745, 54 Pac. 1100; Terryll v. City of Faribault, 84 Minn. 341, 87 N. W. 917; Foley v. City of New York, 1 App. Div. 586, 37 N. Y. Supp. 465. Such a notice being a condition precedent to the right of action, it must be set up in the complaint. See, also, Norton v. City of New York, 16 Misc. 303, 38 N. Y. Supp. 90, holding the same.

King v. Village of Randolph, 58

requirements it is held by the weight of authority do not apply to actions or demands based upon a tort but only those arising ex contractu.[1350] This is true unless there is some statutory pro-

App. Div. 25, 50 N. Y. Supp. 902. These requirements may only limit the right to pay costs in an action brought subsequently upon the claim as originally presented. See, also, Spaulding v. Village of Waverly, 12 App. Div. 594, 44 N. Y. Supp. 112.

Hawley v. City of Johnstown, 40 App. Div. 568, 58 N. Y. Supp. 49. The failure to take steps as required by law is a matter of defense and it is not necessary in an action that the pleadings show affirmatively that the required steps were taken by the claimant. But see the case of Jewell v. City of Ithica, 36 Misc. 499, 73 N. Y. Supp. 953, where such a provision, it was held, was a condition precedent to the right of action and must be pleaded.

Chapman v. Wayne County, 27 W. Va. 496; Paulson v. Town of Pelican, 79 Wis. 445, 48 N. W. 715. A compliance with the requirements of a statute must be affirmatively alleged in the complaint in an action subsequently brought. See, also, as holding the same, O'Donnell v. City of New London, 113 Wis. 292, 89 N. W. 511.

Davis v. City of Appleton, 109 Wis. 580, 85 N. W. 515. The failure to comply with such requirement is a matter of defense and the plaintiff need not allege compliance with it.

McKeague v. City of Green Bay, 106 Wis. 577. An action brought by a husband for the loss of service of his wife resulting from an injury caused by a defective street will not be supported by a notice given on behalf of the wife claiming damages from the city for herself as the result of her injuries.

[1350] Neal v. Town of Marion, 126 N. C. 412. Such requirements apply only to actions or claims ex contractu. See, also, the following North Carolina cases: Shields v. Town of Durham, 118 N. C. 450, 36 L. R. A. 293; Frisby v. Town of Marshall, 119 N. C. 570; Sheldon v. City of Asheville, 119 N. C. 606, and Nicholson v. Dare County Com'rs, 121 N. C. 27.

Hoexter v. Judson, 21 Wash. 646. Ball. Ann. Codes and St. § 359, applies to a liability arising in tort. This section requiring the presentment of a claim to county commissioners is a condition precedent to a right of action. Citing McCann v. Sierra County, 7 Cal. 121; Barbour County v. Horn, 41 Ala. 114; Maddox v. Randolph County, 65 Ga. 216; Lawrence County Sup'rs v. City of Brookhaven, 51 Miss. 68; Powder River Cattle Co. v. Custer County Com'rs, 9 Mont. 145; Luzerne County v. Day, 23 Pa. 141, and Hohman v. Comal County, 34 Tex. 37.

Sutton v. City of Snohomish, 11 Wash. 24, 39 Pac. 273. Such requirements apply to claims against municipalities arising from their ordinary transactions; not to violations of municipal duty. Chancey v. Roane County, 51 W. Va. 252, 41 S. E. 156. A claim based upon a tort need not be first presented to the county court. Barrett v. Village of Hammond, 87 Wis. 654, 58 N. W. 1053. The word "damage" does not include personal injuries.

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vision to the contrary. The granting by statute of the right of appeal or of action cannot create any liability where none existed in the first instance.[1351]

§ 495. Miscellaneous.

In order to prevent collusion or improper conduct on the part of public officials, they are generally prohibited by law from "dealing in" or buying and selling either all claims generally as against a corporation of which they are an official or certain designated classes of claims or demands.[1352] A violation of this prohibition may lead to the invalidity of the claim when presented and pressed as against the corporation.

The general statutes of limitations may defeat the validity of claims by the application of the limit of time therein specified and within which they must be presented.[1353]

Wis. 59, 62 N. W. 937. Laws 1891, c. 160, subc. 5, § 4, which requires the presentment of a "claim or demand to the common council for allowance," does not apply to actions caused by defective sidewalks. But see as construing a special charter and holding that a provision of a similar character includes claims in tort as well as those arising ex contractu, the case of Van Frachen v. City of Ft. Howard, 88 Wis. 570.

Davis v. City of Appleton, 109 Wis. 580, 85 N. W. 515. Statutory provisions of this character do not apply to an action solely for actual relief.

[1351] Denning v. State, 123 Cal. 316, 55 Pac. 1000, following Chapman v. State, 104 Cal. 690; Melvin v. State, 121 Cal. 16.

[1352] Alston v. Yerby, 108 Ala. 480, 18 So. 559; Scruggs v. State, 111 Ala. 60, 20 So. 642. A grand jury ticket held a "claim within the meaning of criminal code, § 3931, which provides for the fining of any public officer dealing in "claims payable out of the county treasury." "When the witness appears before the grand jury, in obedience to a proper summons, and is examined as a witness, he has a claim for the amount allowed him by law for such services or for such attendance. The certificate issued to him by the foreman is the evidence of the claim and of the amount due him. * * * It is a claim against the fine and forfeiture fund, made so by statute. * * * The statute prohibits a single purchase of any such claim. Each separate purchase against its provisions is a violation of the statute." Herr v. Seymour, 76 Ala. 270; Moore v. Lawson, 19 Ky. L. R. 1104, 42 S. W. 1136, 43 S. W. 409.

[1353] Ames v. City & County of San Francisco, 76 Cal. 325.

CHAPTER VII.

GOVERNING BODIES.

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(For Complete Analysis of this Subdivision see p. 1444.)

I. Legislative.

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§ 496. Governing bodies.

The three-fold division of the powers of a state based upon their character and nature, into legislative, judicial and executive, is carried out wherever possible in the organization and government of public corporations in the United States; the officials or official bodies exercising each of the powers, acting along well defined lines and independent of each other except as provided by fundamental law;[1] judicial bodies or officers exercising judi-

[1] Wilkinson v. Leland, 2 Pet. (U. S.) 628, where Mr. Justice Story observes: "That government can scarcely be deemed to be free where the rights of property are left solely dependent upon the will of a legislative body, without any restraint. The fundamental maxims of a free government seem to require that the rights of personal liberty and private property should be held sacred. At least no court of justice in this country would be warranted in assuming that the power to violate and disregard them—a power so repugnant to the common principles of justice and civil liberty—lurked under any general grant of legislative authority, or ought to be implied from any general expressions of the will of the people. The people ought not to be presumed to part with rights so vital to their security and well-being without very strong and direct expressions of such an intention."

Citizens' Sav. & Loan Ass'n v. Topeka City, 87 U. S. (20 Wall.) 655. "The theory of our governments, state and national, is opposed to the deposit of unlimited power anywhere. The executive, the legislative, and the judicial branches of these governments are all of limited and defined powers.

"There are limitations on such power which grow out of the essential nature of all free governments. Implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name. No court for instance would hestitate to declare void a statute which enacted that A and B who were husband and wife to each other should be so no longer, but that A should thereafter be the husband of C, and B the wife of D. Or which should enact that the homestead now owned by A should no longer be his, but should henceforth be the property of B."

Kilbourn v. Thompson, 103 U. S. 168. In this case the power of the House of Representatives as one of the co-ordinate parts of the legislative branch of the Federal government was very carefully and thoroughly considered. The court in the opinion of Mr. Justice Miller in speaking of the subject-matter of this section said: "It is believed to be one of the chief merits of the American system of written constitutional law, that all the powers intrusted to government, whether state or national, are divided into the three grand departments, the executive, the legislative and the judicial. That the functions appropriate to each of these branches of government shall be vested in a separate body of public servants,

cial functions only; legislative bodies executing the law-making power without interference from other departments, except as above indicated, and executive officers performing their discre-

and that the perfection of the system requires that the lines which separate and divide these departments shall be broadly and clearly defined. It is also essential to the successful working of this system that the persons intrusted with power in any one of these branches shall not be permitted to encroach upon the powers confided to the others but that each shall, by the law of its creation, be limited to the exercise of the powers appropriate to its own department and no other. * * * In the main, however, that instrument (the Federal Constitution), the model on which are constructed the fundamental laws of the states, has blocked out with singular precision, and in bold lines, in its three primary articles, the allotment of power to the executive, the legislative, and the judicial departments of the government. It also remains true, as a general rule, that the powers confided by the Constitution to one of these departments cannot be exercised by another.

"It may be said that these are truisms which need no repetition here to give them force. But while the experience of almost a century has in general shown a wise and commendable forbearance in each of these branches from encroachments upon the others it is not to be denied that such attempts have been made, and it is believed not always without success. The increase in the number of states, in their population and wealth, and in the amount of power, if not in its nature to be exercised by the Federal Government, presents powerful and growing temptations to those to whom that exercise is intrusted, to overstep the just boundaries of their own department, and enter upon the domain of one of the others, or to assume powers not intrusted to either of them."

Taylor v. Beckham, 178 U. S. 548, 20 Sup. Ct. 890, 1009; Lindsay v. United States Sav. & Loan Ass'n, 120 Ala. 156, 42 L. R. A. 783; Penn v. Tollison, 26 Ark. 545. Construing and defining the source and extent of the powers of the state convention. Franklin Bridge Co. v. Wood, 14 Ga. 80; Busenbark v. Clements, 22 Ind. App. 557; Everett v. Deal, 148 Ind. 90; State v. Meadows, 1 Kan. 90; State v. Hitchcock, 1 Kan. 178; Gay v. Bradstreet, 49 Me. 580. Erroneous acts of a city council can only be vacated or set aside by certiorari.

Prince v. Skillin, 71 Me. 361. Where there are two conflicting legislatures each claiming the sole and legal right to legislate for the state, it is for the courts to determine which has the lawful authority.

Whitcomb's Case, 120 Mass. 118 To punish for contempt is a judicial function and it cannot be legally done by a legislative body. City of Red Wing, v. Chicago, M. & St. P. R. Co., 72 Minn. 240; Merrill v. Sherburne, 1 N. H. 199, 8 Am. Dec. 57. "It is well known and considered that "in the distinct and separate existence of the judicial power consists one main preservative of the public liberty;' that indeed 'there is no liberty if the power of judging be not separated from

tionary duties under no control of either the courts or the legislature except in cases of fraud or gross and wanton abuse of authority. In succeeding sections will be considered briefly the three-fold division.[2]

§ 497. Legislative.

A legislature or general assembly, as the term is variously used by the different state constitutions, exercises for the state, either considered as an independent sovereign or as a public corporation of the highest grade or class, its legislative functions. State constitutions following the Federal constitution designate

the legislative and executive powers.' In other words, that 'the union of these two powers is tyranny;' or, as Mr. Madison observes, may justly be 'pronounced the very definition of tyranny,' or in the language of Mr. Jefferson 'is precisely the definition of despotic government.' "

Warner v. People, 2 Denio (N. Y.) 272, 43 Am. Dec. 740. " 'The legislature being sovereign, possesses all powers over the subject not taken from it by the constitution, and, when the legislature acts, a court must see its way clear before they will pronounce its acts void for transcending its powers.' The sovereignty of the legislature is, however, not without its limitations, else of what avail are written constitutions, on whose provisions the legislative power may trample whenever it may think fit? Of what value are the most important franchises, involving great public interests, even when protected by the solemn guaranties of the constitution, if they may be invaded and disregarded whenever the increase of population or business, as argued in this case, may seem to render it expedient? The mischievous effects of the principle contended for by the plaintiff in error have been already felt in reference to such interests, and it becomes essential to their security that our judicial tribunals should interpose their authority to guard against this wanton abuse of power."

Wanser v. Hoos, 60 N. J. Law, 482; People v. Coler, 32 Misc. 78, 66 N. Y. Supp. 163. It is a valid exercise of the legislative power to determine the amount of wages to be paid by the municipality to those in its employ. Fergus v. City of Columbus, 6 Ohio N. P. 82; Nottage v. City of Portland, 35 Or. 539. A legislature may cure defective proceedings for the making of street improvements. City of Reading v. Savage, 120 Pa. 198; McCarthy v. Com. 110 Pa. 243; State v. Spears (Tenn. Ch. App.), 53 S. W. 247. Courts are not bound by the construction of a state constitution placed upon it by the legislature.

[2] Marbury v. Madison, 1 Cranch (U. S.), 137; Weimer v. Bunbury, 30 Mich. 201. "Such summary process, it is said, which gives the party whose property is seized no opportunity to contest the claim set up against him, cannot be due process of law. There is nothing in these

with particularity the powers such a body is legally capable of exercising and the manner and time of the exercise.[3] To determine the legality of legislative action, the nature and character of the duties they should perform must be considered and the constitutional limitations controlling them.[4]

words, however, that necessarily implies that due process of law must be judicial process. Much of the process by means of which the government is carried on and the order of society maintained is purely executive or administrative. Temporary deprivations of liberty or property must often take place through the action of ministerial or executive officers or functionaries, or even of private parties, where it has never been supposed that the common law would afford redress."

Bebee v. Bank of New York, 1 Johns. (N. Y.) 529; Andrews' American Law, § 229. "It is not within the plan of government that each department should be entirely separate, distinct and independent. On the contrary, they are co-ordinate and mutually dependent members of one system intended to aid and control each other. Thus, the veto power of the chief executive, and the supervisory power of the judiciary, are examples of the system of checks and balances which pervades the whole plan, and prevents the supremacy of any department." 1 Wilson's Works, 367. "We are now led to discover that between these three great powers of government there ought to be a mutual dependency, as well as a mutual independency. We have described their independency; let us now describe their dependency. It consists in this: that the proceedings of each when they come forth into action and are ready to affect the whole, are liable to be examined and controlled by one or both of the others."

1 Story, Const. (5th ed.) § 525. "But when we speak of a separation of the three great departments of government, and maintain that that separation is indispensable to public liberty, we are to understand this maxim in a limited sense. It is not meant to affirm that they must be kept wholly and entirely separate and distinct and have no common link of connection or dependence, one upon the other, in the slightest degree. The true meaning is that the whole power of one of these departments should not be exercised by the same hands which possess the whole power of either of the other departments, and that such exercise of the whole would subvert the principles of a free constitution."

[3] Allen v. McKean, 1 Sumn. 276, Fed. Cas. No. 229; Cheaney v. Hooser, 48 Ky. (9 B. Mon.) 330; Town of Berlin v. Town of Gorham, 34 N. H. 266; City of Paterson v. Society for Establishing Useful Manufactures, 24 N. J. Law (4 Zab.) 385.

[4] Horn v. Lockhart 84 U. S. (17 Wall.) 570. "We admit that the acts of the several states in their individual capacities, and of their different departments of government, executive, judicial and legislative, during the war, so far as they did not impair or intent to impair the supremacy of the national author-

Membership. The number of members,[5] their qualifications,[6] and the districts from which elected,[7] are questions for determination by a state constitution or general laws passed un-

ity, or the just rights of citizens under the Constitution, are, in general, to be treated as valid and binding. The existence of a state of insurrection and war did not loosen the bonds of society, or do away with civil government or the regular administration of the laws. Order was to be preserved, police regulations maintained, crime prosecuted, property protected, contracts enforced, marriages celebrated, estates settled, and the transfer and descent of property regulated precisely as in times of peace. No one, that we are aware of, seriously questions the validity of judicial or legislative acts in the insurrectionary states touching these and kindred subjects, where they were not hostile in their purpose or mode of enforcement to the authority of the National Government, and did not impair the rights of citizens under the Constitution." Home Ins. Co. v. United States, 8 Ct. Cl. 449; Watson v. Stone, 40 Ala. 451; Hawkins v. Filkins, 24 Ark. 286; Gormley v. Taylor, 44 Ga. 76; Snow v. Hudson, 56 Kan. 378. Kan. Laws 1861, c. 17, directing the convening of the state legislature in joint session is directory only. Lafon v. Dufrocq, 9 La. Ann. 350; Davis v. State, 7 Md. 151; Burnham v. Morrissey, 80 Mass. (14 Gray) 226. The Massachusetts house of representatives has the power to compel witnesses to attend and testify before the house or its committees. Shattuck v. Daniel, 52 Miss. 834; Hill v. Higdon, 5 Ohio St. 248; People v. Hurlbut, 24 Mich. 44, 9 Am. Rep. 103.

[5] Opinion of Justices, 20 Mass. (3 Pick.) 517; Morris v. Wrightson, 56 N. J. Law, 126, 22 L. R. A. 548; State v. Perry, 18 R. I. 276, 22 L. R. A. 65.

[6] Scott v. Strobach, 49 Ala. 477; People v. Markham, 96 Cal. 262; State v. Coombs, 32 Me. 526; Opinion of Justices, 68 Me. 594; Opinion of Justices, 20 Mass. (3 Pick.) 517; Opinion of Justices, 122 Mass. 594; Thomas v. Taylor, 42 Miss. 651; State v. Orr, 61 Ohio St. 384, 56 N. E. 14. "Section 1680, Revised Statutes, provides that, 'a member of the council or board of aldermen must be a resident of the corporation for which he is elected and if the corporation is divided into wards or districts, then a resident of the ward or district for which he is elected.' This seems to mean that a member of council must be a resident of his ward, not only when elected, but also that he must remain such resident; and then the statute is supplemented by the ordinance of the city, which provides that a councilman who removes without his ward shall be deemed to have resigned his office. It being conceded in this case that Mr. Crow had removed out of his ward, it must follow that he thereby ceased to be a member of the council, the same as if he had resigned." In re Grand Jury, R. M. Charlt. (Ga.) 149; 2 Am. Rep. 625.

[7] Denney v. State, 144 Ind. 503, 42 N. E. 929, 31 L. R. A. 726; Opinion of Justices, 18 Me. 458; Miller v. Chosen Freeholders of Cumberland County, 58 N. J. Law, 501, 33 Atl. 948; People v. Green, 58 N. Y.

der the authority of some of its provisions.[8] It is well known that no portion of a community can be deprived of its right of representation in any fixing or readjusting of the lines of such representative districts.[9] Statutory or constitutional provisions establishing districts and apportioning members should be phrased so as to secure districts nearly equal in number of inhabitants and composed of convenient and contiguous territory and in as compact form as practicable;[10] the purpose of such requirements be-

295; In re Smith, 90 Hun, 568, 36 N. Y. Supp. 40; People v. Westchester County Sup'rs, 147 N. Y. 1, 30 L. R. A. 74; State v. Orr, 61 Ohio St. 384, 56 N. E. 14.

[8] People v. Markham, 96 Cal. 262; State v. Coombs, 32 Me. 526.

[9] Sabin v. Curtis (Idaho), 32 Pac. 1130; Opinion of Justices, 18 Me. 458; People v. Maynard, 15 Mich. 463; Bay County v. Bullock, 51 Mich. 544, 16 N. W. 896; People v. Hull, 64 Hun, 638, 19 N. Y. Supp. 536; Lanning v. Carpenter, 20 N. Y. 447; State v. Dudley, 1 Ohio St. 437.

[10] People v. Hill, 7 Cal. 97; Ballentine v. Willey, 3 Idaho, 496; People v. Thompson, 155 Ill. 451; Parker v. State, 133 Ind. 178, 18 L. R. A. 567; Denney v. State, 144 Ind. 503, 31 L. R. A. 726; Opinion of Justices, 18 Me. 458; Houghton County Sup'rs v. Blacker, 92 Mich. 638, 16 L. R. A. 432; Giddings v. Blacker, 93 Mich. 1, 16 L. R. A. 402. The court say: "It (the law) requires the exercise on the part of the legislature of an honest and fair discretion in apportioning the districts so as to preserve as nearly as may be the equality of the representation. This constitutional discretion was not exercised in the apportionment act of 1891. The facts themselves demonstrate this beyond any controversy, and no language can made the demonstration plainer. There is no difficulty in making an apportionment which shall justify the demand of the constitution. It is not the purpose or province of this court to inquire into the motives of the legislation. Courts will not discuss the motives of legislative bodies except as they appear in the public acts or journals of such bodies. The validity of an act does not depend upon the motive for its passage. The duty of the court begins with the inquiry into the constitutionality of the law, and ends with a determination of that question."

People v. Aldermen of New York, 14 Misc. 105, 35 N. Y. Supp. 259; In re Smith, 90 Hun, 568, 36 N. Y. Supp. 40. "Apprehending that errors such as have been disclosed in the present case would probably arise in the apportionment of assembly districts, the constitution expressly provides that the act of apportionment 'shall be subject to review by the supreme court at the suit of any citizen, under such reasonable regulations as the legislature may prescribe, and any court before which a cause may be pending involving an apportionment shall give precedence thereto over all other causes and proceedings, and if said court be not in session, it shall convene promptly for the disposition of the same.' This provision of the constitution illustrates the high importance attached by the people of this state

ing to prevent manipulation of the state by one political party for the purpose of perpetuating itself in power politically; this salutary and fundamental principle is constantly violated, however, in practice to a greater or less extent in many states of the union.

§ 498. Municipal councils.

A municipal corporation proper, it will be remembered, is not only a public corporation in the sense that it is an agent of the state or the sovereign and performing its delegated governmental duties or functions, but also an organization of the people of a particular locality for their better comfort, convenience and wel-

to a fair, just and exact performance of the duties intrusted to the boards of supervisors and common councils in the performance of this function; a solicitude which is most natural when we consider that the act to be performed is one affecting the people in their representation in the state legislature. It is, therefore, the plain duty of the court, where it finds such a condition of things, as is disclosed upon the papers in this case, to set aside the apportionment and direct the board to reconvene and properly perform its duties in the manner prescribed in the constitution." State v. Cunningham, 81 Wis. 440, 15 L. R. A. 561; Id., 83 Wis. 90, 17 L. R. A. 145, 35 Am. St. Rep. 27.

People v. Rice, 135 N. Y. 473, 16 L. R. A. 836. Where the court in the opinion of Mr. Justice Peckham say in part: "We start then with the proposition that to the legislature is intrusted some discretion in the matter of apportionment. Is the court to interfere with such power whenever it thinks that the legislature might possibly have come nearer to an equality * * * ? We do not believe in the propriety or necessity of any such rule. On the contrary, we think that the courts have no power in such case to review the exercise of a discretion intrusted to the legislature by the constitution, unless it is plainly and grossly abused. The expression 'as nearly as may be' when used in the constitution with reference to this subject, does not mean as nearly as a mathematical process can be followed. It is a discretion addressed to the legislature in the way of a general statement of the principles upon which the apportionment shall * * * be made. The legislative purpose should be to make a district of an equal number of inhabitants as nearly as may be, and how far that may be carried out in actual practice must depend generally upon the integrity of the legislature. We do not intimate that in no case could the action of the legislature be reviewed by the courts. Cases may easily be imagined where the action of that body would be so gross a violation of the constitution that it could be seen that it had been entirely lost sight of, and an intentional disregard of its commands, both in the letter and in the spirit, had been indulged in." State v. Cunningham,

fare.[11] This latter fact is well recognized and to municipal corporations is, therefore, given the power of legislation or of acting for themselves in local matters under proper restrictions.[12] The legislative body to whom is delegated such functions is usually called a council and possesses, as derived from the municipal charter or general law, restricted legislative powers.[13] Since they are, broadly speaking, legislative bodies of inferior or subordinate bodies. it follows that they do not have the right to act even in respect to local matters except as the right has been granted them; or, to state the proposition differently, their authority is limited and restricted because of their subordinate place in the scheme or plan of government.[14] The legality of their legislative action, therefore, is tested or determined in the first instance by the extent of their powers as found in the municipal charter,[15] or the general laws which warrant their creation, authorize their organization and direct their action.[16] But action within their

81 Wis. 440, 15 L. R. A. 561, and cases therein cited; Id., 83 Wis. 90, 17 L. R. A. 145, 35 Am. St. Rep. 27.

[11] Hiestand v. City of New Orleans, 14 La. Ann. 330; Inhabitants of Camden v. Camden Village Corp. 77 Me. 530; People v. Ingersoll, 58 N. Y. 1, 17 Am. Rep. 178, and §§ 5 et seq., ante.

[12] Harmon v. City of Chicago, 110 Ill. 400; City of Des Moines v. Hillis. 55 Iowa, 643; People v. Common Council of Detroit, 29 Mich. 108; City of Springfield v. Robberson Ave. R. Co., 69 Mo. App. 514; State v. Clarke, 25 N. J. Law (1 Dutch.) 54; Wendell v. City of Brooklyn, 29 Barb. (N. Y.) 204; Beard v. City if Brooklyn, 31 Barb. (N. Y.) 142; People v. Green, 64 N. Y. 499; Culp v. Com., 42 Pa. Law J. 288. See, also, §§ 5 et seq., and 108 et seq., ante.

[13] Sylvester v. Macauley, 1 Wils. (Ind.) 19. Determining and defining the powers of legislation and liability of the members of the common council of Indianapolis. Hooper v. Emery, 144 Me. 375; Public Schools of Alleghany v. Alleghany County Com'rs, 20 Md. 449; Zane v. Rosenberry, 12 Pa. Co. Ct. R. 382; In re Newport Charter, 14 R. I. 655.

[14] Field v. City of Des Moines, 39 Iowa, 575; Fisher v. City of Boston, 104 Mass. 87; Wheeler v. City of Cincinnati, 19 Ohio St. 19; White v. City Council of Charleston, 2 Hill (S. C.) 571; City Council v. Pinckney, 3 Brev. (S. C.) 217; Schroeder v. City Council of Charleston, 3 Brev. (S. C.) 533; Moran v. Thompson, 20 Wash. 525, 56 Pac. 29.

[15] Hewison v. City of New Haven, 37 Conn. 475; People v. Young, 38 Ill. 490; State v. Young, 3 Kan. 445.

[16] Bates v. District of Columbia, 7 Mackey (D. C.) 76. A legislative body can arbitrarily transfer the exercise of certain powers and duties from the city council to other boards that it may create. Trenton Com'rs v. McDaniel, 52 N. C. (7 Jones) 107; Ferguson v. City of

powers is conclusive and not subject to collateral attack unless reconsidered by them or reversed or held void in an authorized proceeding by a court of competent jurisdiction.[17] Ordinarily the powers possessed by municipal councils are considered continuing in their character and the exercise or failure to exercise them at a particular time does not deprive them of the right to act at a subsequent time. This principle is true unless the particular thing authorized is directed to be done at a specified time or in a particular manner.[18] As a rule, the performance of duties entrusted to them by the legislature cannot be delegated.[19]

Snohomish, 8 Wash. 668, 24 L. R. A. 795.

[17] Bass v. City of Ft. Wayne, 121 Ind. 389; City of Indianapolis v. Consumers Gas Trust Co., 140 Ind. 246; Everett v. Deal, 148 Ind. 90; Joyes v. Shadburn, 11 Ky. L. R. 892, 13 S. W. 361; Heman v. Allen, 156 Mo. 534. To establish a district sewer as such is within the exclusive powers of the municipal authorities of the city of St. Louis under § 22, art. 6, of the city charter, and in the absence of fraud or gross abuse of power will not be disturbed by courts. Ex parte City of Albany, 23 Wend. (N. Y.) 277; McClain v. McKisson, 15 Ohio Circ. R. 517.

[18] City of Augusta v. McKibben, 22 Ky. L. R. 1224, 60 S. W. 291. "It is also insisted that because the council did not proceed at the end of the forty days allowed by the ordinance of September 13th, it was erroneous for them to proceed afterwards. There was no statute regulating the subject. It was left to the discretion of the council how and when they should proceed in this matter and if they saw fit to wait and give appellees further time to reconsider and comply with the order, we are unable to see what ground of complaint the appellees, at least, can have. The contract was let on December 8th. The advertisement for the bids was made on November 29th, and, under the rulings of this court, both days cannot be counted, and so there was only nine days' notice of the bidding given. If the statute had required ten days' notice to be given, this would be a very serious objection to the proceeding, but there is no such provision in the statute. The only thing in the record is a direction by the council to its committee to advertise ten days. The failure of the committee to comply strictly with this direction does not invalidate the contract which the council saw fit to make itself, for the whole matter of the notice to be given rested in its discretion." Booth v. City of Bayonne, 56 N. J. Law, 268.

[19] Blair v. City of Waco (C. C. A.) 75 Fed. 800; City of Oakland v. Carpentier, 13 Cal. 540; City of Chicago v. Stratton, 58 Ill. App. 539; City of St. Louis v. Meyrose Lamp Mfg. Co., 139 Mo. 560; State v. Garibaldi, 44 La. Ann. 809; Durant v. Jersey City, 25 N. J. Law (1 Dutch.) 309; Danforth v. City of Patterson, 34 N. J. Law, 163; Thompson v. Schermerhorn, 6 N. Y. (2 Seld.) 92, 55 Am. Dec. 385; In re Trustees of New York Presbytery, 57 How. Pr. (N. Y.) 500. The

§ 499. Council committees.

The method of action by such a legislative body is generally prescribed with particularity.[20] Large legislative bodies are unwieldy and act slowly. The investigation or determination of certain questions can be accomplished with great facility and thoroughness and with more efficiency by a less number of individuals,—another illustration of the well recognized principle of government that in all respects a despotic government is more efficient. There are frequently found provisions in city charters which provide for the reference of certain matters to committees or subcommittees of the larger legislative body with power to investigate and recommend.[21] These committees, equally with the legislative bodies from which selected, are not bodies of original power and do not have large powers of initiative if in-

determination of the manner in which particular public work is to be done cannot be delegated by the city council to a subordinate city official. Baily v. City of Philadelphia, 184 Pa. 594, 39 Atl. 494, 39 L. R. A. 837; Eureka City v. Wilson, 15 Utah, 67; State v. Winter, 15 Wash. 407. The rule in respect to the delegation of municipal powers has been well and concisely given by a recent author. Joyce, Elec. Law, § 236. "The general rule is that powers conferred by statute must be exercised in the manner and mode prescribed. Powers which are intended to be dependent in their exercise upon the judgment of those governing bodies of a municipality to whose deliberations and discretion they are confided cannot be delegated. Thus, a city empowered to act by ordinance upon a certain matter, by its common council, the mode and manner being left to its judgment as a deliberative body, cannot delegate its authority. In such cases it is the judgment of the deliberative body in whom the power is vested and discretion is confided that is required to be exercised and not the judgment of another body or person acting under a delegated power. This rule does not, however, exclude committees, appointed to ascertain and report facts, nor committees, persons or agents appointed to perform administrative or ministerial functions, or, as appears in some of the decisions, the appointment of committees and the empowering them to act in certain matters not purely administrative or ministerial, their acts being made subject to the approval of the appointing municipal body.

[20] State v. Garibaldi, 44 La. Ann. 809.

[21] Buckton v. People, 12 Colo. App. 86, 5 Pac. 871; Whitney v. City of New Haven, 58 Conn. 450; Holland v. State, 23 Fla. 123; State v. Minneapolis & St. L. R. Co., 39 Minn. 219, 39 N. W. 153; Dreyfus v. Lonergan, 73 Mo. App. 336; Salmon v. Haynes, 50 N. J. Law, 97, 11 Atl. 151; Van Vorst v. Jersey City, 27 N. J. Law (3 Dutch.) 493; City of Burlington v. Dennison,

deed they are possessed at all.[22] The legality of their action is, therefore, measured in all cases by the construction and significance of legislative or constitutional authority.[23]

§ 500. Town meetings.

Another body to which is given legislative powers in respect to local concerns is the New England town meeting or other organization possessing similar characteristics. At these meetings, as already suggested, the people of a particular district have the right to assemble and adopt local legislative measures having for their purpose the regulation and convenience of the people thus acting.[24] The authority for these meetings, their powers, the mode of action and restrictions, have been considered in previous sections.[25]

§ 501. Classification of legislative bodies.

Legislative assemblies other than the town meeting,—and this statement is true both in respect to state legislatures or other organizations,—are divided into branches, the purpose of such division being the creation of a check in the respective bodies upon the legislation or the acts of the other.[26] These are usually desig-

42 N. J. Law, 165; Kramrath v. City of Albany, 53 Hun (N. Y.) 206.

[22] Van Vorst v. Jersey City, 27 N. J. Law (3 Dutch.) 493; Salmon v. Haynes, 50 N. J. Law, 97; Sharp v. City of New York, 40 Barb. (N. Y.) 256. A municipality will be bound by the representations of a committee authorized to act in respect to a certain business transaction.

[23] Hitchcock v. City of Galveston, 96 U. S. 341; Branham v. Lange, 16 Ind. 497. The same rule will apply to a committee appointed by a state legislature. Com. v. Hillenbrand, 96 Ky. 407. A committee of aldermen is not authorized to investigate charges of corruption against certain of its members. Damon v. Inhabitants of Granby, 19 Mass. (2 Pick.) 345; Sharp v. City of New York, 40 Barb. (N. Y.) 256. A council committee have power to bind the corporation by their representations or action where these affect the very matter with which they are charged. Commercial & Farmers' Bank v. Worth, 117 N. C. 146, 30 L. R. A. 261. A committee of a state legislature appointed to investigate certain facts and report to the president of the General Assembly is limited in its powers strictly to the resolution authorizing it.

[24] See §§ 101 et seq., ante.

[25] See §§ 98–107, ante.

[26] Andrews' American Law, §§ 231 et seq.

nated as the "Senate and House of Representatives" and in municipal corporations where such division occasionally exists, the two houses of the council or assembly are designated by appropriate terms. Under whatever name these branches may exist, in order that the purpose of their organization may be effective, concurrent action by the two is necessary in respect to all those questions or matters that are intended as general legislative measures or that are to become operative on the community at large.[27]

[27] Darcantel v. People's Slaughterhouse & Refrigerating Co., 44 La. Ann. 632, 11 So. 239. "The next ground is that the ordinance is not operative for want of the 'concurrent approval of the board of health' as required by constitution. We have reproduced the resolutions of the board of health approving the ordinances, the genuineness of which is not disputed. But it appears that when the ordinances were first presented to the board, it adopted resolutions declining to approve them, which action was communicated to the city council and it is claimed that after this the board could not rescind its action and grant a valid approval. The constitution requires nothing but that the ordinances shall be passed by the council and shall be approved by the board of health. We have before us the ordinances duly passed and the approval of the board of health expressed in a formal resolution adopted by the board. What more can we require? The constitution fixes no time or mode in which the approval of the board shall be made. The first disapproval by the board did not annul or cancel the ordinance. It simply remained ineffective for want of such approval. The council has never reconsidered or rescinded the ordinances. It still stands upon the city's records as an existing ordinance and since we hear no complaint from the council as to the time or method of the board's action, we may presume that it persists in its action as expressed thereby. We can perceive no reason why the board's action in first disapproving should prevent it from afterward changing its mind, for reasons doubtless good, and approving it so long at least as the council maintained the ordinance. The council could repeal the ordinance before or after approval by the board. Not having done so the ordinance and the approval coexist, and the constitutional requirement is satisfied. Nor can we listen to complaints of violation by the board of its own rules of parliamentary proceedings. We, and the public, are simply concerned with the fact and not with the method of the board's approval. The constitutional purpose was to protect the people against inconsiderate action by the council in establishing slaughter houses in localities where they might endanger the public health, and with that end in view, to require such ordinances first to receive the sanction of the authorities specially charged with the care of the public health, and so organized as to enable them to give an expert and scientific judgment on such matters. That purpose is fully accomplished in this case, in which

Ordinarily, to each of the separate houses is given particular functions or duties and powers with relation to the performance of acts which affect them only.[28] The upper house or branch is usually composed of less members than the lower,[29] and in addition to the legislative powers possessed by each, the upper house may have, in addition, the sole power conferred upon it of ratifying or confirming the appointment or election of officers or employes after their nomination or selection by the proper executive officers. The upper house or body may also alone possess, in addition to such power of confirmation or ratification, that of impeaching public officers.

§ 502. Members of municipal councils.

The members of municipal councils proper, for the following discussion will relate particularly to them, are usually called aldermen, assemblymen, trustees, or selectmen.[30] They are elected pursuant to the provisions of a municipal charter[31] or if residents of a community not of sufficient size to enjoy under the laws of the state such a governing instrument, then, pursuant to statutory authority.[32] The place and time of their election and the manner in which it is conducted being regulated by laws pertaining to elections are properly considered under that subject.[33] They are elected further to represent especially the people residing within the certain limited or restricted areas of a particular public corporation which are fixed by general law or ordi-

the board of health has acted deliberately and unequivocally." Opinion of Justices, 6 Me. (6 Greenl.) 514; Chandler v. City of Lawrence, 128 Mass. 213; Wetmore v. Story, 22 Barb. (N. Y.) 414; Beekman's Case, 11 Abb. Pr. (N. Y.) 164; Id., 19 How. Pr. (N. Y.) 518.

[28] State v. Chapman, 44 Conn. 595; Buckton v. People, 12 Colo. App. 86.

[29] Foley v. City of Haverhill, 144 Mass. 352; Wetmore v. Story, 22 Barb. (N. Y.) 414.

[30] Mintzer v. Schilling, 117 Cal. 361; Central Bridge Corp. v. City of Lowell, 81 Mass. (15 Gray) 106; Dey v. Jersey City, 19 N. J. Eq. (4 C. E. Green) 412; In re Newport Charter, 14 R. I. 655; State v. Champlin, 16 R. I. 453; Langdon v. Town of Castleton, 30 Vt. 285; McFarland v. Gordon, 70 Vt. 455; Richards v. Town of Clarksburg, 30 W. Va. 491.

[31] Town of Decorah v. Bullis, 25 Iowa, 12; City of Terre Haute v. Lake, 43 Ind. 480.

[32] Giles v. Winton, 4 Lack Leg. N. (Pa.) 171.

[33] Sections 98 et seq., ante.

nance.[34] The pertinency of these brief suggestions lies in the fact that legislative action to be legal and therefore binding upon the persons and property of a given community must have been passed or adopted by those who have the power under general laws or constitution of the state.[35] Legislative measures passed by an illegal assembly or legislative body have no operative effect. The first test of the validity of legislation whatever its grade is the right of the legislative body to act,[36] and then a question may arise of its power to act in respect to a particular question.[37]

§ 503. Organization of legislative bodies.

Such bodies have the power of organization; that is, the right to elect officers[38] and designate committees and subcommittees[39] in order that the purpose for which they are elected may be carried out. This power of organization includes the right to select presiding officers unless provided for by general law,[40] and those who perform the clerical and executive duties of the deliberative or legislative body.[41] The power of selection or election does not include, unless it is specially given, the right to fill vacancies in the list of members occasioned by death, withdrawal or for cause.[42]

[34] State v. Cogshall (Mich.), 65 N. W. 2; State v. McMillan, 108 Mo. 153, 18 S. W. 784; State v. Jersey City, 53 N. J. Law, 112, 20 Atl. 829; Bennett v. Common Council of Trenton, 55 N. J. Law, 72, 25 Atl. 113. An act of the legislature providing for the organization of city councils, the number of members and the districts from which selected must pass, to be valid, successfully the test of its being special and unconstitutional. Appeal of Ayars, 122 Pa. 266, 2 L. R. A. 577.

[35] State v. Alter, 5 Ohio Circ. 253; State v. Kearns, 47 Ohio St. 566.

[36] City of Savannah v. Hussey, 21 Ga. 80, 68 Am. Dec. 452.

[37] Rogers v. Jones, 1 Wend. (N. Y.) 237; State v. Earnhardt, 107 N. C. 789.

[38] Trowbridge v. City of Newark, 46 N. J. Law, 140; People v. Bedell, 2 Hill (N. Y.) 196.

[39] Branham v. Lange, 16 Ind. 497; Com. v. Hillenbrand, 96 Ky. 407; Van Vorst v. Jersey City, 27 N. J. Law (3 Dutch.) 493.

[40] Samis v. King, 40 Conn. 298; People v. Conover, 17 N. Y. 64.

[41] Gray v. Granger, 17 R. I. 201, 21 Atl. 342; Roche v. Jones, 87 Va. 484.

[42] Western Granite & Marble Co. v. Knickerbocker, 103 Cal. 111; Town of Valverde v. Shattuck, 19 Colo. 104; City of Somerset v. Somreset Banking Co., 22 Ky. L. R. 1129, 60 S. W. 5; State v. Wofford, 121 Mo. 61; Parker v. Common

§ 504. Qualifications of members.

These bodies possess usually the exclusive right to determine and pass upon the eligibility or the qualifications of those claiming membership.[43] Courts or judicial bodies have no power to pass upon questions concerning the eligibility or qualifications of the members of a deliberative assembly except as these may be affected by an irregularity in the election.[44] This principle is a matter not only of a professional but also of common knowledge. Its application does not, however, divest the courts of their corrective powers in the consideration of action by legisla-

Council of Newark, 57 N. J. Law, 83, 30 Atl. 186. A bill providing for the filling of vacancies held unconstitutional as special legislation. Goldberg v. Dorland, 56 N. J. Law, 364; Wilson v. Inhabitants of Trenton, 56 N. J. Law, 469; Hamilton County Com'rs v. Rosche, 50 Ohio St. 103, 19 L. R. A. 584.

[43] Green v. Adams, 119 Ala. 472; 24 So. 41; People v. Metzker, 47 Cal. 524; Selleck v. Common Council of South Norwalk, 40 Conn. 359; Booth v. Arapahoe County Ct., 18 Colo. 561; Naumann v. City Canvassers of Detroit, 73 Mich. 252, 41 N. W. 267; Schwartz v. Flatboats, 14 La. Ann. 243; People v. Harshaw, 60 Mich. 200. Where the mayor is constituted a part of the city council by charter provision, the right given to that body to judge of the qualifications and election of its members applies to the mayor as well.

Cate v. Martin, 69 N. H. 619, 45 Atl. 644; Opinion of Justices, 56 N. H. 570. The same rules applies to a decision of the state senate of New Hampshire. Salmon v. Haynes, 50 N. J. Law, 97, 11 Atl. 151; Garside v. City of Cohoes, 58 Hun, 605, 12 N. Y. Supp. 192. Such a provision will not apply to the mayor of a city, as he is not one of the members of the common council within the spirit or intent of the charter. Simon v. Common Council of Portland, 9 Or. 437; Com. v. Common Council of Philadelphia, 23 Pa. Co. Ct. R. 631; Lamb v. Lynd, 44 Pa. 336; Jobson v. Bridges, 84 Va. 298, 5 S. E. 529. Such a right can only be exercised in case of contest. State v. Trimbell, 12 Wash. 440.

[44] McGivney v. Pierce, 87 Cal. 124; Foley v. Tyler, 161 Ill. 167; Keating v. Stack, 116 Ill. 191; Kendell v. City of Camden, 47 N. J. Law, 64. A member having once been seated after investigation by a council, the sole judge of the election and qualification of its members cannot be made the subject of a second investigation. McVeany v. City of New York, 80 N. Y. 185; State v. Kraft, 18 Or. 550; Auchenbach v. Seibert, 120 Pa. 159, 13 Atl. 558; State v. De Gress, 72 Tex. 242; City of New Orleans v. Morgan, 7 Mart. (N. S.; La.) 1, 18 Am. Dec. 232. But see the case of State v. Kempf, 69 Wis. 470, 34 N. W. 226, where the court holds that the power to determine and pass upon the election and qualifications of members is not exclusive but concurrent with the power of the courts to determine the same question.

tive bodies taken without authority or in an arbitrary, fraudulent or illegal manner.[45] The right can be exercised by legislative bodies as affecting only the members of that body at the time such action is taken, and an outgoing assembly has no power to pass upon the qualifications of members of an incoming one,[46]

[45] Hawke v. McAllister, 4 Ariz. 150, 36 Pac. 170; San Diego County v. Seifert, 97 Cal. 594; Board of Aldermen v. Darrow, 13 Colo. 460; State v. Pinkerman, 63 Conn. 176, 22 L. R. A. 653. One not legally a member of such board or body has no power to participate in the proceedings. State v. Anderson, 26 Fla. 240, 8 So. 1; Ridley v. Doughty, 85 Iowa, 418; Doran v. De Long, 48 Mich. 552; Banning v. McManus, 51 Minn. 289; State v. Fitzgerald, 44 Mo. 425; Bartch v. Meloy, 8 Utah, 424.

[46] Green v. Adams, 119 Ala. 472, 24 So. 41. "The words used, 'shall judge of the qualifications, elections and returns of its own members,' are those used in the constitution of the state in respect to the houses of the general assembly and their power to pass upon the eligibility, election, etc., of their own members, and they have always been understood in that connection to mean, and they do mean, that the houses respectively, after they have assembled and been organized, shall judge of their own membership, and not that the houses of an outgoing general assembly shall pass upon the membership of houses which have been elected but whose term of official existence has not commenced. If there should be, for instance, a call session of the general assembly of 1896–1897 after the election of the general assembly of 1897–1898, but before its convention at the time prescribed by law, it would never occur to anybody that such call session could at all inquire into or judge of the qualifications, elections and returns of members of the succeeding general assembly. This would not be for each house to judge of the election, returns and qualifications of its own members, but for the houses of one general assembly to judge of the membership of entirely distinct bodies, the houses of another general assembly, elected but not yet in organized existence. And these words mean the same thing when applied to other bodies—that the body whose membership is drawn in question shall judge thereof for itself and not its predecessor shall determine the qualifications, elections and returns of its membership. They mean when applied to the town councils of Ft. Payne that each succeeding council shall pass upon the qualifications of members elected to it and shall determine who have been elected to it and not that the preceding council in office up to the time of its election shall discharge these functions in respect of its membership. Thus—as it must be—construed, the provision may be an unwise and impracticable one where all members of the council are elected at the same time and by the same constituency, in that the same grounds of contest may exist against all the members; but with that we have nothing to do. Whether a wise provision or not, or practical of execution or not generally or in a given case, it confers no powers, judicial or otherwise,

and further, has no capacity to limit or restrict the action of members not present. It is further held universally that no person has the power to pass upon his own right to serve as a member of such a body or, in other words, act as a judge upon his own case.[47]

§ 505. Meetings; when held.

The meetings of such bodies to be legal must have been called by notice, pursuant to some statutory authority and under the regulations and provisions of the law with respect to them.[48] They must be held at the time fixed by law.[49]

upon the outgoing council and can afford them no excuse or justification for failure to declare the election of their successors as shown by the returns certified by the inspectors." Hudmon v. Slaughter, 70 Ala. 546; Hilton v. Common Council of Grand Rapids, 112 Mich. 500, 70 N. W. 1043; Roberts v. City of Camden, 63 N. J. Law, 186, 42 Atl. 848.

[47] Burwell v. Hawkins, 92 Ill. App. 459; City of Evanston v. Carroll, 92 Ill. App. 495.

[48] Burns v. Thompson, 64 Ark. 489, 43 S. W. 499. A notice in writing stating the time, place and purpose of the meeting is necessary to a legal meeting of school directors. Gill v. Dunham (Cal.) 34 Pac. 68; Rock v. Rinehart, 88 Iowa, 37; Beaver Creek Tp. Board v. Hastings, 52 Mich. 528. A meeting irregularly called will be considered valid if all the members were present and participated in the transaction of business.

Wayne County Sup'rs v. Wayne Circuit Judges, 106 Mich. 166, 64 N. W. 42. It is not necessary to file proof of service of the notice required by law. State v. Kantler, 33 Minn. 69; Tierney v. Brown, 67 Miss. 109, 6 So. 737; People v. Parker, 3 Neb. 409; Morris v. Merrell, 44 Neb. 423, 62 N. W. 865; Schoepflin v. Calkins, 5 Misc. 159, 25 N. Y. Supp. 696; Cassin v. Zavalla County, 70 Tex. 419, 8 S. W. 97. But see Barr v. New Brunswick, 58 N. J. Law, 255, 33 Atl. 477, which holds that it is not necessary for the record to contain the facts relative to the giving of the notice required by the city charter.

[49] Ex parte Benninger, 64 Cal. 291; People v. Town of Fairbury, 51 Ill. 149; State v. Smith, 22 Minn. 218. "The provision of the charter that the 'council shall meet at such time and place as they, by resolution, may direct,' is mandatory and directory, but not prohibitory. This requirement contains no negative upon its meeting at other times than those fixed by resolution. Inasmuch as it is not only the duty but the right of each member to be present and participate in the deliberations and proceedings of the council, a legal notice to all of every meeting, whether regular or special, is requisite, in order to enable a quorum of the council to act, and to give validiy to its transactions. This object is accomplished, in the case of its regular meetings, by a reso-

They are commonly classified into regular and special, and the powers of deliberative assemblies at such meetings in respect to legislation is limited and restricted by the character of the meeting.[50] At regular meetings, all of the powers possessed ordinarily by such bodies may be exercised;[51] at special meetings only such action can be taken as specified or designated in the call for the meeting.[52] Statutory provisions with respect to the calling of a special meeting are considered of a mandatory nature and have been deemed necessary in order to prevent hasty, ill-advised and ill-considered legislation.[53]

lution fixing the time and place thereof, of which all must take notice; whereas, as to special meetings, called by the mayor, personal notice must be served in the manner provided by the charter; and as these two are the only modes provided by the charter for convening the council, a meeting assembled under any other authority, or in any other manner, would be so far unauthorized and illegal that no valid action could be taken by a mere quorum, neither would any alderman be under any obligation to take any notice of it, nor could his attendance be enforced." Magneau v. City of Fremont, 30 Neb. 843, 47 N. W. 280, 9 L. R. A. 786. But a meeting irregularly called is valid if all the members of the council and the necessary officers are present and act as a body. Moore v. Pitt County Com'rs, 113 N. C. 128.

[50] State v. Cumberland County Com'rs, 78 Me. 100; Lyon v. Rice, 41 Conn. 245; City of St. Louis v. Withaus, 16 Mo. App. 247.

[51] Hamilton v. State, 3 Ind. 452; Kearney County Com'rs v. Kent, 5 Neb. 227.

[52] People v. Carver, 5 Colo. App. 156; Stockton v. Powell, 29 Fla. 1, 10 So. 688, 15 L. R. A. 42; White v. Fleming, 114 Ind. 560, 16 N. E. 487. An oral notice of a special session sufficient. See, also, cases cited in following note. Torr v. State, 115 Ind. 188, 17 N. E. 286. The presumption exists that a special meeting was legally and regularly called. See, also, City of St. Louis v. Withaus, 90 Mo. 646; Rutherford v. Hamilton, 97 Mo. 543; Boyce v. Auditor General, 90 Mich. 314, 51 N. W. 457; Id., 90 Mich. 326, 52 N. W. 754, and Wayne County Sup'rs v. Wayne Circuit Judges, 106 Mich. 166, 64 N. W. 42.

Walker v. Inhabitants of West Boylston, 128 Mass. 550; City of St. Louis v. Whitaus, 90 Mo. 646. But see Morford v. Unger, 8 Iowa, 82.

Smith v. Tobener, 32 Mo. App. 601. A municipal council is not limited in its action strictly to an ordinance mentioned in the call for a special meeting, but may consider generally the subject-matter involved by the ordinance. See, also, Dollar Sav. Bank v. Ridge, 62 Mo. App. 324, 79 Mo. App. 26.

[53] Goedgen v. Manitowoc County, 2 Biss. 328, Fed. Cas. No. 5,501; Harding v. Vandewater, 40 Cal. 77; Stow v. Wyse, 7 Conn. 214; Stockton v. Powell, 29 Fla. 1, 15 L. R. A. 42; Mitchell County Sup'rs v. Horton, 75 Iowa, 271; Paota & F. R. R. Co. v. Anderson County

Place of meeting. The provisions of the law are not considered so mandatory in their character in respect to the place of the meeting of a deliberative body although it must be held at some public place of which notice must have been duly given.[54]

Com'rs, 16 Kan. 302; City of Auburn v. Union Water Power Co., 90 Me. 71; Russell v. Wellington, 157 Mass. 100, 31 N. E. 630; Beaver Creek Tp. Board v. Hastings, 52 Mich. 528; Lewick v. Glazier, 116 Mich. 493, 74 N. W. 717; Lord v. City of Anoka, 36 Minn. 176; Forry v. Ridge, 56 Mo. App. 615; State v. Washoe County Com'rs, 22 Nev. 15, 34 Pac. 1057; People v. Batchelor, 22 N. Y. 128.

London & N. Y. Land Co. v. City of Jellico, 103 Tenn. 320, 2 Mun. Corp. Cas. 704. "The result of the authorities upon the subject is that, as a general rule, every member of a municipal council is entitled to reasonable notice of special meetings and that no important action can lawfully be taken at such meeting unless such notice has first been given or unless the members not notified actually attend and participate in the business of the meeting." City of Knoxville v. Knoxville Water Co., 107 Tenn. 647, 64 S. W. 1075, 61 L. R. A. 888.

Hamilton v. Tucker County, 38 W. Va. 71. But see City of Greeley v. Hamman, 17 Colo. 30, 28 Pac. 460, where it is held that the presumption is, in the absence of evidence to the contrary, that a special meeting of the council was a legal meeting duly and regularly called by the proper officers although the record does not show in the affirmative service of notice as required by Mills Ann. St. §§ 4490, 4492. See, also, Schofield v. Village of Tampico, 98 Ill. App. 324, which holds that where all the village trustees and president were present at a special meeting and participated in the proceedings, their action will not be held invalid because some of the provisions of the law in respect to notice of meeting may have been defective.

[54] Stafford County Com'rs v. State, 40 Kan. 21, 18 Pac. 889; State v. Harris (Miss.) 18 So. 123; Harris v. State, 72 Miss. 960, 33 L. R. A. 85; Wisconsin Cent. R. Co. v. Ashland County, 81 Wis. 1, 50 N. W. 937. But see on this point the dissenting opinions of Judges Winslow and Lyon. "At the annual town meeting of the town, held April 5th, 1887, a resolution was adopted to the effect that the next town meeting of the town should be held at the court house in the city of Ashland. It was lawful for the town to thus provide for holding its next town meeting in the city. The time for opening the polls at such town meeting to be so held at the court house in the city was April 3, 1888, at nine A. M. The town board met at the time and place named and adjourned to the Shores block. * * * The statute provides that 'whenever it shall become impossible or inconvenient to hold a town meeting at the place designated therefor the town board of inspectors, or a majority of them, after having assembled at or as near as practicable to such place, and opened the meeting and before receiving any votes, may adjourn such meeting to the nearest convenient place for holding the same, and at such adjourned place forthwith proceed with the meeting.

The deliberations of a legislative body must be had at regular or stated intervals, and cannot be secret, either as to time or place.[55]

§ 506. Adjournments.

A meeting when properly called and legally organized can, if not prohibited by law, be adjourned from time to time or from place to place and the power of the legislative body at such

Upon such adjournment, the board of inspectors shall cause proclamation thereof to be made and shall station a constable, or some other proper person, at the place where such meeting was opened, to notify all electors arriving at such place that the meeting has been adjourned and the place to which it has been adjourned.' Sec. 784, Rev. St. The precise time of meeting at the court house does not appear. The court found that it was some time prior to nine A. M. That would be true, in a sense, if they met a few minutes after the previous midnight. The records in evidence show, in effect, that the meeting was after due and legal notice; that on motion it was voted that the board adjourned as inspectors to Room 15, Shores block; that the town board met pursuant to adjournment in that room; that the meeting was called to order by the chairman at nine o'clock A. M., * * * that proclamation was then made declaring the polls open. Since the section of the statute quoted required the board, as inspectors, to proceed at such adjourned place forthwith with the meeting and since they did so proceed at nine o'clock A. M., it may fairly be inferred that the meeting at the court house was, at most, but a few minutes before that time. Besides, the board was composed of officers acting under the sanction of an oath and some presumptions may be fairly indulged in favor of the legality of their action. * * * But it is contended, in effect, that even if the town board met at the court house at substantially the time prescribed by law, yet that it does not affirmatively appear from the findings or the records that it was 'impossible or inconvenient' to hold the meeting at that place. Manifestly, the statute did not require that it should be impossible to hold it at that place; otherwise, the words 'or inconvenient' would not have been used in the statute. Such words are flexible in their meaning and were necessarily addressed to the good judgment of the board."

[55] But see State v. Rogers, 107 Ala. 444, 19 So. 909, 32 L. R. A. 520. "The remaining objection to the validity of the act is directed to the last clause of the seventh section: 'Nor shall any claim be passed on, or any contract awarded save when the said board and their clerk are in private.' The contention is that this clause is offensive to the declaration of the bill of rights 'that all courts shall be open.' * * * In the making of contracts and in the audit and allowance or rejection of claims, the board is not in the exercise of judicial power nor sitting as a court. It is of peculiar constitution. It has powers which are

adjourned meeting will be full and ample to accomplish the work or transact the business which they could have legally done at the meeting from which the adjournment was taken.[56] Some cases hold that such a meeting is but a part of a continuous session, and that until an adjournment is taken, sine die, it is to be considered, so far as legality of action is concerned, as one continuous session.[57] At an adjourned special meeting that busi-

in their nature judicial, other powers which are in their nature legislative, other powers, the powers of most frequent exercise, which are purely administrative or executive. It is in the exercise of mere administrative power in the making of contracts and in the allowance or rejection of claims. Then it bears a close resemblance to the board of aldermen of a municipal corporation or of directors of private corporations. It would, in the absence of statute, rest in its discretion, whether in the making of contracts and the audit of claims, its deliberations should be private or public. As the pecuniary interests of the citizens and of the county are brought into antagonism, there may be often manifest propriety in their deliberating in private free from all interference and from all extraneous influences. The act, it will be observed, affords no opportunity for avoiding responsibility for official action. It is only at the regular terms of the board that contracts may be made or claims allowed. A majority must concur in the making of a contract or allowance of a claim. The making of a contract or allowance of a claim is matter which will appear of record. If there is division in the board, the clerk records the vote of each member. The records of the board are public records, at all suitable times open to the inspection of any citizen of the county. While the act compels the board to deliberate and act in private, it equally compels publicity of the result of the deliberations, securing official responsibility to the constituency of the board."

[56] Hays v. Ahlrichs, 115 Ala. 239, 22 So. 465; State v. Rogers, 107 Ala. 444, 32 L. R. A. 520; Grimmett v. Askew, 48 Ark. 151, 2 S. W. 707. Where adjournments beyond a specified number are prohibited by law, action taken at a meeting in excess of such number is invalid.

Ex parte Mirande, 73 Cal. 365, 14 Pac. 888; Stockton v. Powell, 29 Fla. 1, 15 L. R. A. 42; State v. Hillyer, 2 Kan. 17; Tillman v. Otter, 93 Ky. 600, 20 S. W. 1036, 29 L. R. A. 110. A charter provision is mandatory that when both boards are in session, one shall not adjourn without the concurrence of the other for a longer time than twenty-four hours. Banning v. McManus, 51 Minn. 289, 53 N. W. 635. A statutory provision that no regular session of the board of county commissioners shall continue longer than six days is to be considered as meaning not six consecutive days but six actual sessions. Ex parte Wolf, 14 Neb. 24; Magneau v. City of Fremont, 30 Neb. 843, 47 N. W. 280, 9 L. R. A. 786.

[57] Durant v. Jersey City, 25 N. J. Law (1 Dutch.) 309. "The record shows that this ordinance was in-

ness only can be transacted as could properly have been done at the special meeting.[58]

§ 507. Quorum.

To prevent action that may be corrupt or hasty in its character, statutory or charter provisions require not only the presence of a required number of the total members of the body[59] but also that of certain designated officials.[60] The rule is ordinarily applied that a majority of a quorum present can legally transact business,[61] but in some instances the action only of a majority

troduced at an adjourned meeting of the council, held on the 21st of April, 1852, but it is objected that it does not appear whether this was an adjourned meeting of a special or stated meeting. If it were the former the adjourned meeting was but a continuance of the special meeting and the ordinance being introduced at such a meeting was never legally before the council." Flood v. Atlantic City, 63 N. J. Law, 530, 42 Atl. 829.

[58] Rylands v. Pinkerman, 63 Conn. 176, 22 L. R. A. 653; Durant v. Jersey City, 25 N. J. Law (1 Dutch.) 309.

[59] People v. Harrington, 63 Cal. 257; City of Covington v. Boyle, 69 Ky. (6 Bush.) 204; City of Somerset v. Somerset Banking Co., 22 Ky. L. R. 1129, 60 S. W. 5; Bybee v. Smith, 22 Ky. L. R. 1684, 61 S. W. 15; State v. Bemis, 45 Neb. 724. The absence of the governor as an ex officio member of a board from its meetings will not invalidate their proceedings where all the other members are present. In re State Treasurer's Settlement, 51 Neb. 116, 70 N. W. 532, 36 L. R. A. 746; Outwater v. Borough of Carlstadt, 66 N. J. Law, 510, 49 Atl. 533; State v. Archibald, 5 N. D. 359.

[60] State v. Pinkerman, 63 Conn. 176, 22 L. R. A. 653; Gostin v. Brooks, 89 Ga. 244, 15 S. E. 361; Griffin v. Messenger, 114 Iowa, 99, 86 N. W. 219; City of Somerset v. Smith, 20 Ky. L. R. 1488, 49 S. W. 456; Bousquet v. State, 78 Miss. 478, 29 So. 399; State v. Gray, 23 Neb. 365, 36 N. W. 577; In re Dudley, 33 App. Div. 465, 53 N. Y. Supp. 742; Zane v. Rosenberry, 153 Pa. 38. The assignment of official duties to a person does not necessarily constitute him a member of a city council. District School Trustees v. Wimberly, 2 Tex. Civ. App. 404, 21 S. W. 49; Doherty v. City of Galveston, 19 Tex. Civ. App. 708, 48 S. W. 804; West v. Burke, 60 Tex. 51. The presence of the county judge is necessary to constitute a quorum of the county commissioner's court.

[61] City of Oakland v. Carpentier, 13 Cal. 540; People v. Harrington, 63 Cal. 257; Wilson v. Waltersville School Dist., 46 Conn. 400; Atkins v. Phillips, 26 Fla. 281, 8 So. 429, 10 L. R. A. 158; Martin v. Townsend, 32 Fla. 318; Schofield v. Watkins, 22 Ill. 66; City of Chariton v. Holliday, 60 Iowa, 391; Wheeler v. Com., 17 Ky. L. R. 636, 32 S. W. 259; Collopy v. Cloherty, 18 Ky. L. R. 1061, 39 S. W. 431; State v. McBride, 4 Mo. 303; State v. Cowgill

of the whole number legally authorized to act is binding.[62] This necessary number is called a quorum.[63] It varies with the different municipal charters or different state laws and before such a body can take legal action, it is necessary that a quorum be present.[64] A number less than a quorum can, however, legally adjourn from time to time.[65] The question of whether the assent

& H. Mill Co., 156 Mo. 620; State v. Yates, 19 Mont. 239, 37 L. R. A. 205; Hutchinson v. Borough of Belmar, 61 N. J. Law, 443, 39 Atl. 643; Cadmus v. Farr, 47 N. J. Law, 208; Barnert v. City of Paterson, 48 N. J. Law, 395; Young v. Crane, 67 N. J. Law, 453, 51 Atl. 482; Weinckie v. New York Cent. & H. R. R. Co., 61 Hun, 619, 15 N. Y. Supp. 689; Mills v. Gleason, 11 Wis. 470.

[62] City of San Francisco v. Hazen, 5 Cal. 169; McCracken v. City of San Francisco, 16 Cal. 591; In re Executive Communication, 12 Fla. 653; Swift v. People, 162 Ill. 534, 44 N. E. 528, 33 L. R. A. 470; City of Evanston v. O'Leary, 70 Ill. App. 124; State v. Porter, 113 Ind. 79, 14 N. E. 883; Strohm v. Iowa City, 47 Iowa, 42; Cascaden v. City of Waterloo, 106 Iowa, 673, 77 N. W. 333; State v. Alexander, 107 Iowa, 177, 77 N. W. 841; Leavenworth, N. & S. R. Co. v. Meyer, 58 Kan. 305, 49 Pac. 89; McLaughlin v. Wheeler, 18 Ky. L. R. 860, 38 S. W. 493; Lyon v. Mason & Foard Co., 19 Ky. L. R. 1642, 44 S. W. 135; Lewis v. Town of Brandenburg, 20 Ky. L. R. 1011, 47 S. W. 862, 48 S. W. 978; Pence v. City of Frankfort, 101 Ky. 534; Zeiler v. Central R. Co., 84 Md. 304, 34 L. R. A. 469; Whitney v. Village of Hudson, 69 Mich. 189, 37 N. W. 184; Attorney General v. Trombly, 89 Mich. 50; Fournier v. West Bay City, 94 Mich. 463; Inavale Tp. v. Bailey, 35 Neb. 453. Two-thirds of the whole number elected necessary. City of North Platte v. North Platte Waterwords Co., 56 Neb. 403; Stanton v. City of Hoboken, 52 N. J. Law, 88, 18 Atl. 685; Schermerhorn v. Jersey City, 53 N. J. Law, 112, 20 Atl. 829; Mueller v. Egg Harbor City, 55 N. J. Law, 245, 26 Atl. 89; Van Zandt v. City of New York, 21 N. Y. Super. Ct. (8 Bosw.) 375; People v. Nichols, 52 N. Y. 478.

State v. Orr, 61 Ohio St. 384. The necessary majority is a majority of the whole number legally elected and capable of performing the duties of the office; not a majority of the full membership. Brooks v. Claiborne County, 67 Tenn. (8 Baxt.) 43; Lawrence v. Ingersoll, 88 Tenn. 52, 12 S. W. 422, 6 L. R. A. 308; State v. Mott, 111 Wis. 19, 86 N. W. 569.

[63] Heiskell v. City of Baltimore, 65 Md. 125; Tappan v. Long Branch Police, Sanitary & Imp. Commission, 59 N. J. Law, 371. Rules of subordinate commissions in respect to the number constituting a quorum must be consistent with the general statutes which control. See, also, as holding the same, People v. Brinkerhoff, 68 N. Y. 259.

[64] Curtis v. Gowan, 34 Ill. App. 516. Action taken by less than a legal quorum may, however, be subsequently ratified at a full meeting. Cadmus v. Farr, 47 N. J. Law, 208; Barnert v. City of Paterson, 48 N. J. Law, 395.

[65] Hentzler v. Bradbury, 5 Kan. App. 1; Leavenworth, N. & S. R. Co.

and action of a member of a deliberative body is necessary to constitute his presence at a meeting of the body of which he is a member or whether his physical presence only is necessary in order that he be included within the number present and acting is an interesting one and it has been generally held that the physical presence only is necessary; that if a member is within the place of meeting or its adjoining lobbies, he can be counted as present and included within the number necessary to constitute a quorum.[66]

Veto. Where the power to veto an ordinance or legislative act is given a designated official,[67] the law may require a particular number as a quorum or as necessary to adopt or pass such measures over the veto. This number is usually a larger proportion of the whole number of the legislative body than that required for the transaction of regular business.[68]

v. Meyer, 58 Kan. 305; In re State Treasurer's Settlement, 51 Neb. 116, 36 L. R. A. 746; In re Light, 21 Misc. 737, 49 N. Y. Supp. 345.

[66] State v. Vanosdal, 131 Ind. 388, 31 N. E. 79, 15 L. R. A. 832; Rushville Gas Co. v. City of Rushville, 121 Ind. 206, 6 L. R. A. 315; Cotton v. Davies, 1 Strange, 53; Com. v. Schubmehl, 3 Lack. Leg. N. (Pa.) 186; Schmulbach v. Speidel, 50 W. Va. 553, 40 S. E. 424, 55 L. R. A. 922. The principle stated in the text applies where the presence of members of a legislative body is secured by compulsory process. See, also, as holding the same, State v. Pinkerman, 63 Conn. 176, 22 L. R. A. 653; Town of Davis v. Davis, 40 W. Va. 464.

[67] Achley's Case, 4 Abb. Pr. (N. Y.) 35; North v. Cary, 4 T. & C. (N. Y.) 357; People v. Schroeder, 12 Hun, 413, affirmed in 76 N. Y. 160; People v. Fitchie, 76 Hun, 80, 28 N. Y. Supp. 600.

[68] City of San Francisco v. Hazen, 5 Cal. 170; McCracken v. City of San Francisco, 16 Cal. 591; Pollasky v. Schmid, 128 Mich. 699, 87 N. W. 1030, 55 L. R. A. 614. "This is an application for a writ of certiorari to review the action of the circuit judge of Wayne county, who denied an application for mandamus to compel the respondent to publish a certain ordinance which petitioner claims was regularly adopted. The ordinance referred to was vetoed by the mayor. The charter divides the city of Detroit into seventeen wards and provides for the election of two aldermen from each ward. The legislative power of the city is vested in a common council, to be composed of aldermen elected from each ward. One of the aldermen died and one resigned. After the ordinance was vetoed, a motion to pass it over the veto of the mayor received twenty-two votes while seven votes were in the negative. Section 103 of the charter provides that after the veto of any ordinance, resolution or proceeding the common council shall proceed to reconsider the vote by which the same was passed, and after such re-

§ 508. Legislative proceedings; their character; review of motive.

To the members of deliberative or legislative assemblies is entrusted the sole power of making laws.[69] They are limited in the exercise of this power by the constitution, by their own rules of conduct and their official oath. The motives which induce the individual members of such bodies in the passage of particular statutes cannot, as a rule, be inquired into in proceedings testing the legality of such legislation.[70] Its validity will depend upon

consideration two-thirds of all the members elected of the common council shall be necessary to pass or adopt the same. The sole question is as to the construction of this provision of the charter. * * * It is admitted that if two of the thirty-four aldermen had been temporarily absent, the ordinance would not have been passed. We cannot see how the fact that two of the thirty-four aldermen elected were permanently absent, instead of being temporarily so, would change the terms of the charter. The language is not ambiguous. The purpose doubtless was that, when legislation was proposed the wisdom of which was in so much doubt as to meet with the veto of the mayor, before it could become a law, it should receive the vote of two-thirds of all the aldermen, when all the wards of the city were fully represented in the council." Beck v. Berrien County Sup'rs, 102 Mich. 346; Lawrence v. Ingersoll, 88 Tenn. 52, 12 S. W. 422, 6 L. R. A. 308. See, also, § 511 and cases cited. But see State v. Orr, 61 Ohio St. 384, 56 N. E. 14.

[69] City of Napa v. Easterby, 76 Cal. 222; Western & A. R. Co. v. Young, 83 Ga. 512, 10 S. E. 197; Nevin v. Roach, 86 Ky. 492; MacKenzie v. Wooley, 39 La. Ann. 944; Moser v. White, 29 Mich. 59.

[70] Cooley, Const. Lim. 186, and cases cited; Kerfoot v. City of Chicago, 195 Ill. 229; Wright v. Defrees, 8 Ind. 298; McCulloch v. State, 11 Ind. 424; Miners' Bank v. United States, 1 G. Greene (Iowa) 553; Buell v. Ball, 20 Iowa, 282; Villavaso v. Barthet, 39 La. Ann. 247; Paine v. City of Boston, 124 Mass. 486.

Borough of Freeport v. Marks, 59 Pa. 253, where it is said that: "The motives of members of a council or the influence under which they acted cannot be brought to nullify an ordinance within their corporate powers duly passed in legal form at a meeting regularly convened. The legality of the acts of legislative or corporate bodies cannot be tested by the motives of individual members or the adventitious circumstances they may lay hold of to carry their measures."

Wood v. City of Seattle, 23 Wash. 1, 62 Pac. 135, 52 L. R. A. 369. But see Champlin v. City of New York, 3 Paige (N. Y.) 573. The court here holds that to warrant the issuing of a parliamentary injunction to restrain the official action of a common council, there must be shown prima facie evidence of corruption or some particular act of fraud on the part of the members of the council who voted for

other conditions, circumstances and questions. The regularity of the proceedings,[71] the power of the body to pass the particular legislation as determined by constitutional or statutory restrictions,[72] the question of a quorum,[73] and many others pertaining to the details of the passage of legislation, can each and all be inquired into by the courts judicially,[74] but the motive of the individual member is above inquiry.[75]

(a) **Proceedings.** A deliberative body must act in the passage of legislation as such. This is a rule which applies also to the deliberative actions of all official bodies. That their action be con-

the particular ordinance; this would indicate that the motives of the members of a municipal council may be inquired into.

State v. Cincinnati Gaslight & Coke Co., 18 Ohio St. 262, which holds that under a colorable exercise of a granted power, the good faith of members of a city council in acting on an ordinance regulating the price of gas can be inquired into by the courts.

[71] City of Indianapolis v. Consumers' Gas Trust Co., 140 Ind. 246; Schanck v. City of New York, 10 Hun, 124, affirmed 69 N. Y. 444.

[72] State v. Shea, 106 Iowa, 735, 72 N. W. 300; Wrought Iron Bridge Co. v. Arkansas City, 59 Kan. 259, 52 Pac. 869; People v. City of Rome, 136 N. Y. 489, reversing 65 Hun, 622, 20 N. Y. Supp. 223.

[73] Masters v. McHolland, 12 Kan. 23; Higgins v. Curtis, 39 Kan. 283; State v. Guiney, 26 Minn. 313; Morris v. Merrell, 44 Neb. 423; Magneau v. City of Fremont, 30 Neb. 843, 47 N. W. 280, 9 L. R. A. 786; Cleveland County Com'rs v. Seawell, 3 Okl. 281.

[74] Swann v. Town of Cumberland, 8 Gill (Md.) 150.

[75] Soon Hing v. Crowley, 113 U. S. 703. In the opinion of Mr. Justice Field the court held that "The rule is general with reference to the enactments of all legislative bodies that the courts cannot inquire into the motives of the legislators in passing them, except as they may be discussed on the face of the acts, or inferable from their operation considered with reference to the condition of the country and existing legislation. The motives of the legislators considered as the purposes they had in view will always be presumed to be to accomplish that which follows as the natural and reasonable effect of their enactments. Their motives considered as the moral inducements of their votes will vary with the different members of the legislative body. The diverse character of such motives and the impossibility of penetrating into the hearts of men and ascertaining the truth precludes all such inquiries as impracticable and futile." Kassell v. City of Savannah, 109 Ga. 491; City of Topeka v. Raynor, 8 Kan. App. 279; Tomlin v. City of Cape May, 63 N. J. Law, 429; Wood v. City of Seattle, 23 Wash. 1, 62 Pac. 135, 52 L. R. A. 369. The courts in the absence of a showing of fraud will not inquire into the motives of individual members of a legislative body in passing laws or of the beneficiary of that legislation.

sidered legal, they must have met as such body and transacted business in the capacity given them by law.[76]

(b) Presumption of law in favor of validity. The presumption of law exists in favor of the validity of the proceedings of legislative bodies. This principle will apply to the manner in which the meeting may be called, the time and place of meeting, the character of the business transacted and the particular manner in which the business may have been transacted as affected by the existence of rules of order, provisions for a quorum and the like.[77]

[76] City of Lowell v. Simpson, 92 Mass. (10 Allen) 88. The power conferred upon the mayor and aldermen of a city cannot be exercised by the mayor alone. The court say: "The ordinances of the city of Lowell in force at the time of the making of the agreement declared on, prohibited the obstruction of any street for the purpose of building, 'without first obtaining a written license from the mayor and aldermen, or some person authorized by them,' and faithfully complying with such reasonable conditions as 'said board may impose.' This ordinance was clearly reasonable and proper and within the power conferred on the city council by the city charter, to make 'salutary and needful by-laws.' The only consideration for the defendant's agreement to indemnify the city against damages caused by his occupation of Bridge street was a license signed by the mayor alone, containing nothing to show that he was authorized by the mayor and aldermen to give it. There is no allegation either in the declaration already filed or in the amended count which the plaintiffs have moved for leave to add, that he was so authorized. Such an authority cannot be implied from the fact of his being mayor. In the absence of such authority the license was void. This ordinance of the city could not be annulled or dispensed with by the individual act of the mayor as one of the surveyors of highways, elected under the act amending the city charter. There being no consideration for the defendant's agreement he is not liable to this action."

[77] Woodruff v. Stewart, 63 Ala. 206. The court here say that the mayor and councilmen or other officers of a municipal corporation are not usually secured because of their learning in the law, their observance of its terms or their instruction in fine distinctions. If their action it to be subjected to a rigid criticism, much of it done in good faith and in the spirit of their definite authority would be avoided.

Red v. City Council of Augusta, 25 Ga. 386. Reconsideration of a vote. City of Indianapolis v. Consumers' Gas Trust Co., 140 Ind. 246; State v. Smith, 22 Minn. 218; Chosen Freeholders of Hudson County v. New Jersey R. & T. Co., 24 N. J. Law, (4 Zab.) 718; Schanck v. City of New York, 10 Hun, 124, affirmed 69 N. Y. 444; City of Lead v. Klatt, 13 S. D. 140; Hark v. Gladwell, 49 Wis. 172. "It will not do to apply to the orders and resolutions of such bodies, nice verbal criticism and strict parliamentary distinctions because the business is

(c) Action; how taken. The manner of taking action, whether in the transaction of ordinary business or the election or appointment of officers or employes is designated by charter or statutory provisions or in their absence, by the adoption of governing rules. It is customary to require on all questions of importance the calling of yeas and nays and to have a record made.[78] Where such provisions exist as found in the charter or statute, they are considered mandatory but if the requirement is one originating from the body itself under the rule of law stated later, these requirements may be waived or modified without affecting the validity of the proceedings.[79]

§ 509. Rules of order.

A legislative body possesses the inherent power to make rules consistent with the general law for its own government and for regulating and controlling the transaction of its business.[80] This power may be given also either by statute or charter; if derived from these sources, it must be exercised in the manner prescribed.[81] If the authority does not exist, then, as already stated, the inherent or implied power follows and it is cus-

transacted generally by plain men not familiar with parliamentary law. Therefore, their proceedings must be liberally construed in order to get at the real intent and meaning of the body." It was in reference to county boards that this language was used and it was subsequently quoted with approval in the case of Wisconsin Cent. R. Co. v. Ashland County, 81 Wis. 1, where the court was determining the legality of a town meeting.

[78] Arthur v. Adam, 49 Miss. 404; In re Carlton St., 16 Hun (N. Y.) 497.

[79] Walter v. Town of Union, 33 N. J. Law, 350; Vreeland v. Town of Bergen, 34 N. J. Law, 438; Kohler v. Town of Guttenberg, 38 N. J. Law, 419. But the state legislature may ratify an irregular proceeding if it possesses the power in the first instance to require the formality.

[80] Malloy v. Board of Education of San Jose, 102 Cal. 642, 36 Pac. 948. The power given, however, in a city charter, to adopt rules for the conduct of its proceedings does not authorize it to change a charter provision requiring a majority of its members as a quorum for the legal transaction of business. Higgins v. Curtis, 39 Kan. 283; Zeiler v. Central R. Co., 84 Md. 304, 34 L. R. A. 469; Heiskell v. City of Baltimore, 65 Md. 125.

[81] Atkins v. Phillips, 26 Fla. 281, 10 L. R. A. 158; Swift v. People, 162 Ill. 534, 44 N. E. 528, 33 L. R. A. 470; Mann v. City of Le Mars, 109 Iowa, 251; Wheeler v. Com., 98 Ky. 59; City of North Platte v. North Platte Waterworks Co., 56 Neb. 402, 76 N. W. 906.

tomary in such cases to adopt those rules of order or regulations for the conduct of the members in performing their prescribed duties, adopted by deliberative bodies and which are recognized and termed as "general parliamentary usage or custom."[82] It follows from the existence of the power to make these rules of order that all deliberative bodies have the right to enforce them. It does not follow, however, that this can be done in an arbitrary or an illegal way.[83] Notice must be given to the member charged with the commission of an offence, the nature of the charge must be known by him, an opportunity must be given for defense and the trial or hearing must be had in an orderly way and pursued to a final consideration of the charge. The power possessed to make rules, it necessarily follows that by the proper methods, a legislative body may abolish, modify or waive them if this can be done without conflict with statutory or charter provisions.[84]

§ 510. Elections.

As already suggested, legislative bodies may have the power to select subordinate public officials[85] or employes,[86] and this right is usually exercised through an election. The election may pro-

[82] People v. Common Council of Rochester, 5 Lans. (N. Y.) 11. Members of legislative bodies alone have the right to depart from parliamentary rules.

[83] Thompson v. Whipple, 54 Ark. 203.

[84] City of Greeley v. Hamman, 17 Colo. 30; Swindell v. State, 143 Ind. 153, 35 L. R. A. 50. Vote of two-thirds necessary to suspend rules. City of Chariton v. Holliday, 60 Iowa, 391; Mann v. Le Mars, 109 Iowa, 251; Wheeler v. Com., 98 Ky. 59, 32 S. W. 259; Bennett v. City of New Bedford, 110 Mass. 433; Holt v. City Council of Somerville, 127 Mass. 408; Davies v. City of Saginaw, 87 Mich. 439; State v. Archibald, 5 N. D. 359.

[85] State v. Philips, 30 Fla. 579; State v. Curry, 134 Ind. 133, 33 N. E. 685. Where an elective official holds his office at the pleasure of an elective body his formal removal is necessary before a successor can be legally selected. But see McAllister v. Swan, 16 Utah, 1, 50 Pac. 812.

Goodloe v. Fox, 96 Ky. 627, 29 S. W. 433; Chase v. City of Lowell, 73 Mass. (7 Gray) 33. The selection by the city council of an officer entitled to compensation and for a definite period constitutes a contract when accepted by the official the obligation of which cannot be

[86] Kinderman v. West Bay City, 117 Mich. 516, 76 N. W. 10; Sharp v. City of New York, 40 Barb. (N. Y.) 256; Com. v. Wyman, 137 Pa. 508.

ceed either viva voce[87] or by ballot[88] which can be either open or secret. The authority for an election must neeessarily exist in some law governing such body and it must be held at the time prescribed and under the conditions required.[89] The prineiple cannot be too often emphasized that where a right exists as proceeding from some public or private statute, it is strictly eonstrued and if its existenee is doubtful, that doubt will be resolved against it.[90] The power of a legislative body in respect to the subject of this section may be what is termed confirmatory only.[91] If a body is divided into houses, the power of the confirmation is possessed usually by the upper house under whatever name it may be termed.[92] The selection of all subordinate officials or employes may be made by appointment which, of eourse, is substantially the equivalent of an election.[93] The right of a delib-

subsequently impaired by the passage of an ordinance affecting either his term of office or compensation.

O'Brien v. Thorogood, 162 Mass. 598; State v. Murray, 41 Minn. 123. Where a date for the election of a city attorney is designated by law, the city council cannot take legal action in this respect prior to that day.

State v. Wadhams, 64 Minn. 318, 67 N. W. 64. An exercise of the legislative power is exhausted in the selection of a public official for a definite period. Ott v. State, 78 Miss. 487, 29 So. 520; State v. Wimpfheimer, 69 N. H. 166, 38 Atl. 786; Greer v. City of Asheville, 144 N. C. 678; State v. Catlin, 84 Tex. 48, 19 S. W. 302.

[87] State v. Lasher, 71 Conn. 540, 42 Atl. 636, 44 L. R. A. 197; Goodloe v. Fox, 96 Ky. 627, 29 S. W. 433; Mitchell v. Brown, 18 N. H. 315.

[88] State v. Barbour, 53 Conn. 76; Tillman v. Otter, 93 Ky. 600, 20 S. W. 1036, 29 L. R. A. 110; Keough v. Aldermen of Holyoke, 156 Mass. 403, 31 N. E. 387. An illegible ballot should be considered as a scattering vote. Boehme v. City of Monroe, 106 Mich. 401; Cooley, Const. Lim. (6th ed.) c. 17, p. 760.

[87] See note 30 Am. & Eng. Corp. Cas. 334; Attorney General v. Connors, 27 Fla. 329, 9 So. 7; Snow v. Hudson, 56 Kan. 378; City of Hoboken v. Harrison, 30 N. J. Law, 73. Without express authority in its charter or the general laws, a municipal corporation cannot create an office and define its duties.

[90] Willard v. Borough of Killingworth, 8 Conn. 247; City of Lafayette v. Cox, 5 Ind. 38; Leonard v. City of Canton, 35 Miss. 189; Nichol v. City of Nashville, 28 Tenn. (9 Humph.) 252.

[91] Randall v. Schweikart, 115 Mich. 286, 73 N. W. 417; State v. Yates, 19 Mont. 239, 47 Pac. 1004, 37 L. R. A. 205; Hawkins v. Cook, 62 N. J. Law, 84, 40 Atl. 781.

[92] Fritts v. Kuhl, 51 N. J. Law, 191, 17 Atl. 102; State v. Finnerud, 7 S. D. 237, 64 N. W. 121.

[93] State v. Dillon, 125 Ind. 65; Horan v. Lane, 53 N. J. Law, 275; Greer v. City of Asheville, 114 N. C. 678, 19 S. E. 635.

erative body to select its own employes impliedly exists.[94] The power to select subordinate public officials must be found in some statutory provision.[95] Where a date is fixed by law or notice for the holding of an election, a majority of those present are legally competent to elect designated officers although this number may be less than that required as a quorum for the transaction of ordinary business.[96]

§ 511. Limitations upon the power of appointment or election.

Without considering the eligibility of the candidate for an appointive or elective position which will be considered later in that chapter pertaining to public officers, the power of a legislative body may be restricted or limited by the existence of general statutes which either grant or withhold the right except in certain specified cases.[97] A common restriction is one which prevents a person from being a candidate because at the time of his candidacy or election he holds a place of profit or honor in the gift of the elective body.[98] The state or the municipality may also have adopted civil service laws so called, which are necessarily restrictive in their character.[99] General legislation may also be found giving to the veterans of the Civil War a preference in respect to the filling of certain offices or the doing of certain work.[100] The constitutionality of such laws has been seriously questioned and if tested, there is, perhaps, no doubt but that they would be held unconstitutional because special legislation and because of the special preference given to certain individuals. Public opinion has, however, tolerated their existence.

[94] Russell v. City of Chicago, 22 Ill. 285; Com. v. City of Pittsburgh, 14 Pa. 177.

[95] Blair v. Ridgely, 41 Mo. 63; State v. Staten, 46 Tenn. (6 Cold.) 233.

[96] Beck v. Hanscom, 29 N. H. (9 Fost.) 213; Kimball v. Marshall, 44 N. H. 465.

[97] State v. Kearns, 47 Ohio St. 566; Whipple v. Henderson, 13 Utah, 484.

[98] State v. Feibleman, 28 Ark. 424; Smith v. Moore, 90 Ind. 299; People v. Green, 58 N. Y. 295.

[99] People v. Kipley, 171 Ill. 44, 41 L. R. A. 775, citing many cases and discussing the matter thoroughly at great length. Chittenden v. Wurster, 153 N. Y. 664.

[100] Stutzbach v. Coler, 168 N. Y. 416, 61 N. E. 697. See, also, 7 Mun. Corp. Cas., note, pp. 77–95, where a very full and complete resumé of the cases upon the question will be found. Thomas v. Beadle County Com'rs, 1 S. D. 452, 47 N. W. 452.

§ 512. Powers of legislative bodies.

Property or personal interests may be affected as the natural and logical result of action by a legislative body and to protect these from erroneous and illegal measures, the courts are usually given by statute corrective powers,[101] although such power to exist need not be expressly granted.[102] The party aggrieved may exercise his right in an appeal where provisions for such are found,[103] or in the commencement of summary proceedings,[104] or

[101] Hayes v. Rogers, 24 Kan. 143.

[102] Swann v. Town of Cumberland, 8 Gill. (Md.) 150.

[103] Meller v. Logan County Com'rs, 4 Idaho, 44, 35 Pac. 712; Reynolds v. Oneida County Com'rs, 6 Idaho, 787, 59 Pac. 730; Fountain County v. Wood, 35 Ind. 70, overruling Wells County Com'rs v. Weasner, 10 Ind. 259; Potts v. Bennett, 140 Ind. 71, 39 N. E. 518; Myers v. Gibson, 147 Ind. 452, 46 N. E. 914; Huntington County Com'rs v. Beaver, 156 Ind. 450, 60 N. E. 150; Gemmill v. Arthur, 125 Ind. 258. Courts will not ordinarily interfere in the exercise of a power entirely discretionary in its character. Brown v. Lewis, 76 Iowa, 159; In re Inhabitants of Windham, 32 Me. 542; City of Worcester v. Worcester County Com'rs, 167 Mass. 565; Ferguson v. Monroe County Sup'rs, 71 Miss. 524; Washita County Com'rs v. Haines, 4 Okl. 701; Hadlock v. G County Com'rs, 5 Okl. 570, 49 Pac. 1012.

[104] Walsh v. Town Council of Johnston, 18 R. I. 88, 25 Atl. 849. "The appellant claims that the right of appeal is given to him by the provisions of section 35 of said chapter, which is as follows: 'Any person aggrieved by the judgment or decree of a town council may appeal within forty days after the entering up of such judgment or decree, and not thereafter, unless the time of taking such appeal is otherwise provided for by law.' The only question before us for decision, therefore, is whether said last-named section gives a right of appeal from the doings of the defendant town council in the premises. We do not think it does; for while said section if considered by itself seems to confer the right of appeal from any judgment or decree of a town council by which any person may be aggrieved, yet, when taken as it must be, in construing the same, in connection with what precedes it, in the same chapter, and also with the other and more specific provisions of the statutes relating to appeals from the doings of town councils, it is evident that it was not intended to confer the right of appeal but merely to fix a limitation of time within which such right, which is elsewhere specifically given, could be exercised. * * * So that in all cases where a right of appeal is conferred, and no special time is given within which it may be exercised, the limitation here fixed controls. This construction is further manifest from the fact that the section of the statute now under consideration, while perhaps seeming to give a right of appeal, does not designate the court to which such appeal must be taken. And the mere giving of the right of appeal without designating the

the use of ordinary methods afforded private litigants.[105] The powers of a legislative body are necessarily large and complete, but this does not authorize an invasion of rights inherent in themselves or guaranteed by constitutional provisions.[106] Whatever action sets in motion corrective proceedings, it must be taken in the time and in the manner limited or fixed by law. One guilty of laches should not be permitted to complain.

§ 513. Municipal legislation.

As already stated, the legislative branch of the sovereign power alone is competent and authorized to take valid legislative action. The only bodies possessing this power are the state legislatures or assemblies and the New England town meeting. State legislatures have usually delegated municipal councils, or some body similar, the power to legislate with reference to those local matters which concern alone a municipality.[107] This delegation of

court to which it may be taken would be a nullity as it would fail to confer jurisdiction of the case upon any court whatsoever. An appeal is a purely statutory right and lies only in cases where the statute expressly provides for it and only to the court upon which jurisdiction is expressly conferred."

[105] Catron v. Archuleta County Com'rs, 18 Colo. 553; Campbell v. Canyon County Com'rs, 5 Idaho, 53, 46 Pac. 1022; Ravenscraft v. Blaine County Com'rs, 5 Idaho, 178, 47 Pac. 942; Wisenand v. Belle, 154 Ind. 38. The appeal is not perfected until provisions in respect to a transcript of the proceedings before the board or county commissioners have been complied with. Hoffman v. Gallatin County Com'rs, 18 Mont. 224; In re Merrill, 55 Hun, 611, 8 N. Y. Supp. 737; Siggins v. Com., 85 Pa. 278; Walsh v. Town Council of Johnston, 18 R. I. 88, 25 Atl. 849; Shelburn v. Eldridge, 10 Vt. 123.

[106] Spring Valley Waterworks v. Bartlett, 16 Fed. 615; Des Moines Gas Co. v. City of Des Moines, 44 Iowa, 505; Tennant v. Crocker, 85 Mich. 328, 48 N. W. 577; State v. Albright, 20 N. J. Law (Spencer) 644; Danforth v. City of Paterson, 34 N. J. Law, 163; People v. Sturtevant, 9 N. Y. (5 Seld.) 263; Public Ledger Co. v. City of Memphis, 93 Tenn. 77; Trading Stamp Co. v. City of Memphis, 101 Tenn. 181; State v. Milwaukee County Superior Ct., 105 Wis. 651, 48 L. R. A. 819.

[107] Ex parte Burnett, 30 Ala. 461; City of Peoria v. Calhoun, 29 Ill. 317; Keim v. City of Chicago, 46 Ill. App. 445; Covington v. City of East St. Louis, 78 Ill. 548; Fuller v. Heath, 89 Ill. 296; Des Moines Gas Co. v. City of Des Moines, 44 Iowa, 505; Avery v. Police Jury, 12 La. Ann. 554; Horn v. People, 26 Mich. 221. Protection to private property from encroachment must be afforded by the laws of the state. A city has no power to pass ordinances of such a character. State v. Clark, 28 N. H. 176; State v.

power is apparently an exception to the rule which universally obtains that legislative powers cannot be delegated for their performance to others. They involve the exercise of judgment and discretion and powers or duties having these qualities for their essential characteristic are not capable of delegation.[108]

A municipal council possessing, however, the power to legislate for those within its jurisdiction, must necessarily act in the same manner under the same conditions, and controlled by the same general principles of law and the special restrictions that may exist for its prototype, the legislative body of the state or nation.[109]

Noyes, 30 N. H. 279; Clarke v. City of Rochester, 28 N. Y. 605; State v. Williams, 11 S. C. 288.

[108] See the following cases with many others holding that in the exercise of such discretionary powers in the absence of fraud or a gross and wanton abuse of the power, courts will not ordinarily interfere. Shoemaker v. United States, 147 U. S. 282; Kelly v. City of Winnepeg, 12 Manitoba, 87. Municipal discretion as to amount of wages paid laborers on public works will not be interfered with in the absence of fraud or improper motive. Burckhardt v. City of Atlanta, 103 Ga. 302. Municipal discretion in repairing streets. Bacon v. City of Savannah, 105 Ga. 62. Question of necessity of street improvement. Chicago General R. Co. v. City of Chicago, 176 Ill. 253; Church v. People, 179 Ill. 205. Extent of public improvement. Dewey v. City of Des Moines, 101 Iowa, 416. Necessity for public improvement. Soden v. City of Emporia, 7 Kan. App. 583, 52 Pac. 461; Sprigg v. Town of Garrett Park, 89 Md. 406, 43 Atl. 813; State v. Cornell, 53 Neb. 556, 39 L. R. A. 513; McGovern v. Inhabitants of Trenton, 60 N. J. Law, 402. Municipal determination of contractor's ability to fulfil contract in the absence of bad faith will not be reviewed by the courts. Wilson v. Inhabitants of Trenton, 61 N. J. Law, 599, 44 L. R. A. 540; Apex Transp. Co. v. Garbade, 32 Or. 582; Beazley v. Kennedy (Tenn. Ch. App.) 52 S. W. 791; Ogden City v. Crossman, 17 Utah, 66.

[109] City of Savannah v. Hussey, 21 Ga. 80, 68 Am. Dec. 452; City of St. Paul v. Briggs, 85 Minn. 290, 88 N. W. 984. "Among the powers conferred upon the common council of the city of St. Paul by its home rule charter we find the following: 'To define, restrain, regulate and license husksters, peddlers, porters, runners, agents and solicitors for common carriers, hotels, public houses, express companies or other establishments.' Under this power the ordinance in question was enacted, the material portion of which is as follows: 'Every person who shall sell or offer for sale, any goods, wares, fruits, nuts, candies, groceries, provisions, vegetables or article of value, or barter or exchange the same at any public place within the city of St. Paul other than upon the land owned or rented by such person, or at a store kept by said person or at a stand at one of the public markets, shall be deemed, called and known as a peddler,' etc.

Its enactments are laws in all their essential characteristics but

The offense of peddling or the term 'peddler,' as defined by the ordinance, is much broader and more comprehensive than any of the definitions given by the lexicographers or found in any of the adjudicated cases. A peddler within the generally accepted meaning of the word is a small retail dealer who carries his merchandise with him, travelling from place to place, and from house to house, exposing his goods for sale and selling them. It is said in 34 Am. Law Reg. 569, in an article relating to this subject that there are four elements required to constitute a peddler, namely: (1) That he should have no fixed place of dealing, but should travel around from place to place; (2) that he should carry with him the wares he offers for sale, not merely samples thereof; (3) that he should sell them at the time he offers them, not merely enter into an executory contract for future sale; and (4) that he should deliver them then and there, not merely contract to deliver them in the future. To these should be added a fifth, to the effect that the sales made by him should be to consumers and not confined exclusively to dealers in the articles sold by him. * * * The only question for determination in the case at bar is whether under the authority to define the offense of peddling, the ordinance under consideration going as it does far beyond the ordinary definition is valid. It is contended by the prosecution that because of the fact that the city is empowered by its charter to define the offense, definitions by lexicographers and others are irrelevant, and not controlling, and that the city had power to adopt a definition or meaning within such limits as its council deemed wise and proper. We are unable to adopt this contention. The charter of the city, it is true, authorizes the council to define and restrain peddlers, porters and others, but it is clear that the power to define the offense must be confined within reasonable bounds, and limited to the generally accepted meaning and scope of the law relating to that subject. It is a rule of general application that the authority given municipal corporations to enact ordinances must be construed strictly and this rule should apply with special force to cities authorized to form and adopt their own charters. If a city organizing under the constitutional amendment empowering cities to form their own charters may assume and clothe itself with power to define crimes and misdemeanors, it may extend and enlarge the criminal laws of the state to suit the notions of its council. There must, in the nature of things, be some limitation upon such authority; if not, confusion may result. Under authority to define peddling, the ordinances of one city might be entirely different from those of another. What would constitute peddling in St. Paul might not in Minneapolis or in Duluth. It could not well be said that if a city was authorized to define petit larceny it could go beyond in doing so, the definition of the offense as known to the law generally. The exercise by municipal corporations of the delegated power to enact ordinances must, therefore, be confined within the general principles of the law applicable to the subject of such or-

limited in operation only with respect to territory.[110] Having in mind these general principles, from which and along which this local legislative action proceeds, the result of its action may be briefly considered.

§ 514. Ordinances.

The result of legislative action by a municipal council or assembly is a local law usually denominated an ordinance. This has been defined as "local law prescribing a general and permanent rule of conduct."[111] "An ordinance is the law of the inhabitants of the municipality" is another definition given.[112] A recent text book writer[113] defines ordinances as "local laws of a municipal corporation duly enacted by the proper authorities prescribing

dinances. Any other rule would confer upon municipal authorities greater power than was intended they should possess." Mays v. City of Cincinnati, 1 Ohio St. 268.

[110] Pittsburg, C. & St. L. R. Co. v. Hood, 94 Fed. 618; Murphy v. City of San Luis Obispo, 119 Cal. 624, 39 L. R. A. 444; State v. Tryon, 39 Conn. 183; Perdue v. Ellis, 18 Ga. 586; Robb v. City of Indianapolis, 38 Ind. 49; City of Detroit v. Ft. Wayne & B. I. R. Co., 95 Mich. 456, 20 L. R. A. 79; Bott v. Pratt, 33 Minn. 323; Jackson v. Grand Ave. R. Co., 118 Mo. 199; State v. Clarke, 25 N. J. Law (1 Dutch.) 54. "The charter of the city confers upon its inhabitants the special franchise of making its own laws in regard to the opening of streets within its territorial limits. So far as it extends it is a grant of sovereignty, a delegation of a part of the sovereign power of making laws. It is, in its essential character, exclusive. Doubtless the legislature may, at its pleasure, revoke the power or limit its exercise. It may repeal the charter or extend the operation of general laws, by express terms, over the city; but until that is done, while the power of legislation upon a given subject remains in the city government, and is exercised in accordance with the charter, those laws must prevail to the exclusion of the general laws of the state, where they are inconsistent or repugnant." Bradshaw v. City Council of Camden, 39 N. J. Law, 416; Jones v. Firemen's Fund Ins. Co., 2 Daly (N. Y.) 307; Griffin v. City of Gloversville, 67 App. Div. 403, 73 N. Y. Supp. 684; Village of Carthage v. Frederick, 122 N. Y. 268, 10 L. R. A. 178; Kennedy v. Sowden, 1 McMul. (S. C.) 323; State v. Soragan, 40 Vt. 450. Not being public laws of general character, city ordinances must be especially pleaded in an indictment. Village of St. Johnsbury v. Thompson, 59 Vt. 300.

[111] Citizens' Gas & Min. Co. v. Town of Elwood, 114 Ind. 332; Bills v. City of Goshen, 117 Ind. 221, 3 L. R. A. 261; Blanchard v. Bissell, 11 Ohio St. 96; Robinson v. Town of Franklin, 20 Tenn. (1 Humph.) 156, 34 Am. Dec. 625.

[112] Mason v. City of Shawneetown, 77 Ill. 533, 537.

[113] McQuillin, Mun. Ord.

general, uniform and permanent rules of conduct relating to the corporate affairs of the municipality." And another leading text book writer on the subject[114] has said, "Acording to Lord Coke, the word 'by' or 'bye' signifies a habitation; and thence a by-law in England, and a by-law or ordinance in this country, may be defined to be the law of the inhabitants of the corporate place or district made by themselves or the authorized body in distinction from the general law of the country or the statute law of the particular state." In the notes will be found reference to many cases discussing and defining the nature of an ordinance or by-law. The law, however, is well established at the present time that gives to such legislative action the qualities and the characteristics stated in the definitions given.[115]

§ 515. Resolutions.

The corporate legislative body of a municipality can legally deal only with local concerns. It has no power to pass or adopt measures which affect generally property or personal interests within a state. This follows first because of the inherent limitations upon legislative bodies and sovereign powers that only the territory, the persons and property within their physical jurisdiction, can be regulated, controlled or affected by their acts, sovereign or delegated,[116] and second because the municipal body is

[114] Dillon, Mun. Corp. (4th ed.) § 307.

[115] City of Walla Walla v. Walla Walla Water Co., 172 U. S. 1; National Bank of Commerce v. Town of Grenada, 44 Fed. 262; City of Oakland v. Oakland Water Front Co., 118 Cal. 160; State v. Swindell, 146 Ind. 527; Bills v. City of Goshen, 117 Ind. 221, 3 L. R. A. 261; State v. Omaha & C. B. R. & B. Co., 113 Iowa, 30, 52 L. R. A. 315; Taylor v. Common Council of Lambertville, 43 N. J. Eq. (16 Stew.) 107; Jones v. Firemen's Fund Ins. Co., 2 Daly (N. Y.) 307; Kepner v. Com., 40 Pa. 124; Farnsworth v. Town Council of Pawtucket, 13 R. I. 82; Robinson v. Town of Franklin, 20 Tenn. (1 Humph.) 156. See, also, McQuillin, Mun. Ord. note on page 3 giving various uses of the term "Ordinance."

[116] City of South Pasadena v. Los Angeles Terminal R. Co., 109 Cal. 315; Taylor v. City of Americus, 39 Ga. 59; Covington v. City of East St. Louis, 78 Ill. 548; Horney v. Sloan, 1 Ind. 266; Gosselink v. Campbell, 4 Iowa, 296; Des Moines Gas Co. v. City of Des Moines, 44 Iowa, 505; Reed v. People, 1 Park. Cr. R. (N. Y.) 481; Jones v. Firemen's Fund Ins. Co., 2 Daly (N. Y.) 307; Salisbury Com'rs v. Powe, 51 N. C. (6 Jones) 134; Whitfield v. Longest, 28 N. C. (6 Ired.) 268. But an ordinance will apply to non-

itself a subordinate agent of some sovereign and is, therefore, still further restricted in its power to legislate even with respect to local concerns.[117] In common with all legislative bodies, action of municipal councils may pertain or relate to questions or subjects of a permanent or general character,[118] and those which are temporary or restricted in their operation and effect.[119] An ordinance is the result of legislative action of the former kind while a resolution is usually the form that legislative action of the latter class assumes. It may be, however, that the term resolution is the one which is applied to the permanent legislative action of a municipal body and it follows that in such cases this distinction will not apply,[120] or it may be also true that the power can be exercised in the alternative.[121]

§ 516. Resolutions continued.

Continuing a discussion of the distinction between an ordinance and a resolution, a resolution has been defined as follows: "An ordinance prescribes a permanent rule of conduct or government while a resolution is of a temporary character only; it may be stated as a general rule that matters upon which the municipal corporation desires to legislate must be put in the form of an ordinance while all acts that are done to its ministerial capacity and for a temporary purpose may be put in the form of resolu-

residents temporarily within the limits of a town. State v. Williams, 11 S. C. 288.

[117] El Paso Gas, Elec. Light & Power Co. v. City of El Paso, 22 Tex. Civ. App. 312.

[118] City of Central v. Sears, 2 Colo. 588; Chicago & N. P. R. Co. v. City of Chicago, 174 Ill. 439; Village of Altamont v. Baltimore & O. S. W. R. Co., 184 Ill. 47; Cambell v. City of Cincinnati, 49 Ohio St. 463, 31 N. E. 606.

[119] State v. Ferguson, 33 N. H. 424.

[120] City of Cape Girardeau v. Fougeu, 30 Mo. App. 551; City of Paterson v. Barnet, 46 N. J. Law, 62; Kepner v. Com., 40 Pa. 124.

[121] Board of Education of Atchison v. De Kay, 148 U. S. 591; Crebs v. City of Lebanon, 98 Fed. 549; Arkadelphia Lumber Co. v. City of Arkadelphia, 56 Ark. 370; Creighton v. Manson, 27 Cal. 613; Pollok v. City of San Diego, 118 Cal. 593; City of Quincy v. Chicago, B. & Q. R. Co., 92 Ill. 21; City of Crawfordsville v. Branden, 130 Ind. 149, 14 L. R. A. 268; Merchants' Union Barb Wire Co. v. Chicago, B. & Q. R. Co., 70 Iowa, 105. A railroad right of way may be granted in a street by either resolution or ordinance. Gleason v. Barnett, 22 Ky. L. R. 1660, 61 S. W. 20; City of Springfield v. Knott, 49 Mo. App. 612; McGavock v. City of Omaha, 40 Neb. 64; Lincoln St. R. Co. v. City of Lincoln, 61 Neb. 109; Green

tions.''[122] The nature or character of the action may thus determine whether it should be denominated a resolution or an ordinance or, stated in another way, the character of the act considered from the standpoint of time or effect may determine whether it should be put into force through the passage of an ordinance or the adoption of a resolution.[123] The charter of the municipal corporation again may determine the necessity for the municipal council to enact either an ordinance or adopt a resolution; for it may provide that certain local action can only be taken through the adoption of a resolution while other, more important in its character and farther reaching in its effects, can only be accomplished through the passage of an ordinance.[124]

Further distinctions. Where the two methods of taking legislative action can be legally followed, the resolution, ordinarily, is adopted with less formality, and, in a determination of its legal effects, laws are considered less strictly than where an ordinance is the method followed.[125] The ordinance is considered a formal law and all of the formalities prescribed by the charter

v. City of Cape May, 41 N. J. Law, 45; City of Burlington v. Dennison, 42 N. J. Law, 165; Butler v. City of Passaic, 44 N. J. Law, 171; Brady v. City of Bayonne, 57 N. J. Law, 379, Babcock v. Scranton, 1 Lack. Leg. N. (Pa.) 223; City of San Antonio v. Micklejohn, 89 Tex. 79.

[122] City of Cape Girardeau v. Fougeu, 30 Mo. App. 551; City of Paterson v. Barnet, 46 N. J. Law, 62; Kepner v. Com., 40 Pa. 124.

[123] Arkadelphia Lumber Co. v. City of Arkadelphia, 56 Ark. 370; People v. Mount, 186 Ill. 560; Bergen Neck R. Co. v. City of Bayonne, 54 N. J. Law, 474; Avis v. Borough of Vineland, 55 N. J. Law, 285; Campbell v. City of Cincinnati, 49 Ohio St. 463, 31 N. E. 606.

[124] Pimental v. City of San Francisco, 21 Cal. 351; State v. Tryon, 39 Conn. 183; Bearden v. City of Madison, 73 Ga. 184; Backhaus v. People, 87 Ill. App. 173. An ordinance cannot be repealed by the passage of a resolution. People v. Village of Crotty, 93 Ill. 180; City of Anderson v. O'Conner, 98 Ind. 168; City of Crawfordsville v. Braden, 130 Ind. 149, 14 L. R. A. 268; Newman v. City of Emporia, 32 Kan. 456; City of Cape Girardeau v. Fougeu, 30 Mo. App. 551; Hisey v. City of Charleston, 62 Mo. App. 381; City of Westport v. Mastin, 62 Mo. App. 647; Eichenlaub v. City of St. Joseph, 113 Mo. 395, 18 L. R. A. 590; City of Nevada v. Eddy, 123 Mo. 546; Avis v. Borough of Vineland, 55 N. J. Law, 285, 26 Atl. 149; City of Paterson v. Barnet, 46 N. J. Law, 62; City of San Antonio v. Micklejohn, 89 Tex. 79; Mills v. City of San Antonio, (Tex. Civ. App.) 65 S. W. 1121.

[125] City of Central v. Sears, 2 Colo. 588; Green v. City of Cape May, 41 N. J. Law, 45; City of Burlington v. Dennison, 42 N. J. Law, 165.

or the general laws must be followed in its passage,[126] and in its construction and interpretation those principles control that are applied in the determination of the legality of legislative acts of higher bodies.

§ 517. Ordinances; when necessary.

A municipal corporation proper is, to a certain extent, a diminutive state. It is an organization possessing the power of taking action in respect to its own local wants and its local affairs in which the state at large is neither interested nor concerned. In this regard the corporation possesses a quasi power of initiating action looking to the satisfaction of such needs or the management and control of such matters. It is, however, but one of many subordinate agencies which a state may have created for exercising its own governmental powers and, therefore, as a subordinate agent it is subject to those rules of conduct laid down by its superior.[127] Action, therefore, which has for its purpose the accomplishment of these results, is necessarily through the enactment of ordinances and in this manner only will action when taken be considered valid.[128]

As suggested, a municipal corporation is regarded as a subordinate agent of government and in the exercise of all its powers or the performance of any duties which may be imposed upon it, this character is not disregarded or cannot be ignored. The sole

[126] City of Alma v. Guaranty Sav. Bank, 19 U. S. App. 622; Gleason v. Barnett, 22 Ky. L. R. 1660, 61 S. W. 20; First Municipality v. Cutting, 4 La. Ann. 336; Kerlin Bros. Co. v. City of Toledo, 20 Ohio Circ. R. 603; Elyria Gas & Water Co. v. City of Elyria, 57 Ohio St. 374. But if a resolution is of a general and permanent nature, the same formalities must be followed as in the passage of an ordinance proper. Sower v. City of Philadelphia, 35 Pa. 231; City of Green Bay v. Brauns, 50 Wis. 204.

[127] New Orleans Waterworks Co. v. City of New Orleans, 164 U. S. 471. The power to enact by-laws as delegated to the city by the sovereign power and the exercise of the authority gives to such enactments the same force and effect as if they had been passed directly by the legislature, they are public laws of a limited and local operation designed to secure good order for the welfare and comfort of the inhabitants. Taylor v. City of Carondelet, 22 Mo. 105; State v. De Bar, 58 Mo. 395; Moore v. City of Cape Girardeau, 103 Mo. 476; City of Corvallis v. Carlile, 10 Or. 139, 4 Am. Rep. 134; Southwark Com'rs v. Neil, 3 Yeates (Pa.) 54.

[128] City of Baltimore v. Porter, 18 Md. 284; Town of Trenton v. Clayton, 50 Mo. App. 535.

end of government and all its agencies is the public good and not the advancement of any private interests.[129] A municipal corporation, therefore, is regarded not only as an agency of government but also as an agency having for its object the public welfare. All of its powers, rights and franchises are to be exercised and its property used for the public benefit and its officers and employes as well as itself in a corporate capacity are trustees for the public.[130]

Although possessing limited original powers of action in respect to local needs, the fact cannot be forgotten that it is simply an agency of government and that the exercise of certain governmental functions have been, for convenience, delegated to it. These powers thus delegated must be exercised by the municipal corporation through action of its legislative body. It cannot in turn delegate to other bodies or to individuals the performance of such duties or the exercise of such powers.[131]

[129] City of Baltimore v. Hughes' Adm'r, 1 Gill. & J. (Md.) 480; State v. Ferguson, 33 N. H. 424.

[130] Illinois Cent. R. Co. v. Illinois, 146 U. S. 387. In the opinion written by Justice Field, the court here said "The state can no more abdicate its trust over property in which the whole people are interested * * * so as to leave them entirely under the use and control of private parties * * * than it can abdicate its police powers in the administration of government and the preservation of the peace." State v. Graves, 19 Md. 351; Cummings v. City of St. Louis, 90 Mo. 259; Chicago, S. F. & C. R. Co. v. McGrew, 104 Mo. 59; Belcher Sugar Refining Co. v. St. Louis Grain Elevator Co., 101 Mo. 192, 8 L. R. A. 801; Strong v. City of Brooklyn, 68 N. Y. 1.

[131] Walsh v. City of Denver, 11 Colo. App. 523, 53 Pac. 458; McGregor v. Village of Lovington, 48 Ill. App. 211; Foss v. City of Chicago, 56 Ill. 354. Where the charter vests in the city council a discretion to determine the manner and extent of certain local improvements, an ordinance vesting the same power in a board of public works is void.

Gross v. People, 172 Ill. 571. An ordinance providing that a street shall be graded according to the profiles established by and under the direction of the city engineer is not a delegation of a discretionary power resting in the city council.

DeWitt County v. City of Clinton, 194 Ill. 521; City of Plymouth v. Schultheis, 135 Ind. 339, 35 N. E. 12; Chilson v. Wilson, 38 Mich. 267. Where the power to grade a street is vested in a municipal council, this cannot be delegated by them to a street committee with discretionary powers.

City of St. Louis v. Russell, 116 Mo. 248, 22 S. W. 470, 20 L. R. A. 721. Where it is proposed to erect a livery stable, a municipal council cannot delegate the power to grant or refuse permission to the

It is impossible, considering the nature of a municipal corporation, that it have granted to it any powers or privileges that have for their purpose one other than a public one.[132] Legislative attempts to accomplish this are futile, whether made by a legislative assembly of the state or a municipal council.[133] Neither in its capacity as a public agent of the government can a municipal corporation engage in a commercial or manufacturing business that involves the elements of profit and loss.[134]

§ 518. Power to pass.

A discussion of the subject involves, to some extent, a review of the doctrine of express and implied powers as belonging to public corporations. These which include municipal bodies are mere agents of a government organized for the better physical, material and moral welfare of the people. To the outward form of government and the agencies created under it are given by the people the right to exercise, in the manner prescribed, specific powers,[135] and there follows from the grant of these specific powers the implied right to adopt those agencies or to exercise such

owners of property in the block in which it is to be erected. Kansas City v. Mastin, 169 Mo. 80, 68 S. W. 1037; Thompson v. Schermerhorn, 6 N. Y. (2 Seld.) 92; Batsel v. Blaine (Tex. App.) 15 S. W. 283. But where a city marshal is directed to establish public pounds this is not regarded such a delegation of the authority granted by the statute as to invalidate the ordinance. City of Eureka v. Wilson, 15 Utah, 53; State v. Dering, 84 Wis. 585, 19 L. R. A. 858. See, also, Joyce, Elec. Law, § 236.

[132] Ex parte Byrd, 84 Ala. 17; City & Suburban R. Co. v. City of Savannah, 77 Ga. 731; O'Malley v. Borough of Freeport, 96 Pa. 24. See, also, §§ 1 et seq.

[133] Town of Greensboro v. Ehrenreich, 80 Ala. 579; Ex parte Chin Yan, 60 Cal. 78; City of Chicago v. Rumpff, 45 Ill. 90.

[134] City of Nashville v. Ray, 86 U. S. (19 Wall.) 468; City of Wetumpka v. Wetumpka Wharf Co., 63 Ala. 611. Here the court said in part "Private gain, trading, speculation or the derivation of pecuniary profit are not purposes or objects within the contemplation of the charter and no powers are conferred to stimulate, encourage or advance such purposes further than the incidental encouragement and advancement which may follow a prudent exercise of the powers of local government." Cook v. Johnston, 58 Mich. 437.

[135] Steinmetz v. Town of Versailles, 40 Ind. 249; State v. Fourcade, 45 La. Ann. 717; People v. Armstrong, 73 Mich. 288; Aurora Water Co. v. City of Aurora, 129 Mo. 540, 31 S. W. 946; Tanner v. Trustees of Albion, 5 Hill (N. Y.) 121. See, also, §§ 108 et seq., ante.

other powers as are absolutely necessary to carry into effect those expressly granted.[136] The grant of powers, however, is usually construed strictly.[137]

The existence, however, of certain public corporations is recognized and the truth that they are organized for certain specific purposes in connection with the sole end and aim of government. The fact and the purpose of existence is, therefore, made the basis by some cases of holding that certain implied powers are possessed by these agencies of government in order that the results for which they were created may not be lessened, lost or destroyed.[138]

(a) When exercised. The power to pass an ordinance depends, therefore, upon the legal capacity of the corporation to deal with the subject or question involved in the ordinance. All legislative action of a municipal corporation originates in the municipal council, and an ordinance or resolution is the visible manifestation or outward form of such action.[139] It is unnecessary here to repeat the general principles which control public corporations including municipal in the exercise of powers relating to the making of contracts,[140] the incurring of debts,[141] the issuing of bonds and negotiable securities,[142] the collection and disbursement of public moneys,[143] the exercise of the police power,[144] the acquirement and control of public property which in-

[136] Littlefield v. State, 42 Neb. 223, 28 L. R. A. 588; Taintor v. Town of Morristown, 33 N. J. Law, 57. The power of making by-laws belongs to a corporation by implication. Farnsworth v. Town Council of Pawtucket, 13 R. I. 83; Town of Sumter v. Deschamps, 4 S. C. (4 Rich.) 297. See, also, §§ 108 et seq., ante.

[137] State v. Tryon, 39 Conn. 183; City of Keokuk v. Scroggs, 39 Iowa, 447; Denning v. Yount, 62 Kan. 217.

[138] City of Mobile v. Yuille, 3 Ala. 137, 36 Am. Dec. 441; City of Alton v. Aetna Ins. Co., 82 Ill. 45. But acts not fully within the powers conferred on a city by statute are ultra vires. City of Crawfordsville v. Braden, 130 Ind. 149, 14 L. R. A. 268; Champer v. City of Greencastle, 138 Ind. 339, 24 L. R. A. 768; Meyers v. Chicago, R. I. & P. R. Co., 57 Iowa, 555; Burg v. Chicago, R. I. & P. R. Co., 90 Iowa, 106; State v. Robertson, 45 La. Ann. 954; State v. Morris, 47 La. Ann. 1660; People v. Common Council of Detroit, 29 Mich. 108; Drake v. Hudson River R. Co., 7 Barb. (N. Y.) 508; Farnsworth v. Town Council of Pawtucket, 13 R. I. 83.

[139] City of St. Louis v. Bell Tel. Co., 96 Mo. 623, 2 L. R. A. 278.

[140] See §§ 246–299, ante.

[141] See §§ 140–168, ante.

[142] See §§ 169–217, ante.

[143] See c. VI. Fuller v. Heath, 89 Ill. 296.

[144] See §§ 115–139, ante, 32 Am. &

cludes its use and disposal,[145] and the management and control of public offices, officials and employes.[146] All these have been or will be considered fully in the chapters and sections referred to. Additional cases, however, will be found under the appropriate titles in succeeding sections.[147] The exercise of many municipal powers, especially those pertaining to local necessities or demands, is left by the state, largely, to the discretion of the subordinate corporation, and this is true whether such powers and duties are legislative or ministerial in their character.[148] The making of local improvements belongs to this class, and municipal corporations may exercise or refrain from exercising their granted powers in respect to these without interference.[149] The power always exists,

Eng. Corp. Cas. notes 354–459; City of Newport v. Newport & C. Bridge Co., 90 Ky. 183, 13 S. W. 720, 8 L. R. A. 484.

[145] See post, c. IX.

[146] See post, c. VIII.

[147] State v. Johnson, 17 Ark. 407. The power granted of the establishing of a tribunal for the trial of contested municipal elections.

[148] Union Pac. R. Co. v. City of Cheyenne, 113 U. S. 516; State v. Swearingen, 12 Ga. 23. "These municipal corporations are the germs and minature models of free government; and their internal police and administration should not be interfered with for slight causes nor unless some great right has been withheld or wrong perpetrated,"

City of Chicago v. McKechney, 91 Ill. App. 442; Des Moines Gas Co. v. City of Des Moines, 44 Iowa, 505; Moses v. Risdon, 46 Iowa, 251. "In the absence of actual fraud, courts cannot interfere with the judgment and discretion of city councils in determining what are and what are not suitable rooms for the purposes of the city and its officers." Evansville, I. & C. S. L. R. Co. v. City of Evansville, 15 Ind. 395; Asher v. Hutchinson Water, Light & Power Co., 66 Kan. 496, 71 Pac. 813, 61 L. R. A. 52; Spaulding v. City of Lowell, 40 Mass. (23 Pick.) 71; City of St. Louis v. Boffinger, 19 Mo. 15; Lincoln St. R. v. City of Lincoln, 61 Neb. 109; Poillon v. City of Brooklyn, 101 N. Y. 132.

[149] Goodrich v. City of Chicago, 20 Ill. 445; Sheridan v. Colvin, 78 Ill. 237; City of Richmond v. McGirr, 78 Ind. 192; Kitchel v. Union County Com'rs, 123 Ind. 540; Fulton v. Cummings, 132 Ind. 453; City of Topeka v. Huntoon, 46 Kan. 634; Inhabitants of Melpomene St. v. City of New Orleans, 14 La. Ann. 452. "The city as a corporation has control over the public places and highways within its bounds and it is the province of the corporation and not of a judicial tribunal to determine what improvements shall be made in the streets and canals of the city." Hovey v. Mayo, 43 Me. 322; Farrar v. City of St. Louis, 80 Mo. 379; Teegarden v. City of Racine, 56 Wis. 545; Horton v. City of Nashville, 72 Tenn. (4 Lea) 39. See, also, cases cited note 108, § 513, ante.

however, in the judiciary to redress wrongs, compensate injuries sustained and correct mistakes made or done by public corporations even in the exercise of discretionary and legislative powers.[150]

(b) Where found. The power to pass ordinances, except in special and exceptional instances, may be found in the Constitution of the state,[151] general or special statutes relating to or granting specific powers or dealing with specific questions[152] and, finally, the charter of the particular municipality.[153] In this instrument will be found most commonly and frequently the grants of power to the municipal corporation

§ 519. The power to pass peace ordinances, so called.

A municipal corporation being a petty state and having for its purpose the better government of the people within its boundaries may, in the exercise of its governmental and police powers, pass ordinances defining or establishing certain acts or conditions as offenses against the peace, the good order and the welfare of

[150] Union Pac. R. Co. v. City of Cheyenne, 113 U. S. 516. Illegal tax. Dunham v. Village of Hyde Park, 75 Ill. 371; Brush v. City of Carbondale, 78 Ill. 74; Regenstein v. City of Atlanta, 98 Ga. 147; City of Valparaiso v. Gardner, 97 Ind. 1; City of Vincennes v. Citizens' Gaslight Co., 132 Ind. 114, 16 L. R. A. 485; Slack v. Maysville & L. R. Co., 52 Ky. (13 B. Mon.) 1; State v. District Court, 33 Minn. 295; Morse v. City of Westport, 136 Mo. 276; Cape May & S. L. R. Co. v. City of Cape May, 35 N. J. Eq. (8 Stew.) 419; Babcock v. City of Buffalo, 56 N. Y. 268; Sitzinger v. Tamaqua, 187 Pa. 539; Kelley v. City of Milwaukee, 18 Wis. 83.

Pieri v. Town of Shieldsboro, 42 Miss. 493, where it is held that municipal authorities cannot through an arbitrary ordinance, destroy private property by force or compel the owner to destroy or remove it.

[151] Foster v. Police Com'rs, 102 Cal. 483. Where the power is found in the constitution it obviates all necessity for any other authority. State v. Fourcade, 45 La. Ann. 717; State v. Noyes, 30 N. H. 279; Tanner v. Trustees of Albion, 5 Hill (N. Y.) 121.

[152] Crofut v. City of Danbury, 65 Conn. 294. An unauthorized ordinance cannot be made valid by any action of a city. Lane v. City of Concord, 70 N. H. 485, 49 Atl. 687.

[153] Culbertson v. The Southern Belle, Newb. Adm. 461, Fed. Cas. No. 3,462; City of El Dorado v. Beardsley, 53 Kan. 363; Remy v. Municipality No. 2, 15 La. Ann. 657; Landis v. Borough of Vineland, 54 N. J. Law, 75, 23 Atl. 357; City Council of Charleston v. Seeba, 4 Strob, (S. C.) 319; Milliken v. City Council of Weatherford, 54 Tex. 388. Disorderly houses. Ex parte Powell, 43 Tex. Cr. R. 391, 66 S. W. 298. Gambling houses, lotteries and pool rooms. City of Janes-

the community.[154] It may establish and enforce, in other words as it were, a complete criminal code defining and punishing petty offenses. Such power is usually an express one and must be found in some specific provision of the general laws.[155] In common with other ordinances, their legality is determined by the tests to be suggested in the following sections.[156] The power to pass them is usually limited by the provision that they must not conflict with general statutes or deal with acts made crimes or misdemeanors by the general laws.[157]

§ 520. Limitations upon this power.

Without now giving the restrictions upon the power to pass or enact ordinances that are found in rules controlling their passage or determining their validity in respect to other matters, the limitations which exist upon the power to pass an ordinance are either express or implied. They may be found either in the instrument, the source of power and authority,[158] or in the implied authority of the judicial branch of the sovereign power to pass upon and determine the validity[159] of all legislative action, and in

ville v. Milwaukee & M. R. Co., 7 Wis. 484; City of Green Bay v. Brauns, 50 Wis. 204.

[154] City of Talladega v. Fitzpatrick, 133 Ala. 613, 32 So. 252. Disturbing a religious assembly. Amboy v. Sleeper, 31 Ill. 499; City of Burlington v. Stockwell, 5 Kan. App. 569, 47 Pac. 988; Kansas City v. White, 69 Mo. 26; Lane v. City of Concord, 70 N. H. 485, 49 Atl. 687; Melick v. Inhabitants of Washington, 47 N. J. Law, 254; Pennsylvania R. Co. v. Jersey City, 47 N. J. Law, 286; Cox v. Special Sessions, 7 Hun (N. Y.) 214. The power to pass ordinances concerning the health of the city may be delegated by the legislature to the board of health.

[155] City of Owensboro v. Sparks, 18 Ky. L. R. 269, 36 S. W. 4; State v. Hammond, 40 Minn. 43; State v. Clay, 118 N. C. 1234, 24 S. E. 492; City of Portland v. Schmidt. 13 Or. 17; Judy v. Lashley, 50 W. Va. 628, 41 S. E. 197, 57 L. R. A. 413; Village of Platteville v. McKernan, 54 Wis. 487.

[156] McInerney v. City of Denver, 17 Colo. 302; State v. Kirkley, 29 Md. 85.

[157] City of Mobile v. Yuille, 3 Ala. 137; Holt v. City of Birmingham, 111 Ala. 369; Waters v. Leech, 3 Ark. 115; In re Sic, 73 Cal. 142, 14 Pac. 405; Ex parte Kuback, 85 Cal. 274, 9 L. R. A. 482; Phillips v. City of Denver, 19 Colo. 179; Adams v. City of Albany, 29 Ga. 56. But see Polinsky v. People, 11 Hun (N. Y.) 390, and Borough of York v. Forscht, 23 Pa. 391.

[158] Huesing v. City of Rock Island, 128 Ill. 465; City of Keokuk v. Scroggs, 39 Iowa, 447.

[159] New Orleans M. & C. R. Co. v. Dunn, 51 Ala. 128; State v. Swearingen, 12 Ga. 23; Sherlock v. Village of Winnetka, 59 Ill. 389;

exceptional cases to restrain it[160] as warranted by constitutional and statutory provisions. Express limitations may not only be found in the charter of the corporation but also in the general statutes dealing with and controlling municipal corporations and perchance in constitutional provisions classifying them or providing for their government.[161]

The implied power of the courts to determine the legality of legislative action by municipal councils is itself restricted and limited by its character as the judicial arm or branch of the government. A legislative body is one of the three co-ordinate and distinct branches of government and to it is intrusted by the people the sole power of making laws. This involves the exercise of legislative powers which are discretionary in their character and which require for their proper exercise the use of individual judgment. It is a common principle that where an official or an official body is granted powers that partake of these characteristics, that official or official body is free to exercise them without restraint or interference by or an inquiry into of judicial bodies in the absence of fraud or action in excess of authority.[162]

City of Valparaiso v. Gardner, 97 Ind. 1; Holland v. City of Baltimore, 11 Md. 186; City of Frostburg v. Wineland, 98 Md. 239, 56 Atl. 811; Cape May & S. L. R. Co. v. City of Cape May, 35 N. J. Eq. (8 Stew.) 419; Place v. City of Providence, 12 R. I. 1.

[160] Dailey v. City of New Haven, 60 Conn. 314, 14 L. R. A. 69; New Orleans El. R. Co. v. City of New Orleans, 39 La. Ann. 127; Champlin v. City of New York, 3 Paige (N. Y.) 573; Lewis v. Oliver, 4 Abb. Pr. (N. Y.) 121; Whitney v. City of New York, 28 Barb. (N. Y.) 233; People v. Dwyer, 90 N. Y. 402; Smith v. McCarthy, 56 Pa. 359. See, also, cases cited in the following notes.

[161] Ex parte Burnett, 30 Ala. 461; City of Alton v. Aetna Ins. Co., 82 Ill. 45.

[162] Des Moines Gas Co. v. City of Des Moines, 44 Iowa, 505. "The General Assembly is a co-ordinate branch of the state government and so is the law making power of public municipal corporations within the prescribed limits. It is no more competent for the judiciary to interfere with the legislative acts of the one than the other. But the unconstitutional acts of either may be annulled."

Conery v. New Orleans Waterworks Co., 39 La. Ann. 770, 29 Am. & Eng. Corp. Cas. 323; State v. Cozzens, 42 La. Ann. 1069, 46 Am. & Eng. R. Cas. 168; Coulson v. City of Portland, Deady, 481, Fed. Cas. No. 3,275; New Orleans M. & C. R. Co. v. Dunn. 51 Ala. 128; Ex parte Delaney, 43 Cal. 478; Macon Consol. St. R. C. v. City of Macon, 112 Ga. 782, 38 S. E. 60. "The courts will not readily interfere with the governing authorities of a city in the performance of a discretionary act; it is only where it 'has passed

Legislative action of municipal councils is further regulated by the courts through the application of those unwritten rules or canons for the construction and interpretation of statutes which

the boundary of legislative and judicial discretion and is exercising the municipal power arbitrarily to the injury and oppression of the citizens' that judicial interference will be justified."

City of Athens v. Camak, 75 Ga. 429; Burckhardt v. City of Atlanta, 103 Ga. 302. The court here in its opinion say: "The question of improving, repairing, or repaving the streets of Atlanta is left to the discretion of its municipal legislature. It is a well established rule of law that the courts will not interfere with the exercise of such discretion unless the power conferred is exceeded, or fraud is imputed and shown, or there is an arbitrary and unreasonable invasion of private rights. While the state is jealous of her sovereign right of legislation, and while a strict construction will be given any legislative power conferred by her upon one of her communities, yet it should not receive such a narrow interpretation as would result in defeating the very ends for which it was conferred. An incorporated city is a government within a government. It has its own executive, judicial and legislative branches. It is a creature of the state, and can exercise no power that is not derived from its creator. Where legislative power is conferred upon it by the state, it is necessary that a degree of freedom should be allowed in its exercise; otherwise the city would be so hampered in the government of its people as would defeat the very ends of its incorporation. Hence it is that the state courts will never interfere with the free exercise of such rights as are left to the discretion of a corporate authority, unless such authority should go beyond the scope of power delegated, or unless the discretion given should be abused by an arbitrary exercise thereof, and by a plain and unwarranted violation of private rights." Village of Desplaines v. Poyer, 22 Ill. App. 574, affirmed 123 Ill. 348, 14 N. E. 677. But the principle stated in the text does not permit a municipal corporation to pass an ordinance declaring all public picnics a nuisance, irrespective of their character. Handy v. City of New Orleans, 39 La. Ann. 107; In re Inhabitants of Weymouth, 56 Mass. (2 Cush.) 335; City of St. Louis v. Boffinger, 19 Mo. 15; Lockwood v. City of St. Louis, 24 Mo. 20. Sheidley v. Lynch, 95 Mo. 487; Bond v. City of Newark, 19 N. J. Eq. (4 C. E. Green) 376. "All legislative acts or exercise of discretionary powers within their authority are beyond the control of the courts however unwise or impolitic or even when done from corrupt motives or unworthy purposes."

Schumm v. Seymour, 24 N. J. Eq. (9 C. E. Green) 143; Treasurer of Camden v. Mulford, 26 N. J. Law (2 Dutch.) 49; Wiggin v. City of New York, 9 Paige (N. Y.) 16; People v. City of New York, 32 Barb. (N. Y.) 35; Id., 9 Abb. Pr. (N. Y.) 253; Kavanagh v. City of Brooklyn, 38 Barb. (N. Y.) 232; Ex parte City of Albany, 23 Wend. (N. Y.) 277; Satterthwaite v. Beaufort County Com'rs, 76 N. C. 153;

have been formulated as the inevitable result of long experience,[163] and those which exist in written form providing for and controlling the passage and character of legislation.[164]

§ 521. Limitations upon the general power to pass.

Considering now in detail the limitations upon the power of a municipal legislative body to pass ordinances or take legislative action, it will be remembered thoroughly that a municipal corporation is a diminutive state and, as such, possesses certain specific powers accompanying such an organization. The validity of ordinances will depend upon an answer to two general questions: first, have the written and unwritten requirements controlling the enactment of legislation in respect to its verbal and mechanical form and mode of passage been complied with and, second, assuming the affirmative to the first query, is the ordinance valid considered in respect to its subject-matter and general characteristics?

Presumption of validity. The presumption of law exists in favor of right acting and right thinking; this principle in criminal law finds expression in the familiar phrase that one is presumed innocent until he is proven guilty. In corporation law the courts adopt the principle that an act of a corporation is presumed to be within its legal powers until established to the contrary. The burden of proof is upon one who attacks the

Wilson v. Aldermen of Charlotte, 74 N. C. 748; State v. Superior Ct. of Milwaukee County, 105 Wis. 651, 48 L. R. A. 819. The court here say: "The exceptions to the rule would seem to be limited to cases where the governing body of the municipality has no power to act on the particular subject, legislatively, at all; or, where the threatened act is not legislative but purely ministerial or where such body is clothed with certain powers but threatens to go beyond or outside of such powers and thereby invade the property or property rights of the complainant, or where such body threatens to squander or divert some fund or property held by it or some of its officials in trust for its taxpayers and citizens." See, also, cases cited note 108, § 513, and § 518, ante.

[163] In re Yick Wo, 68 Cal. 294; Zorger v. City of Greensborough, 60 Ind. 1; Denning v. Yount, 62 Kan. 217; State v. Kirkley, 29 Md. 85; Quinette v. City of St. Louis, 76 Mo. 402. See, also, 58 Am. Rep. 112.

[164] In re Yick Wo, 68 Cal. 294; Bearden v. City of Madison, 73 Ga. 184; Denning v. Yount, 9 Kan. App. 708; Milne v. Davidson, 5 Mart. (N. S.; La.) 409; Flynn v. Canton Co., 40 Md. 312.

validity of a contract and this doctrine of presumption is found in the determination of nearly every legal question. The courts apply the same doctrine in the determination of cases involving the validity of ordinances, where the presumption obtains that an ordinance is valid,[165] that all required formalities were complied with in its passage and that it is legal in respect to both its subject-matter and its general characteristics. The doctrine stated in the first of the section shifts the burden of proof to the one attacking the validity of the ordinance and operates generally in favor of the legality of corporate action.

This principle, however, is not carried to such an extent as to conflict with the doctrine and theory that municipal corporations are bodies of restricted and limited powers. As said in an Illinois case,[166] "Municipal corporations exercise only delegated and lim-

[165] City of Birmingham v. Tayloe, 105 Ala. 170; Santa Rosa City R. Co. v. Central St. R. Co. 38 Pac. (Cal.) 986. The doctrine of presumption especially will apply where, for fourteen years after the passage of an ordinance, the city has treated it as duly passed and recognized its existence as valid. Merced County v. Fleming, 111 Cal. 46; Ex parte Haskell, 112 Cal. 416, 32 L. R. A. 527; City of Greeley v. Hamman, 17 Colo. 30, 28 Pac. 460; Terre Haute & I. R. Co. v. Voelker, 129 Ill. 540, 22 N. E. 20; Parker v. Catholic Bishop of Chicago, 146 Ill. 158, 34 N. E. 473; Chicago & A. R. Co. v. City of Carlinville, 103 Ill. App. 251; Fralich v. Barlow, 25 Ind. App. 383, 58 N. E. 271; State v. Vail, 53 Iowa, 550; Taylor v. McFadden, 84 Iowa, 262, 50 N. W. 1070; Town of Bayard v. Baker, 76 Iowa, 220; Allen v. City of Davenport, 107 Iowa, 90, 77 N. W. 532; Downing v. City of Miltonvale, 36 Kan. 740, 14 Pac. 281; City of Lexington v. Headley, 68 Ky. (5 Bush) 508; Nevin v. Roach, 86 Ky. 492, 5 S. W. 546; Elliott v. City of Louisville, 101 Ky. 262, 40 S. W. 690; City of Duluth v. Krupp, 46 Minn. 435; Becker v. City of Washington, 94 Mo. 375, 7 S. W. 291; Van Vorst v. Jersey City, 27 N. J. Law (3 Dutch.) 493; City of Seattle v. Doran, 5 Wash. 482, 32 Pac. 105, 1002; O'Mally v. McGinn, 53 Wis. 353; Stafford v. Chippewa Valley Elec. R. Co., 110 Wis. 331; Wood v. City of Seattle, 23 Wash. 1, 62 Pac. 135, 52 L. R. A. 369. But see City of Altoona v. Bowman, 171 Pa. 307, which holds that the same presumption of law does not exist in favor of the legality of the passage of an ordinance that applies to an act of the legislature.

[166] Schott v. People, 89 Ill. 195; City of St. Paul v. Laidler, 2 Minn. 190 (Gil. 159). "The city of St. Paul is a municipal corporation, organized and established to accomplish certain purposes and objects particularly specified in its charter. The city government derives its power and authority to make and enforce laws for the government of the city solely from the legislature. It is entirely a creature of the statute, and in the exercise of its authority cannot exceed the limits

ited powers and in the absence of express statutory provisions to that effect courts are authorized to indulge in no presumptions in favor of the validity of their ordinances. If in conformity with the express or necessarily implied grant in the charter, they are valid; otherwise, not."

§ 522. Form of ordinance.

The form of an ordinance may be prescribed by charter or general law;[167] otherwise, it can take any phraseology or form which the experience or taste of the writer may dictate.[168] Since it is a law, it should contain in its form the technical essentials of a law and these have been held to include a title, an enacting clause, the body or substance, a repealing clause, the operative clause and the proper and necessary signatures and approvals.[169] In

therein prescribed. It is a body of special and limited jurisdiction; its powers cannot be extended by intendment or implication, but must be confined within the express grant of the legislature. Especially is this the case in the exercise of its legislative authority, or the power of making ordinances or laws for the government of the city; and not only so, but this power must be exercised reasonably and in sound discretion, and strictly within the limits of the charter, and in perfect subordination to the constitution and general laws of the land, and the rights dependent thereon (2 Kent, 296); and where the charter enables a company or corporation to make by-laws (or ordinances), in certain cases and for certain purposes, its power of legislation is limited to the cases and objects specified; all others being excluded by implication."

[167] City of Rockwell v. Merchant, 1 Mo. App. Rep'r, 84. An immaterial variation from the form prescribed by law will not, however, invalidate an ordinance. Pope v. Town of Union, 32 N. J. Law, 343; State v. Fountain, 14 Wash. 236, 44 Pac. 270. The enacting clause of an ordinance that reads "Be it ordained by the town council" sufficiently complies with a statute which provides that the enacting clause of all ordinances shall be as follows: "Be it ordained by the council of the town of ——." State v. Nohl, 113 Wis. 15, 88 N. W. 1004.

[168] Los Angeles County v. Eikenberry, 131 Cal. 461, 63 Pac. 766. The fact that the subdivisions of an ordinance are not numbered in consecutive order does not make it void.

People v. Murray, 57 Mich. 396. In the absence of a charter requirement for the insertion of an enacting clause in an ordinance, its omission will not render it void. City of Tarkio v. Cook, 120 Mo. 1, 25 S. W. 202. Where a city charter is silent in regard to the form of an enacting clause or a failure to follow a statutory form, irregularities in this respect will not render an ordinance invalid. City of Janesville v. Dewey, 3 Wis. 245.

[169] Atkins v. Phillips, 26 Fla. 281, 10 L. R. A. 158; Pitts v. Opelika

some is included a recital of the reasons for its passage and it is also customary in ordinances based upon the police power to include a penal section or clause providing a punishment or penalty for their violation.[170]

The repealing clause is frequently omitted. The form of an ordinance may also differ with its nature or character. They may be divided in this respect into those sustaining or enforcing the police power of the municipality, those relating to public improvements, those having for their purpose the imposition of taxes and the control of public property including the granting of franchises and, finally, those which relate to the general administration of municipal affairs.[171] Again, some ordinances may be contractual in their nature and, therefore, in their construction and application involve contract relations with third persons.[172] Others are penal in their character and are subject to those rules of law

Dist., 79 Ala. 527; Bills v. City of Goshen, 117 Ind. 221, 3 L. R. A. 261. Defects in respect to form cannot be remedied by a subsequent motion. City of Topeka v. Huntoon, 46 Kan. 634; Hamilton v. State, 61 Md. 14. The great seal of the state is necessary to the authenticity of a bill and the governor may refuse to consider one presented without its being affixed.

Tennant v. Crocker, 85 Mich. 328; Magneau v. City of Fremont, 30 Neb. 843, 9 L. R. A. 786; Schermerhorn v. Jersey City, 53 N. J. Law, 112; Fisher v. Graham, 1 Cin. R. (Ohio) 113. The provisions of a statute in respect to the authentication of an ordinance may be directory merely, not mandatory, and a failure upon the part of the designated officer will not affect the validity of the ordinance.

Waln v. City of Philadelphia, 99 Pa. 330. The signature of the mayor necessary. City of Allentown v. Grim, 109 Pa. 113. A mistake in the date of the formal approval by the mayor of an ordinance will not affect its validity. Galveston, H. & S. A. R. Co. v. Harris (Tex. Civ. App.) 36 S. W. 776. An ordinance without the enacting clause as required by the state statutes is void. Boehme v. City of Monroe, 108 Mich. 401, 64 N. W. 204.

[170] State v. Zeigler, 32 N. J. Law, 262; Massinger v. City of Millville, 63 N. J. Law, 123, 43 Atl. 443; Smith v. Treasurer of Clinton, 53 N. J. Law, 329; Smith v. Gouldy, 58 N. J. Law, 562; State v. Cleaveland, 3 R. I. 117.

[171] Lisbon v. Clark, 18 N. H. 234.

[172] New Orleans, S. Ft. & L. R. Co. v. Delamore, 114 U. S. 501; New Orleans Gas Co. v. Louisiana Light Co., 115 U. S. 650; New Orleans Waterworks Co. v. Rivers, 115 U. S. 674; City of St. Louis v. Western Union Tel. Co., 148 U. S. 92; Citizens' St. R. Co. v. City of Memphis, 53 Fed. 715; Baltimore Trust & G. Co. v. City of Baltimore, 64 Fed. 153; Des Moines Gas Co. v. City of Des Moines, 44 Iowa, 505; Seitzinger v. Borough of Tamaqua, 187 Pa. 539; City of Ashland v. Wheeler, 88 Wis. 607.

which control and interpret penal statutes.[173] The validity of the ordinance considered in respect to its form may depend upon its place in one or the other of the classifications noted above. It is scarcely necessary to say that penal statutes or laws are construed strictly and every intendment is taken against them.[174] On the other hand, ordinances involving contract relations and pertaining to the general administrative affairs of the city are construed liberally and given force when not in violation of some express law or principle of the law.[175] The rule of strict construction also applies to all ordinances relating to the collection of revenues and the making of public improvements for, through the enforcement of such ordinances, the wrongful taking of private property may be accomplished.[176]

It is not necessary to recite in the ordinance either the authority for its passage,[177] or, where the council is acting upon discretionary matters, the reason for its basis of action.[178] If no par-

[173] Donovan v. City of Vicksburg, 29 Miss. 247; Ex parte Neill, 32 Tex. Cr. R. 275.

[174] Ex parte Sims, 40 Fla. 432; City of Chicago v. Rumpff, 45 Ill. 90; Krickle v. Com., 40 Ky. (1 B. Mon.) 361; City of St. Louis v. Goebel, 32 Mo. 295; Town of Pacific v. Seifert, 79 Mo. 210; State v. Gritzner, 134 Mo. 512; City of St Louis v. Dorr, 145 Mo. 466, 42 L. R. A. 686; McConvill v. Jersey City, 39 N. J. Law, 38; People v. Rosenberg, 138 N. Y. 110, 20 L. R. A. 81.

Fowler v. City of St. Joseph, 37 Mo. 228. The rules or canons of construction as applied to penal statutes are not ordinarily applied as rigidly to municipal ordinances. See, also, First Municipality v. Cutting, 4 La. Ann. 335, in which the courts say the by-laws of very few of its corporations could stand such a test; they should receive a reasonable construction and their terms should not be strictly scrutinized for the purpose of making them void.

[175] Whitlock v. West, 26 Conn. 406; Swift v. City of Topeka, 43 Kan. 671, 8 L. R. A. 772; First Municipality v. Cutting, 4 La. Ann. 335; Merriam v. City of New Orleans, 14 La. Ann. 318; Com. v. Robertson, 59 Mass. (5 Cush.) 438; Rounds v. Munford, 2 R. I. 154.

[176] Illinois Cent. R. Co. v. City of Bloomington, 76 Ill. 447; State v. Morris, 47 La. Ann. 1660; Fowler v. City of St. Joseph, 37 Mo. 228; River Rendering Co. v. Behr, 77 Mo. 91; Davenport v. City of Richmond, 81 Va. 636, 59 Am. Rep. 694.

[177] Methodist Church v. City of Baltimore, 6 Gill (Md.) 391; City of Baltimore v. Ulman, 79 Md. 469, 30 Atl. 43; Com. v. Fahey, 59 Mass. (5 Cush.) 408; City of Ogdensburgh v. Lyon, 7 Lans. (N. Y.) 215.

[178] Young v. City of St. Louis, 47 Mo. 492. A declaration of the necessity for the passage of an ordinance held not necessary. Kansas City v. Mastin, 169 Mo. 80, 68 S. W. 1037; Stuyvesant v. City of New York, 7 Cow. (N. Y.) 588; Kiley v. Forsee,

ticular form is prescribed by the charter or general law in which the ordinance shall be engrossed, any arrangement of words is sufficient to constitute a by-law or ordinance provided, however, that it contains the essentials of a law and that enough is recited to clearly and definitely indicate the will of the council and the terms and objects to which it applies.[179]

§ 523. Title.

An ordinary constitutional provision in respect to legislation passed by state legislative bodies is that no law or statute shall contain more than one subject which shall be clearly expressed in the title; such a requirement is for the purpose of preventing legislation as introduced from passing upon more than one subject while the title refers to one alone,[180]—a serious reflection certainly upon the care and attention which legislators give to those matters upon which their action is expected.

It also has for its purpose the simplification of legislation by preventing incongruous and many subjects to be regulated or dealt with in the same bill and it also operates in preventing the people and legislators from being misled upon reading the title.[181] This same restriction is frequently found applying to the legislative action of municipal councils.[182] In the absence of a statute

57 Mo. 390; Cronin v. People, 82 N. Y. 318.

[179] Lisbon v. Clark, 18 N. H. 234; City of San Antonio v. Micklejohn, 89 Tex. 79.

[180] The Borrowdale, 39 Fed. 376; Beard v. Wilson, 52 Ark. 290; Baird v. State, 52 Ark. 326. But, "The Drag-net proviso" so called, of March 26th, 1883, held not in contravention of Const. of Ark. 1874, art. 5, § 23.

Ex parte Haskell, 112 Cal. 412, 32 L. R. A. 527; Donnersberger v. Prendergast, 128 Ill. 229, 21 N. E. 1; Village of Hinsdale v. Shannon, 182 Ill. 312; Bush v. City of Indianapolis, 120 Ind. 476; Town of Bayard v. Baker, 76 Iowa, 220; In re Thomas, 53 Kan. 659; City of Topeka v. Raynor, 60 Kan. 860; Elliott v. City of Louisville, 101 Ky. 262; Callaghan v. Town of Alexandria, 52 La. Ann. 1013; People v. Hanrahan, 75 Mich. 611, 4 L. R. A. 751; Town of Ocean Springs v. Green, 77 Miss. 472; City of Tarkio v. Cook, 120 Mo. 1; Neuendorff v. Duryea, 6 Daly (N. Y.), 276.

[181] Senn v. Southern R. Co., 124 Mo. 621; Morrow County v. Village of Mt. Gilead, 8 Ohio N. P. 669; Harrisburg v. Eby, 16 Pa. Co. Ct. R. 124; City of Chester v. Bullock, 187 Pa. 544; Yesler v. City of Seattle, 1 Wash. St. 308.

[182] Ex parte Haskell, 112 Cal. 412, 32 L. R. A. 527; Hanson v. Hunter, 86 Iowa, 722, 53 N. W. 84, affirmed in 48 N. W. 1005; Stebbins v. Mayer, 38 Kan. 573, 16 Pac. 745; City of Humboldt v. McCoy, 23 Kan. 249;

making such a constitutional provision applicable to city ordinances, it is generally held that it only applies to state laws.[183] It follows that where such a provision exists, a violation of its terms will render invalid the ordinance defective in this respect or inoperative except as to the subject expressed.[184] The courts have held that such a requirement, however, does not call for more than a reference to the general subject covered by the ordinance.[185] It is not necessary that the title should specify in de-

Callaghan v. Town of Alexandria, 52 La. Ann. 1013. It is not necessary that the title of an ordinance should be expressed with the same formality as that required for public statutes. People v. Wagner, 86 Mich. 594, 13 L. R. A. 286; City of St. Louis v. Weitzel, 130 Mo. 600; Yesler v. City of Seattle, 1 Wash. St. 308. Such a charter provision may be suspended by the subsequent passage of a general law.

[183] Ex parte Haskell, 112 Cal. 412, 32 L. R. A. 527; Green v. City of Indianapolis, 25 Ind. 490; City of Topeka v. Raynor, 60 Kan. 860; Id., 61 Kan. 10. Kan. Const. art. 2, § 16, prohibiting any bill from containing more than one subject and which shall be expressed in the title in the absence of express provision does not apply to city ordinances.

People v. Hanrahan, 75 Mich. 611, 4 L. R. A. 751; People v. Wagner, 86 Mich. 594, 13 L. R. A. 286; City of Tarkio v. Cook, 120 Mo. 1. The Const. provision that "No bill shall contain more than one subject which shall be clearly expressed in the title," in the absence of a statute making it expressly apply to city ordinances is not applicable to them. State v. Gibbes, 60 S. C. 500.

[184] Thomas v. City of Grand Junction, 13 Colo. App. 80, 56 Pac. 665. An ordinance, the title of which is in the alternative, it is here held, is not subject to such a provision.

Walker v. People, 170 Ill. 410. An ordinance which provides for a connected system of sewers and drains for the entire city is not defective. It is not necessary to pass a separate ordinance providing for each street alone. Village of Hinsdale v. Shannon, 182 Ill. 312. It is not necessary to state the purpose of the ordinance as a part of its title.

Thompson v. City of Highland Park, 187 Ill. 265; Town of Bayard v. Baker, 76 Iowa, 220; Missouri Pac. R. Co. v. City of Wyandotte, 44 Kan. 32; Weber v. Johnson, 37 Mo. App. 601; State v. City of St. Louis, 161 Mo. 371; Town of Ocean Springs v. Green, 77 Miss. 472. The following title "An ordinance to prevent the carrying or exhibiting of a deadly weapon," held not in violation of such a provision. But see Bergman v. St. Louis, I. M. & S. R. Co., 88 Mo. 678, which holds that an ordinance entitled "An act to regulate the speed within the city limits of cars and locomotives," a section was invalid providing for the giving of danger signals and for the equipment of railroad cars.

[185] Hanson v. City of Hunter, 86 Iowa, 722; Missouri Pac. R. Co. v. City of Wyandotte, 44 Kan. 32; City of Des Moines v. Keller, 116 Iowa, 648, 88 N. W. 827, 57 L. R. A. 243; In re Thomas, 53 Kan. 659; Lowry v. City of Lexington, 113 Ky. 763, 68 S. W. 1109; Elliott v.

tail all the sections or provisions,[186] but it should contain sufficient to comply with the rule above noted.

An ordinance may violate in part such a restrictive clause while other portions comply with the requirements and in these cases it is commonly held that the invalid may be separated from the valid portions of the ordinance and the latter enforced.[187]

§ 524. Council and quorum.

An ordinance or resolution, since it is a local law, must be passed by a legal legislative body acting in such capacity[188] at a meeting where that action can be legally taken and by the requisite number of votes.[189] The subject of a quorum has been considered in a preceding section[190] to which reference is made.

In considering the latter question, a provision frequently found in city charters is to the effect that in case of a tie the mayor of the city or the presiding office of the council shall have the power of casting the deciding vote.[191] This right is limited, however,

City of Louisville, 101 Ky. 262; City of St. Louis v. Weitzel, 130 Mo. 600, 31 S. W. 1045; State v. City of St. Louis, 169 Mo. 31, 68 S. W. 900; Senn v. Southern R. Co., 124 Mo. 621; Morgan v. State, 64 Neb. 369, 90 N. W. 108; Robert v. Kings County Sup'rs, 3 App. Div. 366, 38 N. Y. Supp. 521; Barton v. City of Pittsburg, 4 Brewst. (Pa.) 373; City of Chester v. Bullock, 187 Pa. 544.

[186] Thomas v. City of Grand Junction, 13 Colo. App. 80; City of Des Moines v. Hillis, 55 Iowa, 643; City of Emporia v. Shaw, 6 Kan. App. 808; City of Baltimore v. Stewart, 92 Md. 535, 48 Atl. 165; People v. Wagner, 86 Mich. 594, 24 Am. St. Rep. 141, 13 L. R. A. 286; Barton v. City of Pittsburg, 4 Brewst. (Pa.) 373.

[187] Henry v. City of Macon, 91 Ga. 268; City of Baltimore v. Ulman, 79 Md. 469; City of Duluth v. Krupp, 46 Minn. 435; City of St. Louis v. St. Louis R. Co., 89 Mo. 44; Chamberlain v. City of Hoboken, 38 N. J. Law, 110.

[188] County of San Luis Obispo v. Hendricks, 71 Cal. 242.

[189] John v. Connell, 64 Neb. 233, 89 N. W. 806, modifying 61 Neb. 267, 85 N. W. 82.

[190] Fournier v. West Bay City, 94 Mich. 463; State v. Anderson, 45 Ohio St. 196, 12 N. E. 656. In the election of officers a plurality of those present and voting, if it is a legal quorum, is sufficient to elect.

[191] Wooster v. Mullins, 64 Conn. 340, 25 L. R. A. 694; Metropolitan St. R. Co. v. Johnson, 90 Ga. 500; City of Carrollton v. Clark, 21 Ill. App. 74; Parker v. Catholic Bishop, 146 Ill. 158; State v. Alexander, 107 Iowa, 177, 77 N. W. 841; Taylor v. McFadden, 84 Iowa, 262; Larkin v. Burlington, C. R. & N. R. Co., 85 Iowa, 492; Bybee v. Smith, 22 Ky. L. R. 1684, 61 S. W. 15; State v. Armstrong, 54 Minn. 457; Eichenlaub v. City of St. Joseph, 113 Mo. 395, 18 L. R. A. 590; State v. Cow-

strictly to these occasions and its existence does not make that officer a member of the council. A charter may also require a specified vote, usually larger, for the passage of ordinances involving the expenditure of money or the consideration of questions regarded as important while for those of less importance, or those not involving the disbursement of moneys, a smaller vote is necessary to legal action.[192] In determining the question of a legal quorum, the right of a member to vote and act as a member of a council may be restricted by charter or statutory provisions that forbid members from voting or participating in proceedings where they are directly or indirectly interested in the subject under discussion and which is to be acted upon.[193] In these cases the principle applies that where the vote of a member thus interested is included and is necessary for the passage of the legislation, such action will not be considered valid.[194]

§ 525. Mode of passage.

A provision of frequent occurrence in city charters is that which requires that on the passage or adoption of every ordinance or resolution, the yeas and nays shall be called and a record made

gill & Hill Mill. Co., 156 Mo. 620; Brown v. Lutz, 36 Neb. 527; Magneau v. City of Fremont, 30 Neb. 843, 9 L. R. A. 786; Outwater v. Borough of Carlstadt, 66 N. J. Law, 510, 49 Atl. 533; Mueller v. Egg Harbor City, 55 N. J. Law, 245; Lake Shore & M. S. R. Co. v. City of Dunkirk, 65 Hun, 494, 20 N. Y. Supp. 596; People v. Bresler, 171 N. Y. 302; Campbell v. City of Cincinnati, 49 Ohio St. 463; State v. Mott, 111 Wis. 19, 86 N. W. 569.

[192] Clarke v. Jennings (Cal.), 32 Pac. 909; McDonald v. Dodge, 97 Cal. 112; Tennant v. Crocker, 85 Mich. 328, 48 N. W. 577; City of Cincinnati v. Bickett, 26 Ohio St. 49; Hall v. City of Racine, 81 Wis. 72.

[193] Smith v. Los Angeles I. & L. Co-operative Ass'n, 78 Cal. 289, 12 Am. St. Rep. 53; State v. Porter, 113 Ind. 79; Dorchester v. Youngman, 60 N. H. 385. But a resident of a town interested in a suit is not disqualified from voting at a town meeting in respect to the subject-matter of the suit. Van Hook v. Somerville Mfg. Co., 5 N. J. Eq. (1 Halst.) 139.

[194] City of San Diego v. San Diego & L. A. R. Co., 44 Cal. 106; State v. Pinkerman, 63 Conn. 176, 22 L. R. A. 653; Buffington Wheel Co. v. Burnham, 60 Iowa, 493. But see City of Topeka v. Huntoon, 46 Kan. 634, where it is held that because an alderman owns property within the limits of a proposed sewer district he is not thereby disqualified from acting. See, also, Goff v. Nolan, 62 How. Pr. (N. Y.) 323, where the fact that an alderman will be benefited by the proposed widening of a street is held not to

of the vote.[195] Sometimes this provision applies only to ordinances or resolutions involving the expenditures of moneys, the making of contracts or action considered of a more important character.[196] Usually it is necessary that an ordinance be read at one meeting of the city council and only voted upon for final passage after a final reading at some subsequent meeting.[197] The purpose of this provision is the prevention of ill-advised, hasty

disqualify him. West Jersey Traction Co. v. Public Works of Camden, 56 N. J. Law, 431, 29 Atl. 163.

[195] Brophy v. Hyatt, 10 Colo. 223; Coffin v. City of Portland, 43 Fed. 411; German Ins. Co. of Freeport v. City of Manning, 95 Fed. 597; Goodyear Rubber Co. v. City of Eureka, 135 Cal. 613, 67 Pac. 1043; Tracey v. People, 6 Colo. 151; Sullivan v. City of Leadville, 11 Colo. 483, 18 Pac. 736; Swift v. People, 162 Ill. 534, 44 N. E. 528, 33 L. R. A. 470; New Albany Gas Light & Coke Co. v. Crumbo, 10 Ind. App. 360, 37 N. E. 1062; City of Logansport v. Dykeman, 116 Ind. 15; Town of Olin v. Meyers, 55 Iowa, 209.

Preston v. City of Cedar Rapids, 95 Iowa, 71, 63 N. W. 577. It is sufficient that the record show that all the aldermen voted for the ordinance. Downing v. City of Miltonvale, 36 Kan. 740, 14 Pac. 281; Steckert v. City of East Saginaw, 22 Mich. 104; McCormick v. Bay City, 23 Mich. 457; Wiggin v. City of New York, 9 Paige (N. Y.), 16.

In re South Market St., 76 Hun, 85, 27 N. Y. Supp. 843. Where a village charter requires the yeas and nays and a record of such vote to be made, the record "all voting aye" is not a sufficient compliance with the charter provision. O'Neil v. Tyler, 3 N. D. 47, 53 N. W. 434. But see City of Logansport v. Dykeman, 116 Ind. 15, 17 N. E. 587.

[196] Cutler v. Town of Russellville, 40 Ark. 105.

[197] McGraw v. Whitson, 69 Iowa, 348. Such a statutory requirement is complied with when the ordinance is read on different days before a different council, no election having been held meantime. Fehler v. Gosnell, 99 Ky. 380, 35 S. W. 1125; City of Louisville v. Selvage, 21 Ky. L. R. 349, 51 S. W. 447; East Tennessee Tel. Co. v. Anderson County Tel. Co., 22 Ky. L. R. 418, 57 S. W. 457; Specht v. City of Louisville, 22 Ky. L. R. 699, 58 S. W. 607; McCormick v. Bay City, 23 Mich. 457; State v. Priester, 43 Minn. 373. Rules in this respect may be suspended by unanimous consent if the charter so provides.

Aurora Water Co. v. City of Aurora, 129 Mo. 540, 31 S. W. 946; Barber Asphalt Pav. Co. v. Hunt, 100 Mo. 22, 8 L. R. A. 110; Anderson v. City of Camden, 58 N. J. Law, 515, 33 Atl. 846. Such a provision is complied with by reading merely the title of the ordinance on the third and final reading.

Flood v. Atlantic City, 63 N. J. Law, 530, 42 Atl. 829; Jersey City, H. & P. St. R. Co. v. City of Passaic, 68 N. J. Law, 110, 52 Atl. 242; City of Cape May v. Cape May, D. B. & S. P. R. Co., 60 N. J. Law, 224, 39 L. R. A. 609.

Simmerman v. Borough of Wildwood, 60 N. J. Law, 365, affirmed 60 N. J. Law, 367, 40 Atl. 1132. An or-

or corrupt legislation. Sometimes if the law warrants the action by unanimous consent or that of a prescribed number of all the members of the council or of those present, such a charter provision or rule may be suspended and an ordinance or resolution adopted by the same meeting at which introduced.[198] It is scarcely necessary to add that where charter or statutory provisions exist regulating the manner of enactment of municipal legislation they will be considered mandatory in their character and compliance with them necessary to the validity of such legislation.[199] This principle applies not only to the requirements noted in this but also those in succeeding sections.

dinance altered at the time of its final passage is invalid where such a charter provision exists as that stated in the text.

Flood v. Atlantic City, 63 N. J. Law, 530; In re Lewis, 51 Barb. (N. Y.) 82. By unanimous consent an ordinance may be passed on the same day as introduced. Campbell v. City of Cincinnati, 49 Ohio St. 463, 31 N. E. 606; Bloom v. City of Xenia, 32 Ohio St. 461; City of Altoona v. Bowman, 171 Pa. 307; Wright v. Forrestal, 65 Wis. 341.

[198] City of Greeley v. Hamman, 17 Colo. 30; Shea v. City of Muncie, 148 Ind. 14; Town of Bayard v. Baker, 76 Iowa, 220; Nevin v. Roach, 86 Ky. 492, 5 S. W. 546; Dickson v. Gleason, 99 Ky. 380; Boehme v. City of Monroe, 106 Mich. 401; Campbell v. City of Cincinnati, 49 Ohio St. 463, 31 N. E. 606.

[199] Pollok v. City of San Diego, 118 Cal. 593; Village of Belknap v. Miller, 52 Ill. App. 617. But a statutory provision calling for the yeas and nays and their entry on the record is directory merely in respect to that part calling for the entry.

Town of Olin v. Meyers, 55 Iowa, 209; Heins v. Lincoln, 102 Iowa, 69; City of Pineville v. Burchfield, 19 Ky. L. R. 984, 42 S. W. 340. An ordinance defective because of a failure to record the yeas and nays voted as required by Ky. St. § 3489, may be cured by its re-enactment and the passage of a nunc pro tunc order directing the clerk to record the yea and nay vote as taken on the original passage of the ordinance.

Oswald v. Gosnell, 21 Ky. L. R. 1660, 56 S. W. 165; East Tennessee Tel. Co. v. Anderson County Tel. Co., 22 Ky. L. R. 418, 57 S. W. 457; State v. Dakota County Dist. Ct., 41 Minn. 518; Striker v. Kelly, 7 Hill (N. Y.) 9. In this case the court said in the majority opinion: "The objection to it is that it was passed without calling the ayes and noes and this it is said was in violation of the act of April 7, 1830. But I think the provision referred to should be construed as directory merely, the essential requisite being the determination of the corporation and not the form or manner of expressing that determination." A dissenting opinion, however, is found in this respect and gives most excellent reasons for its basis. It reads in part: "It is well known that men acting in a body, especially when under the cover of cor-

§ 526. Ordinances; mode of passage.

Continuing the subject of the last section, it will be found upon an examination of the cases that the character of the ordinance or resolution may affect to a great extent the formalities required in its passage. Action which involves the expenditure of public moneys,[200] the granting of franchises,[201] the making of contracts,[202] or that of a grave and important character,[203] may require the passage of an ordinance instead of the adoption of a resolution; the presentation to the mayor or the presiding officer of the council for his consideration, which may not be necessary under ordinary conditions,[204] or the introduction of the ordinance

porate privileges, will often do what no one of them would be willing to do if acting alone and upon his individual responsibility. And they will sometimes say aye, or permit a matter to pass sub silentio, when they would not venture to record their names in favor of the measure. To guard against such evils, and protect the citizens against the imposition of unnecessary burdens, it was provided by the seventh section of the amended charter that the ayes and noes should be called and published whenever a vote of the common council should be taken on any proposed improvement involving a tax or assessment upon the citizens (Laws 1830, p. 126). The language is imperative—the ayes and noes shall be called. When the particular mode in which the corporation is to act is thus specially declared by its charter, I think it can only act in the prescribed form. The contrary doctrine wants the sanction of legal authority, and is fraught with the most dangerous consequences. It would place corporations above the laws and there is reason to fear that they would soon become an intolerable nuisance."

O'Neil v. Tyler, 3 N. D. 47, 53 N. W. 434; Campbell v. City of Cincinnati, 49 Ohio St. 463, 31 N. E. 606; Ladd v. City of East Portland, 18 Or. 87, 22 Pac. 533; Walker v. City of Burlington, 56 Vt. 131; Town of Danville v. Shelton, 76 Va. 325.

[200] City of Greeley v. Hamman, 17 Colo. 30; Doty v. Lyman, 168 Mass. 318, 44 N. E. 337; Hendrickson v. Borough of Point Pleasant, 65 N. J. Law, 535, 47 Atl. 465; Erwin v. Jersey City, 60 N. J. Law, 141; People v. Common Council of Amsterdam, 90 Hun, 488, 36 N. Y. Supp. 59.

[201] Buffington Wheel Co. v. Burnham, 60 Iowa, 493; State v. Henderson, 38 Ohio St. 644; City of Vancouver v. Wintler, 8 Wash. 378; Raborn v. Mish, 12 Wash. 167, 40 Pac. 731.

[202] Dey v. Jersey City, 19 N. J. Eq. (4 C. E. Green) 412.

[203] Allen v. City of Davenport, 107 Iowa, 90; Pierson v. City Council of Dover, 61 N. J. Law, 404; Gleason v. Peerless Mfg. Co., 1 App. Div. 257, 37 N. Y. Supp. 267.

[204] In re Standiford, 5 Mackey (D. C.) 549; Roberts & Co. v. City of Paducah, 95 Fed. 62; Jacobs v. City & County Sup'rs of San Fran-

and its final passage only after several readings and at different meetings.[205] Other differences in the mode of passage arising from the character of the action are suggested in the cases cited in the notes.[206]

§ 527. Veto power.

As a further check upon hasty or corrupt legislation, the chief executive officer of the nation, the state or a municipal corporation, may be given the power to pass upon all bills, ordinances or

cisco, 100 Cal. 121; Morton v. Broderick, 118 Cal. 474; Altman v. City of Dubuque, 111 Iowa, 105, 82 N. W. 461. A mayor elected subsequently to the passage of an ordinance has no power to sign it.

City of Leavenworth v. Douglass, 3 Kan. App. 67, 44 Pac. 1099. In the absence of the mayor, the president of the city council has no power to approve ordinances except those appropriating moneys for the payment of current expenses.

Becker v. City of Henderson, 18 Ky. L. R. 881, 38 S. W. 857; Hibbard v. Suffolk County, 163 Mass. 34, 39 N. E. 285. A resolution fixing the salary of an officer employed in the county jail does not require its presentation to the mayor of the city of Boston for his approval.

Whitney v. City of Port Huron, 88 Mich. 268. An oral approval is not a sufficient compliance with the requirement of a city charter that all resolutions and ordinances of the council shall be approved in writing by the mayor.

Saleno v. City of Neosho, 127 Mo. 627, 27 L. R. A. 769, But an ordinance may become a law without the mayor's approval and signature after the lapse of a prescribed time.

Aurora Water Co. v. City of Aurora, 129 Mo. 540, 31 S. W. 946. The failure of the record to show the presence of the mayor at a meeting at which an ordinance was passed will not invalidate it where it was properly signed.

Barber Asphalt Pav. Co. v. Hunt, 100 Mo. 22, 8 L. R. A. 110; Pierson v. City Council of Dover, 61 N. J. Law, 404, 39 Atl. 675. Where a city charter requires the submission of every resolution to the mayor for his approval, the city council cannot evade this by calling certain legislative action a "motion" instead of a "resolution."

Platt v. City of Englewood, 68 N. J. Law, 231, 52 Atl. 239; Booth v. City of Bayonne, 56 N. J. Law, 268; People v. Schroeder, 12 Hun (N. Y.) 413; Babbidge v. City of Astoria, 25 Or. 417; Walker v. Burlington, 56 Vt. 131; Hall v. City of Racine, 81 Wis. 72, 50 N. W. 1094. The requirement would not apply to a street improvement ordinance based upon a petition of interested property owners.

[205] See, also, cases cited in note 197 of preceding section. People v. Maxon, 139 Ill. 306, 16 L. R. A. 178; Swindell v. State, 143 Ind. 153, 35 L. R. A. 50; Brown v. Lutz, 36 Neb. 527, 54 N. W. 860; Cowen v.

[206] Swindell v. State, 143 Ind. 153, 35 L. R. A. 50.

resolutions and approve them if, within his judgment and discretion, they are worthy,[207] or return them to the house in which originated with his veto if, in his opinion, they are illegal, ill-advised or not warranted by reasons of public policy or of public good.[208] It is customary to require an executive officer to accompany a veto with his objections in order that the legislative body may be informed.[209] Positive action is sometimes required of an executive within a specified time and the failure to return the bill or the ordinance within such time will be regarded as equivalent to a veto,[210] or an approval.[211]

After reconsideration a legislative body ordinarily has the power

Borough of Wildwood, 60 N. J. Law, 365, 38 Atl. 22; Delaware & A. Tel. Co. v. Committee of Pensauken Tp., 67 N. J. Law, 91, 50 Atl. 452, affirmed 67 N. J. Law, 531, 52 Atl. 482. But see E. M. Derby & Co. v. City of Modesto, 104 Cal. 515.

[207] New York & N. E. R. Co. v. City of Waterbury, 55 Conn. 19, 10 Atl. 162. The approval should be in writing. State v. Anderson, 26 Fla. 240, 8 So. 1; Skinner v. City of Chicago, 42 Ill. 52; Town of Bayard v. Baker, 76 Iowa, 220. Where the records show, however, a majority in favor of the ordinance, a failure to record the "nays" does not invalidate it.

Chicago, R. I. & P. R. Co. v. City of Council Bluffs, 109 Iowa, 425. An ordinance is rendered invalid by the failure of the mayor to sign as required. Hibbard v. Suffolk County, 163 Mass. 34; State v. Meier, 143 Mo. 439, 45 S. W. 306, distinguishing State v. Stone, 120 Mo. 428, 23 L. R. A. 194. If a bill, under the St. Louis city charter, is presented to the presiding officer for signature with no objection, the duty to sign then becomes obligatory, and mandamus may issue to compel a performance of the duty.

Saleno v. City of Neosho, 127 Mo. 627, 27 L. R. A. 769; Booth v. City of Bayonne, 56 N. J. Law, 268, 28 Atl. 381; Gleason v. Peerless Mfg. Co., 1 App. Div. 257, 37 N. Y. Supp. 267; People v. Schroeder, 76 N. Y. 160.

[208] Junction City v. Webb, 44 Kan. 71; Baar v. Kirby, 118 Mich. 392, 76 N. W. 754; Caswell v. Marsac, 99 Mich. 417; Wilson v. Inhabitants of Trenton, 56 N. J. Law, 469; Pennsylvania Globe Gaslight Co. v. City of Scranton, 97 Pa. 538.

[209] Oswald v. Gosnell, 21 Ky. L. R. 1660, 56 S. W. 165; City of Baltimore v. Gorter, 93 Md. 1, 48 Atl. 445; Truesdale v. City of Rochester, 33 Hun (N. Y.) 574; Kittinger v. Buffalo Traction Co., 160 N. Y. 377.

[210] Baar v. Kirby, 188 Mich. 292, 76 N. W. 754; State v. Carr, 1 Mo. App. 490.

[211] Harris v. City of St. Joseph, 99 Fed. 246; Terre Haute & I. R. Co. v. Voelker, 129 Ill. 540, 22 N. E. 20; Lehigh Coal & Nav. Co. v. Inter-County St. R. Co., 167 Pa. 126. But see Opinion of Justices, 135 Mass. 594, in regard to the temporary absence of the governor from the commonwealth, and Detroit v. Moran, 46 Mich. 213, as to the effect of a temporary absence of the mayor from the city.

to pass a bill returned unapproved.[212] A larger number of votes is usually necessary to pass a bill or ordinance over an executive's veto, than required for the passage of ordinary legislation.[213]

§ 528. Ordinances; publication.

It is a just and salutary principle which requires the legislative action of a municipal body to be promulgated or published in some manner before it can become effective.[214] This action results, as has been seen, in the passage of a law, local in its operation it is true, but having within the jurisdiction of the enacting body all the force and effect of law. The principle not only requires the publication of an ordinance or resolution, but in addition, its publication in that manner which shall best bring it to the attention of those whose actions and property it was designed to control or affect. The law does not tolerate at this time the practice of the old Roman Emperor who posted his proclamations and edicts, printed in fine characters, so far above the heads of

[212] Atlanta R. & P. Co. v. Atlanta Rapid Transit Co., 113 Ga. 481, 39 S. E. 12; Terre Haute & I. R. Co. v. Voelker, 129 Ill. 540, 22 N. E. 20; Stutsman v. McVicar, 111 Iowa, 40, 82 N. W. 460; Caswell v. Recorder of Bay City, 99 Mich. 417, 58 N. W. 331; State v. District Ct., 41 Minn. 518; Oakley v. Atlantic City, 63 N. J. Law, 127. But see Wilson v. Inhabitants of Trenton, 56 N. J. Law, 469, 29 Atl. 183.

[213] Heins v. Lincoln, 102 Iowa, 69; State v. Darrow, 65 Minn. 419, 67 N. W. 1012; Stanton v. City of Hoboken, 52 N. J. Law, 88, 18 Atl. 685; Peck v. City of Rochester, 3 N. Y. Supp. 872; People v. Board of Councilmen of Buffalo, 20 N. Y. Supp. 51; Gleason v. Peerless Mfg. Co., 1 App. Div. 257, 37 N. Y. Supp. 267.

[214] People v. City & County Sup'rs of San Francisco, 27 Cal. 655. It is not necessary that provisions of the law referred to in an ordinance should be published with it. City & County of San Francisco v. Buckman, 111 Cal. 25, 43 Pac. 396; Conboy v. Iowa City, 2 Iowa, 90; Com. v. McCafferty, 145 Mass. 384, 14 N. E. 451. A provision for publication directory only.

McKusick v. City of Stillwater, 44 Minn. 372, 46 N. W. 769. The fact that the contract for printing between the official newspaper and the city is different will not render ordinances and notices, duly published as required, invalid. Chamberlain v. City of Hoboken, 38 N. J. Law, 110. The proceedings of a city council cannot be published in any other manner than that directed by the legislature. In re Astor, 50 N. Y. 363; In re Anderson, 60 N. Y. 457; Olds v. Erie City, 79 Pa. 380; Klais v. Pulford, 36 Wis. 587; Herman v. City of Oconto, 100 Wis. 391, 76 N. W. 364. The provision for the publication of an ordinance at a stated time is mandatory.

the people that it was impossible for them to gain a knowledge of their contents and then punished them for infractions of the laws thus published.

The publication or promulgation of the ordinance may be required by charter or statutory provisions and to be made by some designated officer charged with this particular duty,[215] and a failure to exercise the authority in the manner thus prescribed is fatal.

The time of publication again may be material and important considered from the standpoint of legislative action. Some charter provisions require the publication or posting of the ordinance or resolution before final action is taken by the municipal legislative body complying with the principle that notice, either actual or constructive, should be given to all who are interested, before the final adoption of legislative action which affects and practically adjudicates property rights,[216] while other charters, and the greater number, provide that the publication or posting shall take place only after the passage of the ordinance or resolution and its approval by the mayor or presiding officer.[217]

[215] Hellman v. Shoulters, 114 Cal. 136; Higley v. Bunce, 10 Conn. 436; Barnett v. Town of Newark, 28 Ill. 62; Tisdale v. Town of Minonk, 46 Ill. 9; Conboy v. Iowa City, 2 Iowa, 90; City of Pittsburg v. Reynolds, 48 Kan. 360.

[216] City & County of San Francisco v. Buckman, 111 Cal. 25, 43 Pac. 396; Ex parte Christensen, 85 Cal. 208; Ex parte Haskell, 112 Cal. 412, 32 L. R. A. 527; Dumars v. City of Denver, 16 Colo. App. 375, 65 Pac. 580; City of Leavenworth v. Douglass, 3 Kan. App. 67; City of Baltimore v. Little Sisters of the Poor, 56 Md. 400; Doty v. Lyman, 166 Mass. 318; Heman Const. Co. v. Loevy, 64 Mo. App. 430; Barr v. City of New Brunswick, 58 N. J. Law, 255, 33 Atl. 477; City of Cape May v. Cape May, D. B. & S. P. Co., 60 N. J. Law, 224, 37 Atl. 892, 39 L. R. A. 609; Anderson v. City Council of Camden, 58 N. J. Law, 515; City of Schenectady v. Furman, 61 Hun, 171, 15 N. Y. Supp. 724; In re Bassford, 50 N. Y. 509; In re Douglass, 46 N. Y. 42; In re Smith, 52 N. Y. 527; Bank of Columbia v. City of Portland, 41 Or. 1, 67 Pac. 1112. Under the city charter of Portland it is only necessary to publish a notice that the council may improve a particular part of a designated street and in the manner specified. State v. Fountain, 14 Wash. 236; Herman v. City of Oconto, 100 Wis. 391, 76 N. W. 364; Linden Land Co. v. Milwaukee Elec. R. & Light Co., 107 Wis. 493, 83 N. W. 851; Quint v. City of Merrill, 105 Wis. 406.

[217] People v. City & County Sup'rs of San Francisco, 27 Cal. 655; Schweitzer v. City of Liberty, 82 Mo. 309; In re Levy, 4 Hun (N. Y.) 501.

§ 529. Manner of publication; language and medium.

The manner of publication, as already suggested, is important in considering the reason for publication. English is the official and national language in this country and it is scarcely necessary to add that an ordinance or resolution written or published in a language other than English will not be binding.[218] Some cases go to the extent of holding that municipal laws must be not only written and printed in English but also in a newspaper or newspapers printed and published in the same language.[219] Publication is usually limited to newspapers having a general circulation in the community[220] or those printed and published within the municipal limits.[221]

[218] Raker v. Village of Maquon, 9 Ill. App. 155; Town Council of Breaux's Bridge v. Dupuis, 30 La. Ann. 1105; Davidson v. Houston, 35 La. Ann. 492; North Baptist Church v. City of Orange, 54 N. J. Law, 111, 22 Atl. 1004, 14 L. R. A. 62. A statute or ordinance has no legal existence except when expressed in the language in which it is passed.

[219] City of Chicago v. McCoy, 136 Ill. 344, 26 N. E. 363, 11 L. R. A. 413, affirming 33 Ill. App. 576. "It seems to be suggested by counsel that by virtue of some inherent power vested in the city, it has the right for the benefit and protection of its citizens and tax payers and their property, to provide for the publication of the matters in question in a newspaper printed in the German language. The settled rule in respect to municipal power is that, unless the power claimed is conferred in express words, or by necessary implication, it does not exist." Union Pac. R. Co. v. Montgomery, 49 Neb. 429. See Wilson v. Inhabitants of Trenton, 56 N. J. Law, 469, 29 Atl. 183.

[220] Dumars v. City of Denver, 16 Colo. App. 375, 65 Pac. 580; Wasem v. City of Cincinnati, 2 Cin. R. (Ohio) 84. But the manner may be discretionary with the city council. Miller v. Smith, 7 Idaho, 204, 61 Pac. 824; Tisdale v. Town of Minonk, 46 Ill. 9. It is not necessary that the newspaper should be published in the same town in which the ordinance is passed so long as it is a paper of general circulation in the community enacting the ordinance. Moss v. Village of Oakland, 88 Ill. 109; Smith v. Yoram, 37 Iowa, 89; State v. Omaha & C. B. R. & Bridge Co., 113 Iowa, 30, 84 N. W. 983, 52 L. R. A. 315. A publication of an extra edition to the daily newspaper is not a compliance with the requirement that ordinances shall be published in a newspaper of general circulation. City of Pittsburg v. Reynolds, 48 Kan. 360, 29 Pac. 757. Chapter 156, Kansas Laws of 1891, in regard to the printing of legal notices, advertisements, etc., does not apply to city ordinances. City of Knoxville v. Knoxville Water Co., 107 Tenn. 647, 64 S. W. 1075, 61 L. R. A. 888. An ordinance not invalid because published on Sunday.

[221] Bayer v. City of Hoboken, 44 N. J. Law, 131, following Id., 40 N. J. Law, 152.

Form. Charter and statutory provisions again may vary as to the form of publication. This may be in book[222] or pamphlet form,[223] or by merely posting in public places or official bulletin boards true copies of the ordinance or resolution.[224] The copy as printed or published should be duly authenticated[225] and usually, if an ordinance refers to maps and books, they need not be included.[226]

§ 530. Time of publication.

The element of time as considered in the proper publication of a municipal ordinance may refer either to the time of publication or its frequency. The usual provision is to the effect that the ordinance or resolution shall be published in the manner provided by law for a certain length of time after its final passage,[227] or a prescribed number of times within a fixed limit of time.[228]

[222] City of Birmingham v. Tayloe, 105 Ala. 170, 16 So. 576; Merced County v. Fleming, 111 Cal. 46, 43 Pac. 392; Chicago & A. R. Co. v. Winters, 65 Ill. App. 435; Whalin v. City of Macomb, 76 Ill. 49. A charter provision requiring city authorities to publish the text of its ordinance at certain specified times is directory only. Union Pac. R. Co. v. Montgomery, 49 Neb. 429; Law v. People, 87 Ill. 385.

[223] Raker v. Village of Maquon, 9 Ill. App. 155; People v. Maxon, 139 Ill. 306, 28 N. E. 1074, 16 L. R. A. 178, affirming 38 Ill. App. 152; Standard v. Village of Industry, 55 Ill. App. 523.

[224] Higley v. Bunce, 10 Conn. 436; O'Hara v. Town of Park River, 1 N. D. 279, 47 N. W. 380.

[225] City of Napa v. Easterby, 76 Cal. 222, 18 Pac. 253; Moss v. Village of Oakland, 88 Ill. 109; McChesney v. City of Chicago, 159 Ill. 223.

[226] City of Napa v. Easterby, 76 Cal. 222; Law v. People, 87 Ill. 385.

[227] City of Napa v. Easterby, 76 Cal. 222, 18 Pac. 253; E. M. Derby & Co. v. City of Modesto, 104 Cal. 515. A statutory provision that an ordinance must be published "at least two weeks" in some newspaper is complied with by its publication for fourteen consecutive days.

People v. Town of Linden, 107 Cal. 94; City of Chicago v. McCoy, 136 Ill. 344, 11 L. R. A. 413; Kimble v. City of Peoria, 140 Ill. 157; Richter v. Harper, 95 Mich. 221, 54 N. W. 768. A charter requirement that ordinances must be published at least one week in the official paper of the city is sufficiently complied with by the publication in such a

[228] Ex parte Fiske, 72 Cal. 125, 13 Pac. 310. The times of publication need not be necessarily consecutive. County of San Luis Obispo v. Hendricks, 71 Cal. 242; City of Sacramento v. Dillman, 102 Cal. 107. Such a provision is directory merely. People v. Keir, 78 Mich. 98, 43 N. W. 1039.

§ 531. Character of ordinances.

Provisions for publication may not apply to all acts of a municipal council. Some ordinances are more important in their character either as considering the welfare of the city or the rights of those whose property or personal interests may be affected. The management, speaking generally, of the affairs of a municipality requires a great variety in character of action by the municipal legislative body. Much of this may be quasi legislative or administrative in its character; mere directions or orders to subordinate officials and employes relating to the technical details of current affairs. Other action is not only strictly legislative in its nature but it may also relate to the expenditure of large sums of money, the incurring of debts, the making of public contracts, the granting of franchises or other business of an important character. It may not be necessary to publish action of the first class[229] while to render the latter effective and valid it must be published in the manner required.[230] It is also customary to have penal ordinances published when such a requirement may not apply to others.[231]

paper as often as issued; the fact that it may have no issue on one day of the week is immaterial.

City of Hoboken v. Gear, 27 N. J. Law (3 Dutch.) 265. Publishing an ordinance once each week for three successive weeks is a sufficient compliance with a charter requirement that every ordinance shall be published twenty days. North Baptist Church v. City of Orange, 54 N. J. Law, 111, 14 L. R. A. 62; Town of Stillwater v. Moor (Okl.) 33 Pac. 1024.

[229] City of Napa v. Easterby, 76 Cal. 222, 18 Pac. 253; People v. Town of Linden, 107 Cal. 94, 40 Pac. 115; Heilbron v. City of Cuthbert, 96 Ga. 312; People v. Keir, 78 Mich. 98; Fairchild v. City of St. Paul, 46 Minn. 540, 49 N. W. 325; Abraham v. Meyers, 29 Abb. N. C. 384, 23 N. Y. Supp. 225, 228. Consolidation act, N. Y. laws 1882, c. 410, § 80, provides that no resolution or ordinance shall be adopted concerning the alienation of city property until after the publication of an abstract thereof. The sale of a street railway franchise it not a resolution or ordinance coming within the meaning of this statute. Seitzinger v. Borough of Tamaqua, 187 Pa. 539.

[230] People v. Bailhache, 52 Cal. 310; People v. Cole, 70 Cal. 59; Whalin v. City of Macomb, 76 Ill. 49; State v. Omaha & C. B. R. & Bridge Co., 113 Iowa, 30, 84 N. W. 983, 52 L. R. A. 315.

[231] National Bank of Commerce v. Town of Grenada, 41 Fed. 87; City & County of San Francisco v. Buckman, 111 Cal. 25; Standard v. Village of Industry, 55 Ill. App. 523; State v. City of Noblesville, 157 Ind. 31, 60 N. E. 704; Union Pac. R. Co. v. Montgomery, 49 Neb. 429; Union Pac. R. Co. v. McNally, 54 Neb. 112, 74 N. W. 390; Village of

§ 532. Miscellaneous matters in connection with publication of ordinances.

Statutory provisions in respect to the proof of publication of an ordinance as a technical requirement of law, like all others of similar character, must be strictly followed.[232] The law may provide for a publication of the proceedings of municipal councils[233] which, when thus published, becomes competent evidence of the facts stated and the legality of the ordinances in respect to their form of passage.[234] The publication of the proceedings may be considered as a sufficient official promulgation.[235]

§ 533. Record.

The publication of the proceedings in official form may serve as a record of ordinances or resolutions passed. In the absence of a requirement of this kind, city charters often contain provisions for the permanent entry and record of all legislative action by the

Watkins v. Hillerman, 73 Hun, 317, 26 N. Y. Supp. 252; Town of Oak Grove v. Village of Juneau, 66 Wis. 534.

[232] Vincent v. City of Pacific Grove, 102 Cal. 405; Hutchison v. City of Mt. Vernon, 40 Ill. App. 19; Rowland v. City of Greencastle, 157 Ind. 591, 62 N. E. 474; Larkin v. Burlington, C. R. & N. R. Co., 91 Iowa, 654; Preston v. City of Cedar Rapids, 95 Iowa, 71, 63 N. W. 577; De Loge v. New York Cent. & H. R. R. Co., 92 Hun, 149, 36 N. Y. Supp. 697, affirmed 157 N. Y. 688; Clinton v. City of Portland, 26 Or. 410, 38 Pac. 407. Oral evidence is admissible to supply a defective proof of publication. Klais v. Pulford, 36 Wis. 587. Parol evidence is inadmissible proof of compliance with a city charter in respect to publication and record. Schwartz v. City of Oshkosh, 55 Wis. 490.

[233] City of Leavenworth v. Douglass, 3 Kan. App. 67; Reed v. City of Louisville, 22 Ky. L. R. 1636, 61 S. W. 11. Such a provision will be directory only. State v. Village of Cloquet, 52 Minn. 9, 53 N. W. 1016; Waln's Heirs v. City of Philadelphia, 99 Pa. 330.

[234] San Diego County v. Seifert, 97 Cal. 594, 32 Pac. 644; Boyer v. Yates City, 47 Ill. App. 115; Louisville, N. A. & C. R. Co. v. Patchen, 167 Ill. 204, 47 N. E. 368; McGregor v. Village of Lovington, 48 Ill. App. 208; State v. Curry, 134 Ind. 133; Larkin v. Burlington, C. R. & N. R. Co., 85 Iowa, 492.

City of Troy v. Atchison & N. R. Co., 11 Kan. 519, and City of Troy v. Atchison & N. R. Co., 13 Kan. 70. Both hold that a city may be estopped to urge irregularities and defects in the passage and record of an ordinance where a third party has acted in good faith and without knowledge of such irregularities and has made large expenditures of money.

City of Tarkio v. Cook, 120 Mo. 1, 25 S. W. 202.

[235] Reed v. City of Louisville, 22 Ky. L. R. 1636, 61 S. W. 11.

municipal council or legislative body;[236] the record to contain a recital of those facts and acts which are necessary to constitute a legal passage of an ordinance or resolution.[237] A failure to properly record and enter as thus required will, usually, invalidate an ordinance[238] and, to repeat again a common principle of law,

[236] Amey v. Allegheny City, 24 How. (U. S.) 364. A city was authorized by the legislature to incur an indebtedness. The ordinance, the basis of the issue of the bonds was not published as required by the city charter; this, it was held, did not affect the validity of the bonds as the legislature in its act of authority gave power to the council of Alleghany to do what it could not do by charter. Beaumont v. City of Wilkes-Barre, 142 Pa. 198; City of Rutherford v. Swink, 90 Tenn. 152, 16 S. W. 76.

[237] Jones v. McAlpine, 64 Ala. 511; Merced County v. Fleming, 111 Cal. 46, 43 Pac. 392; Santa Clara County v. Southern Pac. R. Co., 66 Cal. 642. The omission of the clerk to add the official seal to the record of an ordinance in the ordinance book does not render it invalid.

Schofield v. Village of Hudson, 56 Ill. App. 191. A record entry that "New Ordinances Nos. one, two, three and ten were adopted and passed by the board" is insufficient to show the legal passage of an ordinance under a statutory provision that a board shall keep a general record of its proceedings; that the yeas and nays shall be called and entered and that the concurrence of a majority of all the members elected shall be necessary to the passage of any ordinance. Schofield v. Village of Tampico, 98 Ill. App. 324; City of Hammond v. New York, C. & St. L. R. Co., 5 Ind. App. 526, 31 N. E. 817; City of Billings v. Dunnaway, 54 Mo. App. 1; Beaumont v. City of Wilkes-Barre, 142 Pa. 198, 21 Atl. 888.

[238] Reynolds v. Schweinefus, 1 Cin. R. (Ohio) 215. Parol evidence is not admissible to supply the place of the record required to be made under such a provision. National Bank of Commerce v. Town of Granada (C. C. A.) 54 Fed. 100, affirming 48 Fed. 278; State v. Curry, 134 Ind. 133, 33 N. E. 685; Stevenson v. Bay City, 26 Mich. 44. A failure to comply with the provisions requiring ordinances to be recorded does not make such record a condition precedent to the validity of an ordinance regularly adopted unless that fact is clearly expressed in the charter. The adoption of another principle would practically give to the recorder the power to veto all ordinances by simply failing to properly record them. Kepner v. Com., 40 Pa. 124; Marshall v. Com., 59 Pa. 455; Com. v. Marshall, 69 Pa. 328. The failure to record an ordinance is a technical defect only which the legislature can remedy by the passage of proper legislation. Waln's Heirs v. City of Philadelphia, 99 Pa. 330; Borough of Verona's Appeal, 108 Pa. 83.

But see Shea v. City of Muncie, 148 Ind. 14, 46 N. E. 138, which holds that such provisions is directory only, and Crebs v. City of Lebanon 98 Fed. 549, where it is held that the omission by a clerk to copy upon the city records an ordinance does not affect its validity. Also Allen v. City of Davenport, 107 Iowa, 90, 77 N. W. 532. Such

all details with respect to the exercise of the law-making power are construed strictly and a failure to follow the plain provisions of the law will result in a holding by the courts of invalidity.[239]

§ 534. Validity in respect to subject-matter and general characteristics.

Municipal or quasi public corporations are subordinate agents of government and possess, therefore, restricted and limited powers. All laws or commands of governmental organizations of a higher grade must be respected and obeyed by them and the application conversely of this principle prevents them from passing ordinances, resolutions or from taking action which is in conflict with the provisions of the Federal and state constitutions or general laws: this subject has been briefly referred to in a previous section[240] and will now be considered in detail.

§ 535. Constitutional provisions.

The Constitution of the United States, in so far as specified, is the paramount law of this nation[241] and contains many provisions which operate as prohibitions upon the powers of all other governments or governmental agencies. Municipal action, therefore, which violates its provisions, is void. This instrument gives to the Federal government the exclusive right of exercising certain powers; among others, that of regulating commerce with foreign nations, among the several states and with Indian tribes;[242] of coining of money and fixing a standard of weights and measures;[243] of laying and collecting of taxes, duties, imposts and excises and the establishing of post roads and post offices.[244]

a provision directory only. Town of Crowley v. Rucker, 107 La. 213; Barton v. City of Pittsburg, 4 Brewst. (Pa.) 373, and Central Irr. Dist. v. De Lappe, 79 Cal. 351; Trustees of Erie Academy v. City of Erie, 31 Pa. 515.

[239] Higley v. Bunce, 10 Conn. 436.

[240] Section 521, ante.

[241] United States v. Hart, Pet. C. C. 390, Fed Cas. No. 15,316.

[242] See §§ 538–542, post; U. S. Const., art. 1, § 8, cl. 3.

[243] The Miantinomi, 3 Wall., Jr. 46, Fed. Cas. No. 9,521; Harris v. Rutledge, 19 Iowa, 388. "Under the national constitution Congress has power 'to fix the standard of

[244] U. S. Const. art. 1, § 8, pars. 1 and 7; Ware v. United States, 71 U. S. (4 Wall.) 617; Chase v. United States, 155 U. S. 489; Power of Postmaster General, 4 Op. Attys. Gen. (U. S.) 29.

The Federal Constitution also contains certain express prohibitions upon the powers of the states and, therefore, their subordinate agents, including those clauses preventing a state from enacting any law impairing the obligation of a contract;[245] the passing of a bill of attainder or ex post facto law;[246] the laying of any impost or duty on imports or exports, except such as may be absolutely necessary for executing their inspection laws; the laying of duties on tonnage;[247] the making or exercising of any law which shall abridge the privileges or immunities of citizens of the United States;[248] the denial to any person within its jurisdiction of the equal protection of the law,[249] and the passage of laws depriving any person of life, liberty or property without due process of law.[250]

weights and measures.' This power it has never exercised, and until it is exercised, the respective states may for themselves regulate weights and measures." Caldwell v. Dawson, 61 Ky. (4 Metc.) 123; Frazier v. Warfield, 13 Md. 279; Farmers' & Mechanics' Bank v. Smith, 3 Serg. & R. (Pa.) 69; Weaver v. Fegely, 29 Pa. 27, 70 Am. Dec. 151; Menear v. State, 30 Tex. App. 475; U. S. Const. art. 1, § 8, par. 5.

[245] U. S. Const. art. 1, § 10, par. 1; sections 528, 529, post; Fletcher v. Peck, 6 Cranch (U. S.) 87, 137; New Jersey v. Wilson, 7 Cranch (U. S.) 164; Trustees of Dartmouth College v. Woodward, 4 Wheat. (U. S.) 519; Neill v. Gates, 152 Mo. 585; Nottage v. City of Portland, 35 Or. 539.

[246] U. S. Const. art. 1, § 9, par. 3; People v. Crockett, 9 Cal. 112; Cozens v. Long, 3 N. J. Law (2 Penning) 331; Green v. Shumway, 39 N. Y. 430; People v. Hayes, 140 N. Y. 484, 23 L. R. A. 830; Browne v. Blick, 7 N. C. (3 Murph.) 518.

[247] U. S. Const. art. 1, § 9, par. 5; § 10, par. 2; Neary v. Philadelphia, W. & B. R. Co., 7 Houst. (Del.) 419; Worsley v. Second Municipality, 9 Rob. (La.) 324; Crow v. State, 14 Mo. 237; Hancock v. Singer Mfg. Co., 62 N. J. Law, 289, 42 L. R. A. 852.

[248] U. S. Const. amend. art. XIV, § 1; Cumming v. Board of Education of Richmond, 175 U. S. 528, affirming 103 Ga. 641. The failure to maintain by a board of education a high school for colored children when maintaining one for white children does not constitute a denial to colored persons to the equal protection of the law or the equal privileges of citizens of the United States within the meaning of the 14th amendment. State v. Kuntz, 47 La. Ann. 106.

[249] U. S. Const. amend. art. XIV, § 1; Jacksonville, T. & K. R. Co. v. Prior, 34 Fla. 271; Owen v. Sioux City, 91 Iowa, 190; Sullivan v. Haug, 82 Mich. 548, 10 L. R. A. 263; People v. Board of Excise, 13 Misc. (N. Y.) 537.

[250] See, also, the following cases holding ordinances unconstitutional because of containing discriminatory provisions directed against certain individuals because of their class, race or religious belief, thus

The Federal Constitution contains in addition in common with state constitutions what has been commonly termed a bill of rights. These provisions apply to all public corporations and they constitute a guaranty of certain personal rights and privileges.

coming within that clause of the Federal Constitution cited above. Ho Ah Kow v. Nunan, 5 Sawy. 552, Fed. Cas. No. 6,546. This case considered and held unconstitutional. An ordinance passed by the city of San Francisco which provided that for all its violations, each jail prisoner "should have the hair of his head cut or clipped to a uniform length of one inch from the scalp thereof." It being directed against the Chinese of San Francisco and was commonly known and called the "queue" ordinance. "This inhibition upon the state applies to all the instrumentalities and agencies employed in the administration of its government; to its executive, legislative and judicial departments and to the subordinate legislative bodies of counties and cities." "The reason advanced for its adoption, and now urged for its continuance is, that only the dread of the loss of his queue will induce a Chinaman to pay his fine. That is to say, in order to enforce the payment of a fine imposed upon him, it is necessary that torture should be superadded to imprisonment. Then it is said, the Chinaman will not accept the alternative, which the law allows, of working out his fine by his imprisonment, and the state or county will be saved the expense of keeping him during the imprisonment. Probably the bastinado, or the knout, or the thumbscrew, or the rack would accomplish the same end; and no doubt the Chinaman would prefer either of these modes of torture to that which entails upon him disgrace among his countrymen and carries with it the constant dread of misfortune and suffering after death. It is not creditable to the humanity and civilization of our people, much less to their Christianity, that an ordinance of this character was possible."

Soon Hing v. Crowley, 113 U. S. 703; Barbier v. Connolly, 113 U. S. 27; Yick Wo v. Hopkins, 118 U. S. 356; Gilham v. Wells, 64 Ga. 192; City of Shreveport v. Levy, 26 La. Ann. 671; City of Memphis v. Winfield, 27 Tenn. (8 Humph.) 707.

The following cases hold ordinances attempting to regulate personal association or employment unconstitutional because being an invasion of personal liberty: In re Maguire, 57 Cal. 604; Hechinger v. City of Maysville, 22 Ky. L. R. 486, 57 S. W. 619; Gastenau v. Com., 108 Ky. 473; City of St. Louis v. Roche, 128 Mo. 541, and Ex parte Smith, 135 Mo. 223, 33 L. R. A. 606.

But ordinances directed against public drunkenness have been commonly held constitutional for the reason as given: "No one has the constitutional right to appear in a state of intoxication in the streets and public places and thereby degrade the public morals to the annoyance and inconvenience of citizens in the discharge of their daily duties and to destroy the peace, comfort and good order and well being of society."

City of St. Joseph v. Harris, 59 Mo. App. 122; Drunkenness cannot be made the subject of municipal

Interference with religious freedom is prohibited and freedom of speech or of the press cannot be abridged;[251] the people maintain the right to peaceably assemble and to keep and bear arms;[252] unreasonable searches and seizures are proscribed; neither can cruel and inhuman punishments be inflicted nor excessive bail or fines imposed or required.[253] No person can be compelled in a criminal case to be witness against himself, nor can he be twice put in jeopardy for the same offense,[254] and those charged with the commission of crimes and offenses are entitled to a speedy and

regulation, except where it is existence in the individual is at a place or under circumstances or conditions when it annoys or disturbs others. And so it would appear that any sweeping regulation interdicting, under penalty, drunkenness generally, or in cases other than those specified in the exception just stated, would be an invasion of the 'inalienable rights of the citizen.'" But see the later case of Gallatin v. Tarwater, below. Village of Green City v. Holsinger, 76 Mo. App. 567; City of Gallatin v. Tarwater, 143 Mo. 40.

U. S. Const. amend. art. XIV; In re Tiburcio Parrott, 6 Sawy. 349, 1 Fed. 481; Judson v. Reardon, 16 Minn. 431 (Gil. 387); State v. Graves, 19 Md. 351. "The mayor and city council (of Baltimore) are but trustees of the public, the tenure of their office impresses their ordinances with liability to change; they could not, if they would, pass an irrevocable ordinance; the corporation cannot abridge its own legislative powers."

Rutgers College Athletic Ass'n v. City of New Bunswick, 55 N. J. Law, 279, 26 Atl. 87; Ex parte Spinney, 10 Nev. 324; Ex parte City of Albany, 23 Wend. (N. Y.) 277; Pesterfield v. Vickers, 43 Tenn. (3 Cold.) 205; City of Memphis v. Winfield, 27 Tenn. (8 Humph.) 707; Joske v. Irvine (Tex. Civ. App.) 43 S. W. 278; State v. Fire Creek Coal & Coke Co., 33 W. Va. 188, 6 L. R. A. 359; State v. Goodwill, 33 W. Va. 179, 6 L. R. A. 621, 25 Am. St. Rep. 863. See, also, c. V, ante, especially §§ 116 and 117 relating to the police power and its exercise.

[251] U. S. Const. amend. art. I.

[252] U. S. Const. amend. arts. I and II; ex parte Cheney, 90 Cal. 617; Collins v. Hall, 92 Ga. 411, 17 S. E. 622; McGregor v. Village of Lovington, 48 Ill. App. 211; City or Cottonwood Falls v. Smith, 36 Kan. 401; Board of Police v. Giron, 46 La. Ann. 1364; City of St. Louis v. Vert, 84 Mo. 204; Ex parte Caldwell, 138 Mo. 233. But see Van Buren v. Wells, 53 Ark. 368.

[253] U. S. Const. amend. arts. IV and VIII; Carey v. Sheets, 67 Ind. 375; Larthet v. Forgay, 2 La. Ann. 524; People v. Noelke, 29 Hun (N. Y.) 461.

[254] U. S. Const. amend art. V; State v. Adams, 14 Ala. 486; State v. Flint, 63 Conn. 248; Williams v. Com., 78 Ky. 97; Kohlheimer v. State, 39 Miss. 522; State v. Shirer, 20 S. C. 404. But see McInerney v. City of Denver, 17 Colo. 302, 29 Pac. 516.

public trial by a local and impartial jury.[255] Private property cannot be taken for public use without just compensation.[256]

[255] U. S. Const. amend. art. VI; Boring v. Williams, 17 Ala. 510; Colt v. Eves, 12 Conn. 243; Stimson, Am. St. Law, §§ 130 et seq.

[256] U. S. Const. amend. art. V; Wilson v. Baltimore & P. R. R. Co., 5 Del. Ch. 524; Illinois Cent. R. Co. v. City of Bloomington, 76 Ill. 447; Symonds v. City of Cincinnati, 14 Ohio, 173. See Lewis, Em. Dom. (2d Ed.) §§ 110–125 and 155 et seq. See, also, Chapter V, ante, on the police power, especially sections 117 et seq.; section 460 par. a; section 474, section 537 ante, and the sections, post, relating to the use of public streets and highways for various public utilities

It has been held that the right to contract and the right to labor are property and many ordinances prohibiting or limiting these rights have been held void because considered a taking of property without due process of law or without the payment of just compensation. It is impossible even to cite the many cases bearing upon these subjects as well as the other constitutional provisions referred to in the preceding paragraphs and sections. The reader will find the questions thoroughly considered in works on Constitutional Law: Lewis, Em. Dom.; McQuillin, Mun. Ord.; Horr. & Bemis, Mun. Ord. and Tiedeman, State & Fed. Control of Persons & Prop. See, also, Mugler v. Kansas, 123 U. S. 623. "As already stated, the present case must be governed by principles that do not involve the power of eminent domain, in the exercise of which property may not be taken for public use without compensation. A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit. Such legislation does not disturb the owner in the control or use of his property for lawful purposes, nor restrict his right to dispose of it, but is only a declaration by the state that its use by any one, for certain forbidden purposes, is prejudicial to the public interests. Nor can legislation of that character come within the Fourteenth Amendment, in any case, unless it is apparent that its real object is not to protect the community, or to promote the general well being, but, under the guise of police regulation, to deprive the owner of his liberty and property, without due process of law. The power which the states have of prohibiting such use by individuals of their property as will be prejudicial to the health, the morals or the safety of the public, is not—and, consistently with the existence and safety of organized society, cannot be—burdened with the condition that the state must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community. The exercise of the police power by the destruction of property which is itself a public nuisance, or the prohibition of its use in a particu-

§ 536. Must not conflict with state laws or charters.

Neither can a municipal corporation or subordinate body take action that conflicts or is inconsistent with either the constitution or the laws of the state,[257] or the special provisions of its own

lar way, whereby its value becomes depreciated, is very different from taking property for public use, or from depriving a person of his property without due process of law." Ritchie v. People, 155 Ill. 98, 29 L. R. A. 79 "Labor is property, and the laborer has the same right to sell his labor, and to contract with reference thereto, as has any other property owner. * * * The right to acquire, possess and protect property includes the right to make reasonable contracts, and when an owner is deprived of one of the attributes of property, like the right to make contracts, he is deprived of his property within the meaning of the constitution." People v. Hawley, 3 Mich. 330.

[257] Holt v. City of Birmingham, 111 Ala. 369, 19 So. 735. Hewlett v. Camp, 115 Ala. 499. Pool selling. Ex parte Hong Shen, 98 Cal. 681. Retailing opium, ordinance not held void. Foster v. Police Com'rs of City & County of San Francisco, 102 Cal. 483. Additional requirements for obtaining a license to sell liquor in addition to those fixed by the state law will not render an ordinance containing them invalid.

McInerney v. City of Denver, 17 Colo. 302, 29 Pac. 516. Where the ordinance is identical with the statutes of the state applying to the same act, an offender may be proceeded against under either or both. State v. Welch, 36 Conn. 215; State v. Flint, 63 Conn. 248; State v. Dillon, 42 Fla. 95, 28 So. 78; Haywood v. City of Savannah, 12 Ga. 404; City of Savannah v. Hussey, 21 Ga. 80; Jenkins v. Town of Thomasville, 35 Ga. 145; Kassell v. City of Savannah, 109 Ga. 491, 35 S. E. 147; Rothschild v. City of Darien, 69 Ga. 503; Strauss v. City of Waycross, 97 Ga. 475. The power of a municipal corporation to make a given act an offence may be subsequently taken away by the passage of a state law dealing with the same matter.

In re Ridenbaugh, 5 Idaho, 371, 49 Pac. 12; Walker v. City of Aurora, 140 Ill. 402, 29 N. E. 741; Duggan v. Peoria D. & E. R. Co., 42 Ill. App. 536; Clevenger v. Town of Rushville, 90 Ind. 258; City of Indianapolis v. Huegele, 115 Ind. 581; City of Indianapolis v. Higgins, 141 Ind. 1; City of Centerville v. Miller, 57 Iowa, 56; City of Kansas City v. Grubel, 57 Kan. 436; March v. Com., 51 Ky. (12 B. Mon.) 25; Taylor v. City of Owensboro, 98 Ky. 271; State v. Caldwell, 3 La. Ann. 435 (gambling); Jefferson Police Jury v. Arleans, 34 La. Ann. 646; State v. Labatut, 39 La. Ann. 516; State v. Callac, 45 La. Ann. 27; Crawshaw v. City of Roxbury, 73 Mass. (7 Gray) 374; People v. Detroit White Lead Works, 82 Mich. 471, 9 L. R. A. 722; City of St. Louis v. Kaime, 2 Mo. App. 66; Riley v. City of Trenton, 51 N. J. Law, 498, 18 Atl. 116, 5 L. R. A. 352; Mulcahy v. City of Newark, 57 N. J. Law, 513, 31 Atl. 226; Bowyer v. City of Camden, 50 N.

charter,[208] and it should also harmonize with the public policy and the common law of the state.[209]

J. Law, 97; Landis v. Borough of Wineland, 54 N. J. Law, 78; State v. McCoy, 114 N. C. 1059, 21 S. E. 499; Town of Washington v. Hammond, 74 N. C. 85; State v. Brittain, 89 N. C. 474; State v. McCormick, 114 N. C. 1065; State v. Sherrard, 117 N. C. 714; Town of Marietta v. Fearing, 4 Ohio, 427; Collins v. Hatch, 18 Ohio, 523; City of Cincinnati v. Carlile, 19 Or. 139; Walsh v. City of Union, 13 Or. 584.

Borough of Norristown v. Citizens' Pass. R. Co., 148 Pa. 87, 23 Atl. 1062. An ordinance which violates a constitutional provision against the passage of local or special laws relating to the affairs of boroughs or providing for changing methods for the collection of debts is void although third parties may have accepted and acted upon the ordinance.

Schneider v. City of Charleston, 3 Brev. (S. C.) 533; Robinson v. Town of Franklin, 20 Tenn. (1 Humph.) 156; Smith v. City of Nashville, 40 Tenn. (3 Head) 143; Bordages v. Higgins, 1 Tex. Civ. App. 44; Bohmy v. State, 21 Tex. App. 197.

Lynn v. State, 33 Tex. Cr. R. 153, 25 S. W. 774. An ordinance is invalid which requires in its enforcement the doing of an act prohibited by the state laws. Ballard v. City of Dallas (Tex. Cr. R.) 44 S. W. 849; Ex parte Wilson (Tex. Cr. R. 47 S. W. 643; Ex parte Ogden, 42 Tex. Cr. R. 531, 66 S. W. 1100; Village of St. Johnsbury v. Thompson (Vt.) 9 Atl. 571; Behan v. City of New Orleans, 34 La. Ann. 138 (fees or salaries of officers); Wood v. Kansas City, 162 Mo. 303; Jarvis v. City of New York, 49 How. Pr. (N. Y.) 354. See, also, cases fully collected in McQuillin, Mun. Ord. p. 24, note 23.

[208] Thomas v. City of Richmond, 72 U. S. (12 Wall.) 349; Thompson v. Carroll, 22 How. (U. S.) 422; City of Placerville v. Wilcox, 35 Cal. 21; Pollok v. City of San Diego, 118 Cal. 548, 50 Pac. 769; Haywood v. City of Savannah, 12 Ga. 494; Brown v. Atlanta R. & P. Co., 113 Ga. 462, 39 S. E. 71. The limitation does not apply, however, to ordinances which conflict merely with some prior ordinance. But see the case of City of St. Louis v. Sanguinet, 49 Mo. 581, which holds that an ordinance which conflicts with an ordinance of a prior date shall be valid until the express repeal of the former.

People v. Mount, 186 Ill. 569; Andrews v. Union Mut. Fire Ins. Co., 37 Me. 256; Stadler v. City of Detroit, 13 Mich. 346; City of St. Paul v. Laidler, 2 Minn. 190 (Gil. 159); Kemp v. City of Monett, 95 Mo. App. 452, 69 S. W. 31; Kansas City v. Marsh Oil Co., 140 Mo. 468; State v. Johnson, 123 Mo. 43; Treasurer of City of Elizabeth v. Dunning, 55 N. J. Law, 554, 34 Atl.

[209] Norris v. Staps, Hob. 210; Phillips v. City of Denver, 19 Colo. 179; City of Mt. Pleasant v. Breese, 11 Iowa, 399; State v. Burns, 45 La. Ann. 96; Simrall v. City of Covington, 90 Ky. 444, 9 L. R. A. 556; Kennebec & P. R. Co. v. Kendall, 31 Me. 470; City of Canton v. Nist, 9 Ohio St. 439; Collins v. Hatch, 18 Ohio, 523; Pesterfield v. Vickers, 43 Tenn. (3 Cold.) 205; Barling v. West, 29 Wis. 307.

If, however, there is an express grant of the power to public corporations, including municipal, to deal with certain questions, especially those concerning the police power, it is immaterial that state statutes may also regulate the same matters. Municipal ordinances in such cases will be sustained though there may exist state laws upon the same subject.[209]

§ 537. General characteristics.

In addition to the prohibitions which operate as restrictions noted above, there are certain general characteristics which ordinances and resolutions as laws must possess in order that they may be valid and enforceable; they cannot be in restraint of trade,

752. A charter provision may be superseded by a general statute passed by the state legislature.

Leland v. Long Branch Com'rs, 42 N. J. Law, 375; Horan v. Lane, 53 N. J. Law, 275; City of New York v. Ordroman, 12 Johns. (N. Y.) 122; Cowen v. Village of West Troy, 43 Barb. (N. Y.) 48; In re Bayard, 61 How. Pr. (N. Y.) 294; Com. v. Crogan, 155 Pa. 448; State v. City of Nashville, 83 Tenn. 697; Hadlan v. City of Olympia, 2 Wash. T. 340; Wood v. City of Seattle, 23 Wash. 1, 62 Pac. 135, 52 L. R. A. 369. The presumption, however, exists, that the city ordinance is not in conflict with the provisions of its charter.

[209] Town of Van Buren v. Wells, 53 Ark. 368, 14 S. W. 38; State v. Flint, 63 Conn. 248; Theisen v. McDavid, 34 Fla. 440, 26 L. R. A. 224; Chambers v. Town of Barnsville, 89 Ga. 739; State v. Preston, 4 Idaho, 215, 38 Pac. 694; State v. Quong, 8 Idaho, 191, 67 Pac. 491; Town of Petersburg v. Metzker, 21 Ill. 205; City of Chicago v. Brownell, 41 Ill. App. 70; City of Spring Valley v. Spring Valley Coal Co., 71 Ill. App. 432; City of Indianapolis v. Higgins, 141 Ind. 1, 40 N. E. 671; Beiling v. City of Evansville, 144 Ind. 644, 35 L. R. A. 272; In re Thomas, 53 Kan. 659; In re Jahn, 55 Kan. 694; City of Monroe v. Hardy, 46 La. Ann. 1232, 15 So. 696; State v. Fourcade, 45 La. Ann. 717; Board of Police v. Giron, 46 La. Ann. 1364; City of St. Louis v. Schoenbusch, 95 Mo. 618, 8 S. W. 791; City of De Soto v. Brown, 44 Mo. App. 148; City of Plattsburg v. Trimble, 46 Mo. App. 459; Kansas City v. Neal, 49 Mo. App. 72; Kansas City v. Hallett, 59 Mo. App. 160; City of St. Joseph v. Vesper, 59 Mo. App. 459; Riley v. City of Trenton, 51 N. J. Law, 498, 5 L. R. A. 352; Mulcahy v. City of Newark, 57 N. J. Law, 513; Ayres v. City of Dallas, 32 Tex. Cr. R. 603, 25 S. W. 631; Ex parte Abram, 34 Tex. Cr. R. 10; Ex parte Freeland, 38 Tex. Cr. R. 321, 42 S. W. 295; City of Seattle v. Chin Let, 19 Wash. 38, 52 Pac. 324; State v. Newman, 96 Wis. 258, 71 N. W. 438; State v. City of La Crosse, 107 Wis. 654, 84 N. W. 242.

tend to monopoly,[261] or be oppressive.[262] They must operate with uniformity and equality;[263] they cannot contain provisions in der-

[261] Ex parte McKenna, 126 Cal. 429. Trading stamp ordinance. In re Lowe, 54 Kan. 757, 27 L. R. A. 545. An ordinance which provides that the mayor and council may grant the exclusive privilege of removing garbage from private premises, as well as public, is an attempt to create a monopoly and is void.

City of St. Paul v. Laidler, 2 Minn. 190 (Gil. 159); Paterson Chronicle Co. v. City of Paterson, 66 N. J. Law, 121, 48 Atl. 589; People v. Warden of City Prison, 144 N. Y. 529, 27 L. R. A. 718; Borough of Warren v. Lewis, 16 Pa. Co. Ct. R. 176.

Barling v. West, 29 Wis. 307. An ordinance which prohibits the sale without a license at temporary stands of lemonade, fruits, cakes and ice cream, is an unreasonable restraint of trade and, therefore, void. See, also, § 254, ante.

[262] McInerney v. City of Denver, 17 Colo. 302, 29 Pac. 516; City of Clinton v. Phillips, 58 Ill. 102. An ordinance exacting quarterly reports of sales of liquor is oppressive and unreasonable. The court say "This section is in violation of the sanctity of private business and ought not to be tolerated."

McFarlane v. City of Chicago, 185 Ill. 242. An ordinance levying a local improvement tax for paving a street which is already paved with cedar blocks in good condition is void. Pittsburg C., C. & St. L. R. Co. v. Town of Crown Point, 146 Ind. 421, 45 N. E. 587, 35 L. R. A. 684; Hughes v. Recorder's Ct., 75 Mich. 574, 4 L. R. A. 863; People v. Keir, 78 Mich. 98; City of St. Louis v. Roche, 128 Mo. 541, 31 S. W. 915. An ordinance which makes it a penal offense for any one to associate with persons having the reputation of being thieves is invalid and void as being oppressive and restrictive of personal liberty; the mere intention to do evil unaccompanied by any overt act cannot be considered by the courts as the commission of an offense. The further principle also is applied or may be applied in connection with this line of cases that the mere ability or capacity to commit an offense or crime cannot be regarded as the equivalent of an overt act or demonstration against the law.

City of Lamar v. Weidman, 57 Mo. App. 507; State v. Ray, 131 N. C. 814, 60 L. R. A. 634; Long v. Shelby County Taxing Dist., 75 Tenn. (7 Lea) 134; City of Memphis v. Winfield, 27 Tenn. (8 Humph.) 707. An ordinance providing for the arrest of negroes found on the street after ten o'clock at night, held "high handed and oppressive."

[263] Foster v. Police Com'rs of City & County of San Francisco, 102 Cal. 483; Tugman v. City of Chicago, 78 Ill. 405. An ordinance which permits one to engage in a business in a certain locality and prohibits another from carrying on the same business in the same locality is void because of a discrimination.

City of Carthage v. Carlton, 99 Ill. App. 338. An ordinance which affects all persons equally coming within the same class is not void because discriminative. City of Des

ogation of common right,[264] and they must not be unreasonable in their requirements.[265] they must be enacted in good faith.[266]

Moines v. Keller, 116 Iowa, 648, 88 N. W. 827, 57 L. R. A. 243; DeBen v. Gerard, 4 La. Ann. 30; State v. Mahner, 43 La. Ann. 496, 9 So. 480; City of Shreveport v. Levy, 26 La. Ann. 671. An ordinance of the city council granting a privilege to one sect which it denies to another is unconstitutional and therefore void.

State v. Kuntz, 47 La. Ann. 106; Com. v. Goodrich, 95 Mass. (13 Allen) 546. But the validity of the municipal regulation may not be affected by the fact that it is made with special reference to a particular person. Kansas City v. Sutton, 52 Mo. App. 398; City of Hudson v. Thorne, 7 Paige (N. Y.) 261; City of Buffalo v. New York, L. E. & W. R. Co., 6 Misc. 630, 27 N. Y. Supp. 297. An ordinance is not discriminating in its character which applies to but one road when phrased in general terms. Borough of Norristown v. Norristown Pass. R. Co., 148 Pa. 87; City of Chattanooga v. Norman, 92 Tenn. 73, 20 S. W. 417.

[264] Soon Hing v. Crowley, 113 U. S. 703; Shelton v. City of Mobile, 30 Ala. 540; Thomas v. City of Hot Springs, 34 Ark. 553; Hayden v. Noyes, 5 Conn. 391. A town by-law is void and is in contravention of a common right which prohibits all persons except its own inhabitants from fishing in a navigable river within the town limits. City of Atlanta v. Stein, 111 Ga. 789, 36 S. E. 932, 51 L. R. A. 335; Stack v. City of East St. Louis, 85 Ill. 377; Pettis v. Johnson, 56 Ind. 139; DeBen v. Gerard, 4 La. Ann. 30; City of Tarkio v. Cook, 120 Mo. 1, 25 S. W. 202. An ordinance which prohibits the playing of billiard games in billiard halls after nine o'clock P. M. is not void as being oppressive, discriminating and in derogation of common right. Hill v. Thompson, 48 N. Y. Super. Ct. (16 J. & S.) 481; Kurtz v. Clausen, 38 Misc. 105, 77 N. Y. Supp. 97. The grant of an exclusive privilege for maintaining and renting chairs in public parks is illegal and in derogation of common right. State v. Hill, 126 N. C. 1139, 50 L. R. A. 473; City Council of Charleston v. Ahrens, 4 Strob. (S. C.) 241; Milliken v. City Council of Weatherford, 54 Tex. 388.

[265] Moore v. District of Columbia, 12 App. D. C. 537; Barbier v. Connolly, 113 U. S. 27; Beroujohn v. City of Mobile, 27 Ala. 58. An ordinance which requires the city sexton to expend from his fees sufficient to bury paupers free of charge is unreasonable, unjust and void where it is the duty of the municipal corporation to maintain burial grounds and bury paupers.

City of Denver v. Girard, 21 Colo. 447, 42 Pac. 662. The improper enforcement of an ordinance relative to the display of merchandise on sidewalks does not make it discriminative.

City of Chicago v. Brownell, 146 Ill. 64; Champer v. City of Greencastle, 138 Ind. 339, 35 N. E. 14, 24 L. R. A. 768; Com. v. Wilkins,

[266] McMillan v. Portage La Prairie, 11 Manitoba, 216; Austin v. Murray, 33 Mass. (16 Pick.) 121; State v. Cincinnati Gaslight & Coke Co., 18 Ohio St. 262; Kirkham v. Russell, 76 Va. 956.

and must be definite and certain,[267] and cannot delegate to other

121 Mass. 356; City of Baltimore v. Radecke, 49 Md. 217; City of Detroit v. Ft. Wayne & B. G. R. Co., 95 Mich. 456, 29 L. R. A. 79; City of St. Louis v. Russell, 116 Mo. 248, 20 L. R. A. 721; Trenton Horse R. Co. v. Inhabitants of Trenton, 53 N. J. Law, 132, 20 Atl. 1076, 11 L. R. A. 410; Read v. City of Camden, 54 N. J. Law, 347, 24 Atl. 549; State v. Richards, 74 Conn. 57, 49 Atl. 858. Refusal to repair sidewalks. Rahway Gaslight Co. v. City of Rahway, 58 N. J. Law, 510, 34 Atl. 3. An ordinance which affects a single corporation may still not be unreasonable in its requirements. Long v. Jersey City, 37 N. J. Law, 348; State v. Ray, 131 N. C. 814, 60 L. R. A. 634; Kirkham v. Russell, 76 Va. 956; Atkinson v. Goodrich Transp. Co., 60 Wis. 141.

Ordinances imposing restraints on certain occupations, either as to manner, time and place of its exercise if enacted in good faith and applying to all as a class, are not usually held invalid because unreasonable. See the following cases: Ex parte Lacey, 108 Cal. 326, 38 L. R. A. 640. Operating carpet beating machine. City of Chicago v. Stratton, 58 Ill. App. 539. Keeping of a livery stable. State v. Taft, 118 N. C. 1190, 23 S. E. 970, 32 L. R. A. 122.

[267] Town of Huntsville v. Phelps, 27 Ala. 55. An ordinance is not void for uncertainty because the penalty imposed for its violation is left to the municipal court to be imposed within fixed limits. San Francisco Pioneer Woolen Factory v. Brickwedel, 60 Cal. 166; State v. Carpenter, 60 Conn. 97; Atkins v. Phillips, 26 Fla. 281, 8 So. 429, 10 L. R. A. 158; Webber v. City of Chicago, 148 Ill. 313, 36 N. E. 70; Chicago & E. I. R. Co. v. Beaver, 96 Ill. App. 558; City of Shreveport v. Roos, 35 La. Ann. 1010; Com. v. Cutter, 156 Mass. 52, 29 N. E. 1146; Com. v. Goodnow, 117 Mass. 114; Com. v. Roy, 140 Mass. 432; State v. Zeigler, 32 N. J. Law, 262; McConvill v. Jersey City, 39 N. J. Law, 38. "It has been well said that a by-law ought to be expressed in such a manner as that its meaning may be unambiguous and in such language as may be readily understood by those upon whom it is to operate." State v. Rice, 97 N. C. 421, 2 S. E. 180; Louisburg Com'rs v. Harris, 52 N. C. (7 Jones) 281; State v. Higgs, 126 N. C. 1014, 48 L. R. A. 446. An ordinance giving the mayor the discretionary power to impose a fine or imprisonment within fixed limits as a penalty for its violation is not indefinite and uncertain.

Ex parte Bell, 32 Tex. Cr. R. 308, 22 S. W. 1040. An ordinance is too indefinite to support a conviction where it provides for the punishment of the keeper of a variety show which it defines as "any place or institution known or recognized as a variety show." Seymour v. City of Tacoma, 6 Wash. 138, 32 Pac. 1077.

Ordinances relating to local improvements. See citations under § 355, par. b; Mills v. City of Chicago, 182 Ill. 249, 54 N. E. 987; Hynes v. City of Chicago, 175 Ill. 56; Lusk v. City of Chicago, 176 Ill. 207; Cramer v. City of Charleston, 176 Ill. 507; Jarrett v. City of Chicago, 181 Ill. 242; Cruickshank v. City of Chicago, 181 Ill. 415; Vil-

bodies or officials the performance of legislative and discretionary duties.[268]

The state may, however, have conferred the power on a municipal corporation to pass ordinances or take action relating to a particular subject. Many cases hold that where this is true, the determination of the municipal legislative body, as shown by the passage of an ordinance or resolution, is conclusive of the question of reasonableness or expediency.[269]

lage of Hinsdale v. Shannon, 182 Ill. 312; Sawyer v. City of Chicago, 183 Ill. 57; Chicago Terminal Transfer R. Co. v. City of Chicago, 184 Ill. 154; Essroger v. City of Chicago, 185 Ill. 420; Mead v. City of Chicago, 186 Ill. 54; Pittsburgh, C., C. & St. L. R. Co. v. Town of Crown Point, 150 Ind. 536; Barber Asphalt Pav. Co. v. Hezel, 155 Mo. 39, 48 L. R. A. 285; City of Waco v. Chamberlain, 92 Tex. 207, 47 S. W. 527; Kearney v. Andrews, 10 N. J. Eq. (2 Stock.) 70.

In North Carolina it is generally held that ordinances providing a maximum penalty for their violation are void for vagueness and uncertainty. State v Crenshaw, 94 N. C. 877; State v. Cainan, 94 N. C. 883; State v. Worth, 95 N. C. 615; State v. Rice, 97 N. C. 421; State v. Irvin, 126 N. C. 989.

[268] In re Flaherty, 105 Cal. 558, 27 L. R. A. 529; Harrison, De Haven and Fitzgerald, J. J. dissenting. Walsh v. City of Denver, 10 Colo. App. 407, 53 Pac. 458; City of Tampa v. Salomonson, 35 Fla. 446, 17 So. 581; Collins v. Hall, 92 Ga. 411; Webber v. City of Chicago, 148 Ill. 313, 36 N. E. 70; McGregor v. Village of Lovington, 48 Ill. App. 211; City of Cairo v. Coleman, 53 Ill. App. 680; Foss v. City of Chicago, 56 Ill. 354.

City of Chicago v. Stratton, 58 Ill. App. 539. An ordinance which attempts to delegate the power to property owners to control the location of livery stables is void. City of Plymouth v. Schultheis, 135 Ind. 339, 35 N. E. 12; City of Newton v. Belger, 143 Mass. 598; City of St. Louis v. Howard, 119 Mo. 41, 24 S. W. 770, and City of St. Louis v. Russell, 116 Mo. 248, 20 L. R. A. 721; Gallaher v. Smith, 55 Mo. App. 116; City of St. Louis v. Howard, 119 Mo. 41; City of St. Louis v. Weitzel, 130 Mo. 600, 31 S. W. 1045; Bowyer v. City of Camden, 50 N. J. Law, 87, 11 Atl. 127; Borough of Madison v. Morristown Gaslight Co., 63 N. J. Eq. 120, 52 Atl. 158; Bassett v. City of El Paso (Tex. Civ. App.) 28 S. W. 554; City of Eureka v. Wilson, 15 Utah, 53; State v. Dering, 84 Wis. 585, 19 L. R. A. 858.

[269] Ex parte Delaney, 43 Cal. 478; A Coal Float v. City of Jeffersonville, 112 Ind. 15. "The power of a court to declare an ordinance unreasonable, and therefore void, is practically restricted to cases in which the legislature has enacted nothing on the subject-matter of the ordinance, and consequently to cases in which the ordinance was passed under the supposed incidental power of the corporation merely." Cleveland, C., C. & I. R. Co. v. Harrington, 131 Ind. 426, fol-

This principle is limited, however, by the rule of law which prohibits or prevents any legislative body from acting arbitrarily in regard to a matter without considering the nature of the subject, the condition sought to be remedied or the means provided.[270] Neither can municipal councils or their agencies of government renounce powers vested in them by the constitution and general laws of the state or pass ordinances which will disable or cripple them in performing their legal duties. An ordinance which makes even a partial surrender of political power is void.[271] Ordinances or resolutions in order to be valid must also comply with the limitations which prohibit the passage of laws retroactive in their effect.[272]

§ 538. Interstate commerce.

The Federal Constitution[273] gives to commerce the exclusive right of regulating "commerce with foreign nations and among the several states and with Indian tribes," and municipal action of whatever character taken in violation of this provision is void.[274] The absence of intention to regulate is immaterial; the

lowing State v. Woodward, 89 Ind. 110.

Thorpe v. Rutland & B. R. Co., 27 Vt. 140.

[270] Harrison v. Brooks, 20 Ga. 537; Village of Desplaines v. Poyer, 22 Ill. App. 574, affirmed 123 Ill. 348, 14 N. E. 677; City of Evansville v. Miller, 146 Ind. 613, 45 N. E. 1054, 38 L. R. A. 161; Town of Crowley v. West, 52 La. Ann. 526, 47 L. R. A. 652; Shiras v. Olinger, 50 Iowa, 571; City of Baltimore v. Radecke, 49 Md. 217; Pieri v. City of Shieldsboro, 42 Miss. 493; Consolidated Traction Co. v. City of Elizabeth, 58 N. J. Law, 619, 34 Atl. 146, 32 L. R. A. 170; Pickard v. Collins, 32 Barb. (N. Y.) 444; Burditt v. Swenson, 17 Tex. 489; Ex parte Vance, 42 Tex. Cr. R. 619, 62 S. W. 568. See, also §§ 137 and 138 and cases cited.

[271] City of Rushville v. Rushville Nat. Gas Co., 132 Ind. 575, 15 L. R. A. 321; Municipality No. 3 v. Ursuline Nuns, 2 La. Ann. 611; First Municipality v. Cutting, 4 La. Ann. 335.

[272] Foster v. Police Com'rs of City & County of San Francisco, 102 Cal. 483; Forbes v. City of Wilmington, 1 Marv. (Del.) 186, 40 Atl. 1105; Howard v. Corporation of Savannah, T. U. P. Charlt. (Ga.) 173; City of Little Springs v. Withaupt, 1 Mo. App. Rep'r 388; Raton Waterworks Co. v. Town of Raton, 9 N. M. 70, 49 Pac. 898; State v. Langston, 88 N. C. 692; State v. Janesville St. R. Co., 87 Wis. 72, 57 N. W. 970, 22 L. R. A. 759. But an ordinance may be remedial only and not retroactive in its effect.

[273] U. S. Const. art. 1, § 8, par. 3.

[274] Article 1, § 8, par. 3, U. S. Const.; Brown v. Maryland, 12 Wheat. (U. S.) 419; Cook v. Penn-

effect of the action is that which will control the courts, and in construing such provisions,[275] it is the well established principle followed without question that the Federal courts have the sole power and right of ultimately passing upon or determining questions arising under these clauses as well as other provisions that are found in the Federal constitution or Federal laws[276] and which may be suggested in succeeding sections and paragraphs. The power of Congress over interstate commerce may arise through the direct application of the particular clause referred to,[277] through grants of power to Congress in the Constitution to legislate upon commerce and its related subjects[278] and through the Fourteenth amendment which, by decisions of the courts includes as one of the privileges and immunities to citizens which cannot be abridged by any state, the fundamental right to engage in commerce and the right to travel and transportation.[279]

§ 539. Definition of "commerce."

The right or power of the Federal Government under this clause is a most substantial one and far reaching in its effects. In the leading and earliest case construing the interstate commerce provision,[280] defining the term "commerce" and the extent and nature of the right, in the opinion by Chief Justice Marshall, the court said: "The subject to be regulated is commerce; and our constitution being, as was aptly said at the bar, one of enum-

sylvania, 97 U. S. 566; Tiernan v. Rinker, 102 U. S. 123; Metcalf v. City of St. Louis, 11 Mo. 103; City of St. Louis v. McCoy, 18 Mo. 238. See, also, Prentice & E., Commerce Clause.

[275] Cannon v. City of New Orleans, 87 U. S. (20 Wall.) 577; Henderson v. City of New York, 92 U. S. 259; Morgan v. City of New Orleans, 112 U. S. 69; Mobile Bay Pilotage Com'rs v. Steamboat Cuba, 28 Ala. 185.

[276] Mobile County v. Kimball, 102 U. S. 691; Robbins v. Shelby County Taxing Dist., 120 U. S. 489; Western Union Tel. Co. v. State Board of Assessment, 132 U. S. 472; Pacific Coast S. S. Co. v. Board of Railroad Com'rs, 18 Fed. 10; Myers v. Baltimore County Com'rs, 83 Md. 385, 55 Am. St. Rep. 349, 34 L. R. A. 309; Foster v. Blue Earth County Com'rs, 7 Minn. 140 (Gil. 84).

[277] Houston Dist. Nav. Co. v. Insurance Co. of North America, 89 Tex. 1, 30 L. R. A. 713.

[278] United States v. Kagama, 118 U. S. 375; In re City of Salem, 37 Fed. 846, 2 L. R. A. 380.

[279] Robbins v. Shelby County Taxing Dist., 120 U. S. 489.

[280] Gibbons v. Ogden, 9 Wheat, (U. S.) 1.

eration, and not of definition, to ascertain the extent of the power, it becomes necessary to settle the meaning of the word. The counsel for the appellee would limit it to traffic, to buying and selling, or the interchange of commodities, and do not admit that it comprehends navigation. This would restrict a general term, applicable to many objects, to one of its significations. Commerce, undoubtedly, is traffic, but it is something more; it is intercourse. It describes the commercial intercourse between nations, and parts of nations in all its branches, and is regulated by prescribing rules for carrying on that intercourse. * * * The genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the state generally; but not to those which are completely within a particular state, which do not affect other states, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government. The completely internal commerce of a state, then, may be considered as reserved for the state itself.

"But in regulating commerce with foreign nations, the power of congress does not stop at the jurisdictional lines of the several states. It would be a very useless power if it could not pass those lines. The commerce of the United States with foreign nations is that of the whole United States. Every district has a right to participate in it. The deep streams which penetrate our country in every direction, pass through the interior of almost every state in the Union, and furnish the means of exercising this right. If Congress has the power to regulate it, that power must be exercised whenever the subjects exists." And further in discussing the power, he said: "It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution. These are expressed in plain terms, and do not effect the questions which arise in this case, or which have been discussed at the bar. If, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several states, is vested in Congress as absolutely as it would be in a single government having in its constitution the same restrictions on the exer-

cise of the power as are found in the constitution of the United States. The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied to secure them from its abuse." This decision has since been followed consistently by all courts and many municipal ordinances and regulations as well as state laws have been held invalid as violating the constitutional provision[281] although apparently based upon rights proceeding from a legal exercise of either the taxing or police power of the state. In the absence of action by the Federal Government in respect to the question involved, other action by a state and its subordinate agencies has been sustained as legal. The power of Congress is exclusive unless by its consent or assent a state is permitted to act.[282]

§ 540. Definition of "to regulate."

In defining the word regulate in the Gibbons v. Ogden case, it was said: "It has been contended by the counsel for the appellant that as the word 'to regulate' implies in its nature, full power over the thing to be regulated, it excludes necessarily, the action of all others that would perform the same operation on the same thing. That regulation is designed for the entire result, applying to those parts which remain as they were as well as to those which are altered. It produces a uniform whole which is as much disturbed and deranged by changing what the regulating power designs to leave untouched as that on which it has operated." And again, in the opinion of Mr. Justice Johnson, it was said: "The power to regulate foreign commerce is necessarily exclusive. * * * But the language which grants the power as to one description of commerce, grants it as to all and in fact if ever the exercise of a right or acquiescence in a construction could be inferred from contemporaneous and continued assent, it is that of the exclusive effect of this grant."[283] The word "commerce" as

[281] Meyers v. Chicago, R. I. & P. R. Co., 57 Iowa, 555; State v. Indiana Oil, G. & M. Co., 120 Ind. 575, 6 L. R. A. 579.

[282] Osborne v. City of Mobile, 83 U. S. (16 Wall.) 482; People v. Coleman, 4 Cal. 46; City of Newport v. Taylor's Ex'rs, 55 Ky. (16 B. Mon.) 699; Thomas v. Greenwood, 6 Ohio Dec. 639; State v. Pinckney, 10 Rich. Law (S. C.) 474.

[283] Moor v. Veazie, 32 Me. 343.

used in the Constitution has been defined in the broadest way "it is a term of the largest import," it includes not only traffic but every species of commercial intercourse among the states and the agencies employed in the carrying on of that commercial intercourse.[284] Justice Johnson in the Gibbons v. Ogden case defined it as "Commerce in its simplest signification means an exchange of goods; but in the advancement of society, labor, transportation, intelligence, care and various mediums of exchange become commodies and enter into commerce; the subject, the vehicle, the agent and their various operations become the objects of commercial regulations."

§ 541. The taxing power of the state in connection with interstate commerce.

In the apparently legitimate exercise of the taxing or licensing power of a state and its delegated agencies, the effect has been a regulation of interstate or foreign commerce and held to be in contravention of the commerce clause. It has been difficult at times to determine the line between a valid and an invalid exercise of the power by the state.[285] It is clear that by the taxation of certain agencies of interstate commerce or the exercise itself, a regulation is clearly effected and yet the Federal Constitution necessarily does not deprive the states of the right to exercise the taxing power.[286] The principle is well established, however, that where the effect or imposition of a tax or license amounts to a regulation of commerce in its broadest sense, the state is restrained from acting,[287] and it is also well established

[284] Chicago & N. W. R. Co. v. Fuller, 84 U. S. (17 Wall.) 568; Groves v. Slaughter, 15 Pet. (U. S.) 511; Mobile County v. Kimball, 102 U. S. 691; In re Greene, 52 Fed. 113; Crow v. State, 14 Mo. 237; State v. Delaware, L. & W. R. Co., 30 N. J. Law, 478; Ex parte Crandall, 1 Nev. 312; State v. Morgan, 2 S. D. 50.

[285] Western Union Tel. Co. v. Texas, 105 U. S. 460; Leloup v. Port of Mobile, 127 U. S. 640; Postal Tel. Cable Co. v. City of Charleston, 153 U. S. 692.

[286] Western Union Tel. Co. v. Attorney General, 125 U. S. 530; Leloup v. Port of Mobile, 127 U. S. 640; City of St. Louis v. Western Union Tel. Co., 148 U. S. 92.

[287] McCulloch v. Maryland, 4 Wheat. (U. S.) 316. The conclusive argument by Chief Justice Marshall in this case is too familiar to justify a reproduction of more than a brief extract. "That the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create; that there is a plain repugnance in conferring on one govern-

that a state has the right to exercise its sovereign power upon property within its jurisdiction when that power in good faith is exercised for the purpose of raising revenue and not that of regulating commerce,[288] and works no discrimination against interstate commerce.

§ 542. Commerce clause and the police power as exercised by the states.

The states are recognized as independent sovereignties and possess with other powers the right to legislate or take action in respect to the protection of the lives, the good health and the good morals of the people within their jurisdiction.[289] It has been claimed that the police power rests primarily in the states and that it is not only their privilege but their duty to exercise it in a proper manner except as such exercise may interfere with some one or more of the powers given to the Federal Government by

ment a power to control the constitutional measures of another, which other, with respect to those very measures, is declared to be supreme over that which exerts the control, are propositions not to be denied. * * * If the states may tax one instrument employed by the government in the execution of its powers, they may tax any and every other instrument. They may tax the mail; they may tax the mint; they may tax patent rights; they may tax the papers of the customhouse; they may tax judicial process; they may tax all the means employed by the government to an excess which would defeat all the ends of government. This was not intended by the American people. They did not design to make their government dependent on the states."

Crandall v. Nevada, 73 U. S. (6 Wall.) 35. In the opinion of Mr. Justice Miller it is said: "The views here advanced are neither novel nor unsupported by authority. The question of the taxing power of the states as its exercise has affected the functions of the Federal Government has been repeatedly considered by this court and the right of the states in this mode to impede or embarrass the constitutional operations of that government or the rights which its citizens hold under it, has been uniformly denied." And further in the decision, reference is made to McCulloch v. Maryland, 4 Wheat. (U. S.) 316, and the quotation given above from that case is cited with approval.

[288] City of St. Louis v. Western Union Tel. Co., 148 U. S. 92; Western Union Tel. Co. v. Mississippi R. Co., 74 Miss. 80; City of Philadelphia v. American Union Tel. Co., 167 Pa. 406.

[289] In re Rahrer, 140 U. S. 545; United States v. Knight Co., 156 U. S. 13; Addyston Pipe & Steel Co. v. United States, 175 U. S. 211; United States v. Popper, 98 Fed. 423.

the Constitution. Congress is given the power of controlling navigable waters and yet police regulations by the states in many cases have been found necessary for the protection of life and property.[290] The existence of a dual government requires the exercise of forbearance, good faith and a respect for respective rights; the exercise of the police power has already been considered[291] and also that specific exercise of the power under which license fees are imposed upon, in many cases, the agents or instrumentalities of interstate commerce.[292]

§ 543. The impairment of contract obligations.

The consideration of the interstate commerce clause in connection with municipal action is important in defining powers and regulating their exercise as between sovereigns or their agencies. That clause of the Federal Constitution which prohibits a state from passing any law impairing the obligation of a contract is more important in connection with a determination of the rights which may exist in favor of third parties and which, but for the existence of such a clause, might be impaired or destroyed by municipal action. The contract obligation protected by the Constitution may be one which arises because of certain transactions between the public corporation itself and some other party[293] to

[290] Harmon v. City of Chicago, 110 Ill. 400. An ordinance is not unconstitutional as in violation of the interstate commerce clause which prohibits steamboats or tugs in the river and harbor of Chicago from emitting dense smoke and further terms such smoke as a nuisance. People v. Williams, 64 Cal. 498; Robertson v. Com., 101 Ky. 285.

[291] Chap. V, ante.

[292] Sections 398 et seq., ante; Carson River Lumbering Co. v. Patterson, 33 Cal. 334.

[293] Nottage v. City of Portland, 35 Or. 539. There is no contract express or implied by which a city must return an invalid assessment paid under protest. "Again it is claimed that when the plaintiff paid the assessment by coercion and under protest the law created an implied contract on the part of the city to return it to her if wrongfully collected and that the section in question is, therefore, void because it impairs the obligation of such a contract and deprives her of a vested right of action. But there was no contract on the part of the city to return the amount of the invalid assessment paid by the plaintiff. Her right to recover was based on an informality in the proceeding and the legislature may lawfully take away such right because a party has no vested right in a defense or right of action based upon an informality not affecting his substantial equity. This precise question was determined by the supreme court of Pennsylvania

the transaction or altogether between third parties.[294] The state or its agencies may enter into contract obligations[295] or grant franchises or charters which partake of the nature of a contract[296]

in Grim v. Weissenberg School Dist., 57 Pa. 433. In that case the plaintiff had paid an illegal tax under protest and in an action to recover it back, the school district set up as a defense the provisions of an act of the legislature legalizing and making valid such tax. It was claimed there as here, that the act was unconstitutional because at the time of its passage the plaintiff had a vested right to recover from the district the money which he had been compelled to pay without authority of law and this vested right the legislature could not devest. But Mr. Justice Sharswood, speaking for the court, said in answer to this position: 'If an act of assembly be within the legitimate scope of legislative power, it is not a valid objection that it devests vested rights. There is no clause either in the constitution of the United States or of this commonwealth, which prohibits retrospective laws. The legislature cannot impair the obligation of a contract or pass an ex post facto law for both these are expressly forbidden. But an ex post facto law is one which makes an act punishable in a manner in which it was not punishable when it was committed. Ex post facto laws relate to penal and criminal proceedings, * * * and not to civil proceedings which affect private rights retrospectively. Retrospective laws and state laws devesting vested rights, unless ex post facto, or impairing the obligation of contracts, do not fall within the prohibition contained in the constitution of the United States, however repugnant they may be to the principles of sound legislation. * * * All acts curing irregularities in legal proceedings necessarily devest vested rights of the parties by closing the mouths of those who could otherwise avail themselves of such irregularities to escape from the fulfillment of what is a moral obligation and but for the irregularity would be a legal liability. * * * To deny the validity of such laws would be to run the plowshare through hundreds of titles which are founded and repose in security upon them.'"

[294] Lindsay v. City of Anniston, 104 Ala. 257, 16 So. 545, 27 L. R. A. 436. The enforcement of an ordinance regulating acts and the solicitation of patronage by agents of transfer companies does not impair the obligation of a contract between a transfer company and the depot company, made prior to the passage of the ordinance, which gives to the transfer company the exclusive privilege of entering the trains and premises of the depot company to solicit patronage.

[295] Bietry v. City of New Orleans, 24 La. Ann. 21; Chapman v. City of Lowell, 58 Mass. (4 Cush.) 378; Neill v. Gates, 152 Mo. 585.

[296] City of Chicago v. Sheldon, 76 U. S. (9 Wall.) 50; Cleveland City R. Co. v. City of Cleveland, 94 Fed. 385. "The constitution of Ohio has empowered the legislature to confer upon the city of Cleveland the authority to operate lines of railway through its streets. Acting under this delegated power * * * the city council, from time to time, has

and which cannot be impaired by subsequent action. The subject has been considered in those sections relating to contracts,[297] and will be further discussed under the subject of franchises. The inviolability of a contract or a contract obligation is the basis of a well governed and civilized community. Public corporations should not be exempt from performing their contracts; the fact that they are governmental agents does not relieve them of this obligation. The enforcement of this principle in respect to the contracts of public corporations is too often ignored. As said by the supreme court of the United States, "Its character as a municipal corporation does not affect the nature of its obligations to its creditors."[298]

§ 544. Definition of "law."

The Federal Constitution employs the word "law" in stating the prohibition, and its meaning in connection with action impairing or destroying contract rights has been questioned at times although the word is definite and should be easily understood. It

made grants to the street railroads, conferring privileges upon them and at the same time prescribing the terms and conditions under which such lines should be located and operated. Among the powers so vested in the city was the right to prescribe the rate of fare to be collected during the life of each grant. The city, acting under this general authority so conferred, passed ordinances at different times pertaining to the street railways which make a printed volume and are in evidence before the court. These ordinances, granting sometimes original and sometimes additional authority, were accepted by the street railway companies; and these acceptances on the one side, and grants made with conditions on the other, became a contract between the parties, which could not be annulled or amended without the consent of both parties. These ordinances so molded into contracts under the legislative power hereinbefore referred to, are, in effect, laws of the state of Ohio, and, therefore, are without the inhibition of the fourteenth amendment to the constitution of the United States, which is directed quite as pointedly to the legislative power of the state or municipality as to the executive or judicial." Cincinnati St. R. Co. v. Smith, 29 Ohio St. 292; Cincinnati & S. R. Co. v. Village of Carthage, 36 Ohio St. 634; City of Columbus v. Columbus St. R. Co., 45 Ohio St. 104; City of Ashland v. Wheeler, 88 Wis. 607. See, also, sections, post, on exclusive franchises.

[297] Sections 246 et seq., ante.

[298] Meriwether v. Garrett, 102 U. S. 472. See, also, Cincinnati & S. R. Co. v. Village of Carthage, 36 Ohio St. 634.

is commonly in those cases where contract rights have been impaired or destroyed by the public corporation that the doubtful application of the word "law" to the particular action which accomplished certain illegal and injurious results has been raised. The law breaker or the dishonest person is usually a quibbler and seeks to avoid the results of his acts or justify his conduct by subtile and technical arguments or reasons. This term "law" has been defined as "Any enactment from whatever source originating, to which a state gives the force of law is a statute of the state within the meaning of the clause cited." [299] It would include a constitutional provision, an act, ordinance or resolution, a judgment of a court of competent jurisdiction or, in short, any action whatever its character by a state or any of its subordinate agencies to which that state gives the force and effect of a law,[300] using the term in its broad sense as a command or rule of action laid down by a superior and which an inferior is bound to obey.

§ 545. Ordinances; reasonable or unreasonable.

In a preceding section,[301] the statement has been made that an ordinance, to be valid, must not be unreasonable. The determination of this question, when necessary, is for the courts to decide and they will consider all of the circumstances and conditions of the necessity for the passage of the ordinance or regulation.[302] Its existence has raised an important question in respect to the power of a legislative body in passing laws. Where the element

[299] Swift v. Tyson, 16 Pet. (U. S.) 18; Chamberlain v. City of Evansville, 77 Ind. 550; Leavenworth County Com'rs v. Miller, 7 Kan. 501; Budd v. State, 22 Tenn. (3 Humph.) 490; State v. McCann, 72 Tenn. (4 Lea) 7; 1 Bl. Comm. 14; 1 Kent, Comm. 447.

[300] District Tp. of Dubuque v. City of Dubuque, 7 Iowa, 281; Durkee v. City of Janesville, 26 Wis. 703.

[301] Section 537, ante.

[302] State v. Boardman, 93 Me. 73, 46 L. R. A. 750; City of Brownville v. Cook, 4 Neb. 101. Where the court say in passing upon an ordinance for the punishment of those who willfully or mischievously meddle with personal or real property that "a reasonable presumption is that the people of cities and villages require more stringent regulations for their government than do those of more sparsely settled districts of the state." Long v. Jersey City, 37 N. J. Law, 348; City of Lead v. Klatt, 11 S. D. 109. But see Clason v. City of Milwaukee, 30 Wis. 316, which holds that the question of whether an ordinance was reasonable should have been submitted to the jury upon the evidence produced.

of reasonableness is involved, the weight of authority seems to be to the effect that the enactment of a law by a legislative body is conclusive on this point and precludes an investigation by the judicial branch of the government.[303] Those cases which hold to the contrary of this general rule, it seems to the author, are sustained by the better reason. A legislative body is not so far above reproach, superior in intelligence or fair and unprejudiced in its conclusions or conservative in its action as to render it infallible.[304]

Municipal legislative action may proceed from authority expressly granted; that implied because necessary for the exercise of an express power, and, finally, that implied because reasonably necessary and convenient to corporate existence and the performance of corporate duties.[305] In regard to action taken under the first class of powers, the rule seems to be universally that which applies to the action of all legislative bodies.[306] In respect to ac-

[303] Town of Greensboro v. Ehrenreich, 80 Ala. 579; Waters v. Leech, 3 Ark. 110; In re Ah You, 88 Cal. 99, 11 L. R. A. 408; City of Jacksonville v. Ledwith, 26 Fla. 163, 9 L. R. A. 69; Cosgrove v. City of Augusta, 103 Ga. 835, 42 L. R. A. 711; Ex parte Gregory, 20 Tex. App. 210.

[304] Com. v. Steffee, 70 Ky. (7 Bush) 161; Pieri v. City of Shieldsboro, 42 Miss. 493; Borough of Freeport v. Marks, 59 Pa. 253.

[305] Champer v. City of Greencastle, 138 Ind. 339, 46 Am. St. Rep. 390, 24 L. R. A. 768; Burg v. Chicago, R. I. & P. R. Co., 90 Iowa, 106; State v. Morris, 47 La. Ann. 1660; City of Baltimore v. Porter, 18 Md. 284; Town of Trenton v. Clayton, 50 Mo. App. 535; Southwark Com'rs v. Neil, 3 Yeates (Pa.) 54.

[306] Huesing v. City of Rock Island, 128 Ill. 465; Skaggs v. City of Martinsville, 140 Ind. 476, 39 N. E. 241, 33 L. R. A. 781; Shea v. City of Muncie, 148 Ind. 14, 46 N. E. 138; State v. Hammond, 40 Minn. 43. "The charter of the city of Minneapolis provides that 'the city council shall have full power and authority to make, ordain, publish, enforce, alter, amend or repeal all such ordinances for the government and good order of the city, for the suppression of vice and intemperance and for the prevention of crime, as it shall deem expedient; * * * and for these purposes the said city council shall have authority by such ordinances * * * sixteenth, to prevent, open or notorious drunkenness and obscenity in the streets or public places of said city.' * * * In respect to preventing and punishing lewdness, indecency, or obscenity, the specification above quoted,—and it is the only one including that subject,—refers only to acts or conduct in the streets or public places of the city; only to such as may affect the public peace, decency and good order; and does not authorize punishment for private conduct however reprehensible it may be in

tion taken under the second and third classes or the implied powers of the corporation, the rule is different and the courts may inquire into the character of the action and determine whether it is reasonable or unreasonable.[307]

§ 546. Tests of a reasonable ordinance.

It has already been suggested that when the courts have the right to determine the question of whether an ordinance is reasonable or unreasonable, they will consider all of the circumstances surrounding the purpose of, the necessity for and the passage of the ordinance. In detail some of these tests will be given.

Purpose for which passed. A public corporation, it must be remembered, although a governmental agent, is still an artificial person, having as the necessity for its creation the accomplishment of specific objects. If an ordinance as passed by a municipal corporation does not have in view the accomplishment of some object for which the corporation was especially created, it will not be considered as reasonable.[308]

Consistency with superior law. Again, an ordinance is a law of inferior class or grade, and, to be reasonable, it must conform to all laws of a superior grade or class. An ordinance or resolution, therefore, which is not in harmony with the constitution, the general laws of the state or the charter of the municipality, will not be regarded as reasonable [309] without considering the proposition that such ordinances would be also invalid because of such lack of harmony.

the matter of morals. The ordinance exceeds the power and is therefore void." Skinker v. Heman, 64 Mo. App. 441; Littlefield v. State, 42 Neb. 223, 28 L. R. A. 588; State v. Ferguson, 33 N. H. 424; Johnson v. Borough of Asbury Park, 58 N. J. Law, 604; Town of Darlington v. Ward, 48 S. C. 570, 26 S. E. 906, 38 L. R. A. 326, affirmed by divided court, McIver, C. J., and Pope, J., dissenting.

[307] Pittsburgh, C., C. & St. L. R. Co. v. Town of Crown Point, 146 Ind. 421, 45 N. E. 587, 35 L. R. A. 684; Champer v. City of Greencastle, 138 Ind. 339, 24 L. R. A. 768; Skaggs v. City of Martinsville, 140 Ind. 476, 33 L. R. A. 781; State v. Stone, 46 La. Ann. 147; Skinker v. Heman, 2 Mo. App. Rep'r, 1095; Dreyfus v. Lonergan, 73 Mo. App. 336; City of Tarkio v. Cook, 120 Mo. 1.

[308] Los Angeles County v. Hollywood Cemetery Ass'n, 124 Cal. 344; People v. Armstrong, 73 Mich. 288, 2 L. R. A. 721.

[309] City of Placerville v. Wilcox, 35 Cal. 21; City of Durango v.

§ 547. Same subject; surrounding conditions.

The reasonableness of an ordinance or a resolution in many cases is determined entirely by the surrounding conditions and circumstances, and its operation upon the object the ordinance was designed to affect.[310] The population of a municipality, its character, its area, physical characteristics and charter, whether manufacturing, mercantile or otherwise, are a few of the many conditions that courts have to consider.[311] Ordinances or resolutions when enacted by a densely populated city with a large number of foreign-born residents are reasonable [312] but would not be considered so if passed by a city sparsely settled extending over a larger area, and the population of which is well educated and law abiding.[313] The importance of this test cannot be emphasized too strongly in a determination of the reasonableness of a municipal law.[314]

§ 548. Amendment or repeal of legislative action.

The power to legislate carries with it by implication, except as specially prohibited or limited by charter or constitutional provisions, the right to repeal or amend such legislation by subsequent

Reinsberg, 16 Colo. 327; Simrall v. City of Covington, 90 Ky. 444, 9 L. R. A. 556; State v. Burns, 45 La. Ann. 34; State v. Payssan, 47 La. Ann. 1029; Barling v. West, 29 Wis. 307.

[310] City of Mobile v. Yuille, 3 Ala. 137; City of Helena v. Dwyer, 64 Ark. 424, 39 L. R. A. 266; Wills v. City of Ft. Smith, 70 Ark. 221, 66 S. W. 922; City of Chicago v. Rumpff, 45 Ill. 90; City of Clinton v. Phillips, 58 Ill. 102; City of Chicago v. Wilson, 195 Ill. 19, 57 L. R. A. 127; Evison v. Chicago, St. P., M. & O. R. Co., 45 Minn. 370, 11 L. R. A. 434; City of Austin v. Austin City Cemetery Ass'n, 87 Tex. 330. See, also, cases cited under M, Horr & Bemis Mun. Ord., §§ 127 et seq., and 21 Am. & Eng. Enc. Law (2d ed.) "Ordinances."

[311] Kip v. City of Paterson, 26 N. J. Law (2 Dutch.) 298; City of Hudson v. Thorne, 7 Paige (N. Y.) 261.

[312] Cronin v. People, 82 N. Y. 318.

[313] Los Angeles County v. Hollywood Cemetery Ass'n, 124 Cal. 347; Com. v. Steffee, 70 Ky. (7 Bush) 161; City of Baltimore v. Radecke, 49 Md. 217; Corrigan v. Gage, 68 Mo. 541. An ordinance providing for the building of a sidewalk in an uninhabited portion of the city and disconnected with any other street or sidewalk is unreasonable. State v. Freeman, 38 N. H. 426; City of Richmond v. Dudley, 129 Ind. 112, 13 L. R. A. 587, 28 Am. St. Rep. 180, 48 Am. Dec. 679; Com. v. Stodder, 56 Mass. (2 Cush.) 562.

[314] Cosgrove v. City Council of Augusta, 103 Ga. 835, 42 L. R. A. 711; Corrigan v. Gage, 68 Mo. 541.

action of the same body.[315] The amendment or repeal of existing laws may be effected directly or through the application of the doctrine of implication.[316] But courts are ever disinclined to repeal by implication in determining the effect of legislation upon that already existing, and,[317] unless it clearly appears from the attendant circumstances and conditions that it was the intent of the legislative body to amend or repeal [318] or unless the legislation is

[315] Southern Bell Tel. & Teleg. Co. v. City of Richmond, 98 Fed. 671, affirmed (C. C. A.) 103 Fed. 31. The motives inducing the passage of a repealing ordinance cannot be inquired into by the courts in determining the question of its validity. Foster v. Police Com'rs, 102 Cal. 483; Bishoff v. State, 43 Fla. 67, 30 So. 808; First Nat. Bank of Du Quoin v. Keith, 84 Ill. App. 103, affirmed 183 Ill. 475, 56 N. E. 179; Ryce v. City of Osage, 88 Iowa, 558; Lowry v. City of Lexington, 113 Ky. 763, 68 S. W. 1109; New Orleans El. R. Co. v. City of New Orleans, 39 La. Ann. 127, 1 So. 434; State v. Cozzens, 42 La. Ann. 1069, 8 So. 268; Robinson v. City of Baltimore, 93 Md. 208, 49 Atl. 4. Construing acts of 1898, c. 123, § 3. A new city charter for the city of Baltimore. City of Kansas v. White, 69 Mo. 26.

O'Neil v. Tyler, 3 N. D. 47, 53 N. W. 434. An ordinance which is void cannot be made valid by the passage of an ordinance amending the former. City of Philadelphia v. Bowman, 175 Pa. 91; Schmalzried v. White, 97 Tenn. 36, 36 S. W. 393, 32 L. R. A. 782.

[316] Bloomer v. Stolley, 5 McLean, 158, Fed. Cas. No. 1,559; Goldsmith v. City of Huntsville, 120 Ala. 182, 24 So. 509; Booth v. Town of Carthage, 67 Ill. 102; First Nat. Bank of Du Quoin v. Keith, 84 Ill. App. 103; Holdom v. City of Chicago, 169 Ill. 109; Larkin v. Burlington, C. R. & N. R. Co., 85 Iowa, 492, 52 N. W. 480; City of Des Moines v. Hillis, 55 Iowa, 643; Ritchie v. City of South Topeka, 38 Kan. 368, 16 Pac. 332; De Lano v. Doyle, 120 Mich. 258; State v. Enger, 81 Minn. 399, 84 N. W. 218; Inhabitants of Burlington v. Estlow, 43 N. J. Law, 13; Hutchins v. Town of Durnham, 118 N. C. 457, 32 L. R. A. 706; Knight v. Town of West Union, 45 W. Va. 194, 32 S. E. 163.

[317] Goldsmith v. City of Huntsville, 120 Ala. 182; People v. Harrison, 185 Ill. 307; Thompson v. City of Highland Park, 187 Ill. 265; Franklin v. Westfall, 27 Kan. 619; City of Louisville v. Young, 23 Ky. L. R. 1429, 65 S. W. 599; In re Bailey, 64 Kan. 887, 68 Pac. 53; Ruell v. City of Alpena, 108 Mich. 290, 66 N. W. 49; City of Monett v. Beaty, 79 Mo. App. 315; Ruschenberg v. Southern Elec. R. Co., 161 Mo. 70; In re Hall, 10 Neb. 537; Martineau v. Rochester R. Co., 81 Hun, 263, 30 N. Y. Supp. 778; City of Erie v. Griswold, 184 Pa. 435; City of Providence v. Union R. Co., 12 R. I. 473. See, also, cases cited in the two following notes.

[318] Rice v. Foster, 4 Harr. (Del.) 479; Greeley v. City of Jacksonville, 17 Fla. 174; City of Grand Rapids v. Norman, 110 Mich. 544, 68 N. W. 269; Quinette v. City of St. Louis, 76 Mo. 402.

so clearly inconsistent and repugnant that all cannot stand, the doctrine will not be applied.[319]

The character of the legislation may determine the manner of repeal or amendment. Legislation may differ in its character or application either considered from the question of time involved or the importance of the subject legislated upon. An ordinance cannot be amended or repealed by resolution which is usually recognized as a law of inferior grade.[320] General laws cannot be amended or repealed by the passage of special or special grants of powers by general laws.[321] The general principle applies that the legislative action which repeals or amends must be of the same grade or dignity and its passage attended with the same formalities as that required for the adoption of the laws intended to be repealed or altered.[322]

§ 549. Agency and time of repeal or amendment.

The amendment or repeal may be effected through the adoption of a constitutional amendment or provision,[323] the passage of a

[319] Stevens v. Stoutenburgh, 8 App. D. C. 513; Virgo v. City of Toronto, 22 Can. Sup. Ct. 447; People v. Mount, 186 Ill. 560, 58 N. E. 360, affirming 87 Ill. App. 194; Cook & Rathborne Co. v. Sanitary Dist. of Chicago, 177 Ill. 599; People v. Harrison, 185 Ill. 307; Wethington v. City of Owensboro, 21 Ky. L. R. 960, 53 S. W. 644; Smyrk v. Sharp, 82 Md. 97. But an ordinance appropriating money for the improvement of a street when an amount has been appropriated by a former ordinance is not repugnant to the former and both will stand. Lenz v. Sherrott, 26 Mich. 139; People v. Furman, 85 Mich. 110; City of St. Louis v. Weitzel, 130 Mo. 600, 31 S. W. 1045; Ex parte Wolf, 14 Neb. 24; Mulcahy v. City of Newark, 57 N. J. Law, 513; Treasurer of Elizabeth v. Dunning, 58 N. J. Law, 554.

[320] Backhaus v. People, 87 Ill. App. 173; Hibbard v. City of Chicago, 173 Ill. 91, 40 L. R. A. 621; Chicago & N. P. R. Co. v. City of Chicago, 174 Ill. 439; Bills v. City of Goshen, 117 Ind. 221, 3 L. R. A. 261; State v. Swindell, 146 Ind. 527; Ryce v. City of Osage, 88 Iowa, 558, 55 N. W. 532; Cascaden v. City of Waterloo, 106 Iowa, 673, 77 N. W. 333; State v. Cowgill & H. Mill Co., 156 Mo. 620; Ashton v. City of Rochester, 60 Hun, 372, 14 N. Y. Supp. 855; City of San Antonio v. Micklejohn, 89 Tex. 79.

[321] Provisional Municipality v. Sullivan, 23 Fla. 1; Beiling v. City of Evansville, 144 Ind. 644, 42 N. E. 621, 35 L. R. A. 272; State v. Labatut, 39 La. Ann. 516, 2 So. 550; Trustees of Erie Academy v. City of Erie, 31 Pa. 515; Knight v. Town of West Union, 45 W. Va. 194.

[322] Welch v. Bowen, 103 Ind. 256; State v. Swindell, 146 Ind. 527;

[323] Mulcahy v. City of Newark, 57 N. J. Law, 513.

statute either general or special when the latter is not prohibited,[324] and through the local action of a municipal council in respect to its own transactions.[325] Ordinances and resolutions may be amended or repealed through the adoption of a new charter or of such charter provisions as will effect this result,[326] but the

Santo v. State, 2 Iowa, 165; Robinson v. City of Baltimore, 93 Md. 208; Kansas City v. White, 69 Mo. 26; Barber Asphalt Pav. Co. v. Ullman, 137 Mo. 543; In re Hall, 10 Neb. 537; Hudson Tel. Co. v. Jersey City, 49 N. J. Law, 303.

[324] Wethington v. City of Owensboro, 21 Ky. L. R. 960, 53 S. W. 644; People v. Furman, 85 Mich. 110; People v. Brill 120 Mich. 42; Treasurer of Elizabeth v. Dunning, 58 N. J. Law, 554; City of New York v. Tucker, 1 Daly (N. Y.) 107; City of New York v. Hyatt, 3 E. D. Smith (N. Y.) 156.

[325] Bloomer v. Stolley, 5 McLean, 158, Fed. Cas. No. 1,559; Greeley v. City of Jacksonville, 17 Fla. 174; First Nat. Bank of Du Quoin v. Keith, 84 Ill. App. 103, affirmed 183 Ill. 475; Welch v. Bowen, 103 Ind. 256; Robinson v. City of Baltimore, 93 Md. 208; Barber Asphalt Pav. Co. v. Ullman, 137 Mo. 543; In re Hall, 10 Neb. 537; Hudson Tel. Co. v. Jersey City, 49 N. J. Law, 303; Chenango Bank v. Brown, 26 N. Y. 467; City of Philadelphia v. Bowman, 175 Pa. 91; Snyder v. Palmer, 32 Wis. 406; Ashland Water Co. v. Ashland County, 87 Wis. 209, 58 N. W. 235. "The question is whether the right of the county of Ashland to be supplied with water for its courthouse and the offices therein, free of charge, survived the enactment of the ordinance of September 22, 1884. It is, no doubt, a well-settled rule in the construction of statutes that, where a statute provides that a certain former statute 'is hereby amended so as to read as follows,' any provision of such former statute which is not found in the new statute is repealed. The rules for the construction of statutes and of municipal ordinances are the same. The object of construction is to conform the statute or the ordinance to the intention of the body enacting it. It is assumed that the enacting body intended to omit from the law those provisions of the old statute or ordinance which are not preserved and re-enacted in the new. The provision that the county of Ashland should have water for the courthouse and the county offices, free of charge, did not survive the enactment of the ordinance of September 22, 1884. Nor was that provision of the ordinance of August 18, 1884, revived by the latter ordinance of the mayor and common council of the city of Ashland. It is obvious from the language used that the intention of that ordinance was to adopt as the legislation of the city, and to confirm as it then stood, the previous legislation of the town board of supervisors of the town of Ashland relating to the supplying of Ashland with water. So far as it affects the matter in contention, it had this scope; no more." Following State v. Ingersoll, 17 Wis. 631; Goodno v. City of Oshkosh, 31 Wis. 127; State v. Keaough, 68 Wis. 135.

[326] Goldsmith v. City of Huntsville, 120 Ala. 182; Wethington v. City of Owensboro, 21 Ky. L. R.

new charter or statutes may contain a saving clause with respect to existing ordinances.[327] The power to amend or repeal may be exercised as a rule at any time, even at the same session of the official body at which the legislation repealed or amended was adopted.[328] This principle applies in all cases before the time of taking effect of an ordinance, the acceptance of benefits under it by third parties or so long as the action of the legislative body remains executory.[329]

§ 550. Restrictions upon the power to amend or repeal.

Limitations may exist in respect to the power to amend or repeal either as to the mode or because of the subject-matter of the legislation. The former restriction has been suggested in a preceding section. The law requires that certain legislative action can be amended or repealed only by the use of the same formalities as required in the adoption of the original legislation, and this principle applies to all the details of law making, including the character of the legislative body, the question of a quorum and the form of the law itself. Legislation of a higher grade cannot be repealed or amended by resolutions or acts of an inferior grade passed with less formality.[330]

The other restriction upon the power of all legislative bodies exists in connection with the subject-matter. Legislative action

960, 53 S. W. 644; Knight v. Town of West Union, 45 W. Va. 194.

[327] State v. City of Mobile, 24 Ala. 701; City of Pensacola v. Sullivan, 23 Fla. 1; Allen v. City of Davenport, 107 Iowa, 90; United R. & Elec. Co. v. Hayes, 92 Md. 490; Ruell v. City of Alpena, 108 Mich. 290; Kansas City v. White, 69 Mo. 26; Monett v. Beaty, 79 Mo. App. 315; Garey v. City of Galveston, 42 Tex. 627; City of Spokane v. Williams, 6 Wash. 376.

[328] East St. Louis U. R. Co. v. City of East St. Louis, 39 Ill. App. 398; Neal v. Franklin County, 43 Ill. App. 267; Gormley v. Day, 114 Ill. 185; State v. Graves, 19 Md. 351.

[329] City of Rock Island v. McEniry, 39 Ill. App. 218; East St. Louis U. R. Co. v. City of East St. Louis, 39 Ill. App. 398; Gormley v. Day, 114 Ill. 185; Waukesha Hygeia Mineral Spring Co. v. Village of Waukesha, 83 Wis. 475.

[330] People v. Mount, 186 Ill. 560, 58 N. E. 360, affirming 87 Ill. App. 194; Hibbard v. City of Chicago, 173 Ill. 91, 40 L. R. A. 621; Swindell v. State, 143 Ind. 153, 35 L. R. A. 50; Id., 146 Ind. 527, 45 N. E. 700; Ryce v. City of Osage, 88 Iowa, 558; Bailey v. Com., 23 Ky. L. R. 1223, 64 S. W. 995; Naegely v. City of Saginaw, 101 Mich. 532; State v. Cowgill & H. Mill Co., 156 Mo. 620; Ashland Water Co. v. Ashland County, 87 Wis. 209. See, also, cases cited under last paragraph of § 564.

may result in the granting or acquirement of contract, vested or property rights to third parties, and the law universally obtains that such rights cannot be impaired or destroyed by the passage of subsequent legislation,[331] Even where in the granting of franchises the express power is reserved to alter or amend or repeal, the courts universally hold that this is not synonymous with the right of confiscation;[332] that under charter or ordinance rights such property may be acquired as will be afforded protection under those constitutional clauses that prohibit the passage of laws impairing the obligation of a contract and prevent the confiscation of a property vested right or the taking of private property for public use without the payment of just compensation.[333]

§ 551. Effect of repeal.

The repeal of a city ordinance, it has been held, puts an end to all proceedings founded upon it and pending at the time of the repeal unless they are saved by the repealing ordinance.[334] In

[331] Louisiana v. Police Jury of St. Martin's Parish, 111 U. S. 716; Baltimore Trust & G. Co. v. City of Baltimore, 64 Fed. 153, 166 U. S. 673; Reiff v. Conner, 10 Ark. 241; Bishoff v. State, 43 Fla. 67, 30 So. 808; City of Rome v. Lumpkin, 5 Ga. 447; Metropolitan Gas Co. v. Village of Hyde Park, 27 Ill. App. 361; Baldwin v. Smith, 82 Ill. 162; City of Terre Haute v. Lake, 43 Ind. 480; City of Des Moines v. Chicago, R. I. & P. R. Co., 41 Iowa, 569; City of Burlington v. Burlington St. R. Co., 49 Iowa, 144; New Orleans El. R. Co. v. City of New Orleans, 39 La. Ann. 127; City of New Orleans v. Great Southern Tel. & Teleg. Co., 40 La. Ann. 41; Bigelow v. Hillman, 37 Me. 52; State v. Graves, 19 Md. 351; Pond v. Negus, 3 Mass. 230, 3 Am. Dec. 131; State v. Laclede Gaslight Co., 102 Mo. 472; Hudson Tel. Co. v. Jersey City, 49 N. J. Law, 303, 8 Atl. 123; State v. Pinto, 7 Ohio St. 355; Bassett v. City of El Paso, 88 Tex. 169; Stoddard v. Gilman, 22 Vt. 568; City of Ashland v. Wheeler, 88 Wis. 607.

[332] City of Baltimore v. Hughes' Adm'r, 1 Gill & J. (Md.) 480.

[333] Louisiana v. Pilsbury, 105 U. S. 278; Louisiana v. Police Jury of St. Martin's Parish, 111 U. S. 716; City of Baltimore v. Baltimore Trust & G. Co., 166 U. S. 673; Reiff v. Conner, 10 Ark. 241; Metropolitan Gas Co. v. Village of Hyde Park, 27 Ill. App. 361; City of Quincy v. Bull, 106 Ill. 337; City of Terre Haute v. Lake, 43 Ind. 480; City of New Orleans v. Great Southern Tel. & Teleg. Co., 40 La Ann. 41; Missouri, K & T. Trust Co. v. Smart, 51 La. Ann. 416; Bigelow v. Hillman, 37 Me. 52; Hudson Tel. Co. v. Jersey City, 49 N. J. Law, 303; People v. O'Brien, 111 N. Y. 1, 2 L. R. A. 255; State v. Pinto, 7 Ohio St. 355; In re Road in Augusta Tp., 17 Pa. 75; Stoddard v. Gilman, 22 Vt. 568.

[334] Spears v. Modoc County, 101 Cal. 303, 35 Pac. 869; Day v. City of

some few cases the rule seems to be that the repeal of an ordinance expressly repealing other legislation will restore that original legislation.[335]

§ 552. Enforcement of ordinances.

A municipal corporation is organized for the better protection and convenience of those living within its limits. It possesses certain powers, either expressly given or derived by implication from the grant of express powers or because of the nature and effect of its organization. Such powers are possessed because of the necessity for carrying out the purpose of the organization of public corporations.[336] The possession of the power to legislate or to pass laws with reference to matters of local interest and necessary to the preservation of the public peace necessarily carries with it the power to enforce those valid and reasonable laws and regulations as may in the discretion of the corporate authorities be adopted to secure such objects.[337] The power to enforce ordinances in conjunction with that necessary to their legal passage is derived from the legislature.[338] Municipal corporations, the

Clinton, 6 Ill. App. 476; Naylor v. City of Galesburg, 56 Ill. 285; Denning v. Yount, 62 Kan. 217, 61 Pac. 803, affirming 9 Kan. App. 708, 59 Pac. 1092; Baker v. City of Lexington, 21 Ky. L. R. 809, 53 S. W. 16; Kansas City v. Clark, 68 Mo. 588; Kansas v. White, 69 Mo. 26; In re Deering, 14 Daly (N. Y.) 89; Earnhart v. Village of Lebanon, 5 Ohio Circ. R. 578.

[335] Pardridge v. Village of Hyde Park, 131 Ill. 537, 23 N. E. 345; People v. Davis, 61 Barb. (N. Y.) 456; Van Denburgh v. Village of Greenbush, 66 N. Y. 1; City of New York v. Broadway & S. Ave. R. Co., 97 N. Y. 275; Town of Rutherford v. Swink, 96 Tenn. 564.

[336] Bradley v. City of Rochester, 54 Hun (N. Y.) 140; City of Charleston v. Pinckney, 3 Brev. (S. C.) 217; Batsel v. Blaine, 4 Willson, Civ. Cas. Ct. App. (Tex.) 295; Ould v. City of Richmond, 23 Grat. (Va.) 464.

[337] Siloam Springs v. Thompson, 41 Ark. 456; Hamilton v. City of Carthage, 24 Ill. 22. A public corporation de facto as well as one de jure can maintain an action for a penalty. Waters Pierce Oil Co. v. Town of New Iberia, 47 La. Ann. 863; City of Reinhard v. City of New York, 2 Daly (N. Y.) 243; Sands v. City of Richmond, 31 Grat. (Va.) 571; City of Charleston v. Beller, 45 W. Va. 44, 30 S. E. 152. A violation of a city ordinance is an offense against the public, not merely a private wrong; and is, therefore, criminal in its character.

[338] Ford v. City of Denver, 10 Colo. App. 500, 51 Pac. 1015; Moran v. City of Atlanta, 102 Ga. 840, 30 S. E. 298. The power to pass a penal ordinance cannot be inferred from the general welfare clause of

cases hold, as a rule, do not possess an inherent or implied power to impose penalties for the violation of their laws, or to enforce them in any other manner than that prescribed by the charter.[339]

§ 553. Penalties for violation.

The power to impose a penalty for the violation of an ordinance is usually derived directly by legislative grant.[340] The right to legislate would be of no avail or substantial benefit if the corporation had no power to punish those violating ordinance provisions or regulations in the nature of laws.[341] The constitution prohibits restraining all legislative bodies, the imposition of cruel and inhuman or unreasonable punishments.[342] Municipal corporations are permitted only to legislate in regard to petty offenses against the good order of the community; they have no right, as a rule, to make laws or regulations in respect to what are technically and

the city charter; there must exist express legislative authority. State v. Bright, 38 La. Ann. 1; State v. Cowan, 29 Mo. 330; City of Independence v. Moore, 32 Mo. 392.

[339] State v. Zeigler, 32 N. J. Law, 262; Hart v. City of Albany, 9 Wend. (N. Y.) 571; City of Cincinnati v. Kraft, 8 Ohio Dec. 672; Blanchard v. City of Bristol, 100 Va. 469, 41 S. E. 948.

[340] City of Elk Point v. Vaughn, 1 Dak. 113; City of Owensboro v. Sparks, 99 Ky. 351, 36 S. W. 4; State v. Voss, 49 La. Ann. 444; State v. McNally, 48 La. Ann. 1450, 36 L. R. A. 533; State v. Crummey, 17 Minn. 72 (Gil. 50). Where an offense is punishable both by ordinance and state law, one guilty can be proceeded against under both, and a record of conviction by one set of authorities is no defense in actions and proceedings brought by the other. State v. Cantieny, 34 Minn. 1; Marcellus v. Treasurer of Plainfield (N. J. Law) 52 Atl. 233; Philadelphia & B. R. Co. v. Borough of Brigantine, 60 N. J. Law, 127; Raleigh Corp. v. Dougherty, 22 Tenn. (3 Humph.) 11.

[341] Denver City R. Co. v. City of Denver, 21 Colo. 350, 29 L. R. A. 608; Calhoun v. Little, 106 Ga. 336, 43 L. R. A. 630; Jaquith v. Royce, 42 Iowa, 406; City of Burlington v. Stockwell, 5 Kan. App. 569; City of Leavenworth v. Booth, 15 Kan. 627; State v. Lochte, 45 La. Ann. 1405; People v. Detroit Citizens' St. R. Co., 116 Mich. 132; In re Langston, 55 Neb. 310; Smith v. Gouldy, 58 N. J. Law, 562, 34 Atl. 748; Philadelphia & B. R. Co. v. Borough of Brigantine, 60 N. J. Law, 127; City of Alliance v. Joyce, 49 Ohio St. 7; Bolton v. Vellines, 94 Va. 393, 64 Am. St. Rep. 737.

[342] The origin of this provision is found in Stat. 2 Wm. & M. c. 2. Ho Ah Kow v. Nunan, 5 Sawy. 552, Fed. Cas. No. 6,546. Discussing the "queue" ordinance of San Francisco. In re Kemmler, 136 U. S. 436; Harper v. Com., 93 Ky. 290, disfranchising violators of gambling laws. Com. v. Wyatt, 6 Rand. (Va.) 694.

properly speaking, considered as crimes.[343] Because of this difference in the nature and character of offenses solely dealt with by municipal corporations, as compared with those graver acts against society regulated by the state and considered as crimes, and also because they deal exclusively with local affairs, municipal corporations are not permitted, even where the express power to enforce ordinances is given, to impose severe fines or long terms of imprisonment.[344] The customary penalty for the violation of ordinance or local regulations is the imposition of a fine or imprisonment,[345] in extreme cases both,[346] or imprisonment in

[343] State v. Williams, 11 S. C. 288; Browne v. Siegel, Cooper & Co., 90 Ill. App. 49.

[344] City of Eureka Springs v. O'Neal, 56 Ark. 350, 19 S. W. 969; Ex parte Miller, 89 Cal. 41, 26 Pac. 620; In re Ah You, 88 Cal. 99, 11 L. R. A. 408; Ex parte Cheney, 90 Cal. 617; Ex parte Solomon, 91 Cal. 440; State v. Carpenter, 60 Conn. 97; Atkins v. Phillips, 26 Fla. 281, 10 L. R. A. 158; Phillips v. City of Atlanta, 87 Ga. 62; Town of Greenfield v. Mook, 12 Ill. App. 281; City of Carlisle v. Hechinger, 20 Ky. L. R. 74, 45 S. W. 358; State v. Arnauld, 49 La. Ann. 104; Magneau v. City of Fremont, 30 Neb. 843, 9 L. R. A. 786; Smith v. Treasurer of Clinton, 53 N. J. Law, 329; McNeil v. State, 29 Tex. App. 48.

[345] City of Eureka Springs v. O'Neal, 56 Ark. 350; Phillips v. City of Atlanta, 87 Ga. 62, 13 S. E. 201. A greater fine cannot be imposed than warranted by the charge in the complaint. Brieswick v. City of Brunswick, 51 Ga. 639. The power to punish violators of city ordinances by fine or imprisonment is not a grant of authority to imprison for failure to pay the fine imposed. See, also, as holding the same, Carr v. City of Conyers, 84 Ga. 287.

City of Quincy v. O'Brien, 24 Ill. App. 591; Baldwin v. Murphy, 82 Ill. 485; Bills v. City of Goshen, 117 Ind. 221, 3 L. R. A. 261. An ordinance is valid which provides as a penalty for its violation an amount to be fixed in the discretion of the court but within the limit fixed by Rev. St. 1881, § 3155.

City of Burlington v. Stockwell, 5 Kan. App. 569; Fox v. City of Richmond, 19 Ky. L. R. 326, 40 S. W. 251. Where one has been compelled to work out a fine in payment of a judgment held void, he can recover from the city for his time.

City of Owensboro v. Sparks, 99 Ky. 351; State v. Bringier, 42 La. Ann. 1095, 8 So. 298; State v. O'Neil, 49 La. Ann. 1171, 22 So. 352; City of Detroit v. Ft. Wayne & B. I. R. Co., 95 Mich. 456, 54 N. W.

[346] McInerney v. City of Denver, 17 Colo. 302, 29 Pac. 516. Where the power is granted to enforce ordinances "by a proper fine, imprisonment or other penalty," accumulative punishment for the same offense is not allowed. Saner v. People, 17 Colo. App. 307, 69 Pac. 76; Hanscomb v. Russell, 77 Mass. (11 Gray) 373; Hill v. Williams, 14 Serg. & R. (Pa.) 287.

case of failure to pay a fine imposed,[347] and in still further and

958, 20 L. R. A. 79; State v. Ludwig, 21 Minn. 202. Where the power is conferred upon corporate authorities to impose fines or penalties for the unauthorized sale of intoxicating liquors they are authorized to impose the same penalties fixed by general law for the commission of the same offense.

State v. Grimes, 83 Minn. 460, 86 N. W. 449; City of Tarkio v. Cook, 120 Mo. 1, 25 S. W. 202. If the fine imposed is within the limits fixed by the city charter, the question of its reasonableness will not be considered by the courts. Haynes v. City of Cape May, 50 N. J. Law, 55, 13 Atl. 231; McGear v. Woodruff, 33 N. J. Law, 213; Howe v. Treasurer of Plainfield, 37 N. J. Law, 145; Landis v. Borough of Vineland, 54 N. J. Law, 75; Salter v. City of Bayonne, 59 N. J. Law, 128; Village of Bellefontaine v. Vassaux, 55 Ohio St. 323; Grossman v. City of Oakland, 30 Or. 478, 36 L. R. A. 593; Smith v. Hutchinson, 8 Rich. Law (S. C.) 260; City of Yankton v. Douglass, 8 S. D. 441; Ex parte Bowen, 34 Tex. Cr. R. 107; Ogden City v. Crossman, 17 Utah, 66, 53 Pac. 985; Bolton v. Vellines, 94 Va. 393; Falsetto v. City of Seattle, 18 Wash. 509. See, also, City of St. Louis v. R. J. Gunning Co., 138 Mo. 347; Ogden v. City of Madison, 111 Wis. 413, 87 N. W. 568, 55 L. R. A. 506. A penalty imposed for the violation of an ordinance is not a "fine" under Rev. St. Wis. 1898, § 3294.

In New Jersey, some authorities hold that under a charter power to enforce ordinances by penalties not exceeding a certain prescribed limit, an ordinance fixing a maximum and minimum penalty is bad for uncertainty. See State v. Zeigler, 32 N. J. Law, 262; Smith v. Treasurer of Clinton, 53 N. J. Law, 329, 21 Atl. 304; Landis v. Borough of Vineland, 54 N. J. Law, 75, 23 Atl. 357. But see Atlantic City v. Crandol, 67 N. J. Law, 488, 51 Atl. 447, holding that under a special charter, a council could fix a maximum penalty and permit the trial court to exercise its discretion in adjusting the punishment to the particular case. See, also, Borough of Belmar v. Barkalow, 67 N. J. Law, 504, 52 Atl. 157, sustaining the validity of a discretionary punishment within a maximum limit.

[347] Harper v. City of Attalla, 123 Ala. 524, 26 So. 128; Ex parte Smith (Cal.) 29 Pac. 785; Ex parte Green, 94 Cal. 387; State v. Fisher, 50 La. Ann. 45; Cobb v. City of Dalton, 53 Ga. 426; Harris v. City Council of Augusta, 100 Ga. 382; In re McCort, 52 Kan. 18; Ex parte Kiburg, 10 Mo. App. 442; In re Miller, 44 Mo. App. 125; Ex parte Hollwedell, 74 Mo. 395; In re Langston, 55 Neb. 310, 75 N. W. 828; Bregguglia v. Borough of Vineland, 53 N. J. Law, 168, 20 Atl. 1082. The power to enforce the collection of a fine imposed for the violation of an ordinance through judgment does not exist unless especially granted by statute. Papworth v. City of Fitzgerald, 106 Ga. 378, 32 S. E. 363. An opportunity must be given to pay the fine imposed before a term of imprisonment can be lawfully imposed. See, also, as holding the same, Calhoun v. Little, 106 Ga. 336, 32 S. E. 86, 43 L. R. A. 630.

more extreme cases, the right of imposing a fortfeiture.[348] The extent of such penalties are strictly limited by charter or statutory provisions.[349] The latter, especially, is obnoxious to courts, and municipal provisions effecting one are rarely sustained and only when the subject or object itself of the forfeiture is of such a character or is put to such use as to constitute a serious and possibly a continuing menace to the peace, order, and good morals of the community.[350] Where the power exists to impose a forfeiture, the right to waive it impliedly arises.[351]

§ 554. Mode of enforcing ordinances; trial by jury.

A peace ordinance is usually enforced by the arrest of the offender, and a hearing in some court of competent jurisdiction in proceedings brought by the municipality.[352] Where the gravaman

[348] Grover v. Huckins, 26 Mich. 476; Hillsborough County v. City of Manchester, 49 N. H. 57; Bulkly v. Orms, Brayt. (Vt.) 124.

[349] Mobile & O. R. Co. v. People, 24 Ill. App. 250; Fairbanks v. Town of Antrim, 2 N. H. 105; Pike v. Madbury, 12 N. H. 262; Allaire v. Howell Works Co., 14 N. J. Law (2 J. S. Green) 21; Zylstra v. Charleston Corp., 1 Bay (S. C.) 382; Vestry of St. Luke's Church v. Mathews, 4 Desaus. (S. C.) 585. See, also, authorities cited generally under this section. McNeil v. State, 29 Tex. App. 48, 14 S. W. 393.

[350] Willis v. Legris, 45 Ill. 289; Darst v. People, 51 Ill. 286; Gosselink v. Campbell, 4 Iowa, 296; McKee v. McKee, 47 Ky. (8 B. Mon.) 433; Varden v. Mount, 78 Ky. 86; Judson v. Reardon, 16 Minn. 431 (Gil. 387); Johnson v. Daw, 53 Mo. App. 372; Staates v. Inhabitants of Washington, 44 N. J. Law, 605. The forfeiture of a license is not warranted under authority to impose a fine or imprisonment as a penalty for the violation of an ordinance. Cotter v. Doty, 5 Ohio, 395; Phillips v. Allen, 41 Pa. 481; Miles v. Chamberlain, 17 Wis. 446. Ordinance providing for the impounding and sale of animals found running at large. State v. Newman, 96 Wis. 258, 71 N. W. 438.

[351] Chicago City R. Co. v. People, 73 Ill. 541; Common Council of Indianapolis v. Fairchild, 1 Ind. (Smith) 122; Gulick v. Connely, 42 Ind. 134; Gosselink v. Campbell, 4 Iowa, 300; Hubbard v. Norton, 28 Ohio St. 116.

[352] People v. George, 26 Colo. 475; McNulty v. Connew, 50 Ind. 569; State v. Fisher, 50 La. Ann. 45; State v. Faber, 50 La. Ann. 952; Village of Vicksburg v. Briggs, 85 Mich. 502, 48 N. W. 625. A warrant, however, should follow statutory provisions, if such exist. Shafer v. Mumma, 17 Md. 331; State v. Robitshek, 60 Minn. 123, 61 N. W. 1023, 33 L. R. A. 33; Kansas City v. O'Connor, 36 Mo. App. 594.

Village of Oran v. Bles, 52 Mo. App. 509. The arrest may be made by a peace officer without a warrant when the offense is committed in his presence. See, also, as holding the same principle, Bryan v.

of the offense is the violation of some municipal ordinance, because of the class of offenses dealt with and the urgent necessity for a speedy hearing and punishment, the procedure is informal in its character,[353] and the offender is not entitled to the constitutional right of a trial by jury.[354] This question is interesting and important and has given occasion for many decisions by the courts. The weight of authority sustains the principle given and these rulings are based upon the trivial and petty character of the offense and the urgent necessity as stated above for a speedy

Bates, 15 Ill. 87; Scircle v. Neeves, 47 Ind. 289, and Roddy v. Finnegan, 43 Md. 490.

Village of Green City v. Holsinger, 76 Mo. App. 567; City of Brownville v. Cook, 4 Neb. 101. A proceeding for the violation of a city ordinance must be brought in the name of the state as required by the constitution and not that of the city concerned.

Hennessy v. Connolly, 13 Hun (N. Y.) 173; People v. Van Houten, 13 Misc. 603, 35 N. Y. Supp. 186; City of Hudson v. Granger, 23 Misc. 401, 52 N. Y. Supp. 9. Such a hearing is criminal in its character and no appeal will lie from a judgment of acquittal. City Council of Abbeville v. Leopard, 61 S. C. 99; State v. White, 76 N. C. 15; City of Spokane v. Robison, 6 Wash. 547. It is not necessary that prosecutions for the violation of an ordinance be brought in the name of the state, the constitutional provision not applying to such prosecutions. See, also, City of Seattle v. Chin Let, 19 Wash. 38, 52 Pac. 324.

[353] Wheeler v. City of Plymouth, 116 Ind. 158; State v. City of Baton Rouge, 40 La. Ann. 209; City of Leavenworth v. Booth, 15 Kan. 627; State v. Boneil, 42 La. Ann. 1110, 10 L. R. A. 60; Ex parte Washington, 10 Mo. App. 495; City of Gallatin v. Tarwater, 143 Mo. 40, 44 S. W. 750; McGear v. Woodruff, 33 N. J. Law, 213; Haynes v. City of Cape May, 50 N. J. Law, 55; Weller v. City of Burlington, 60 Vt. 28.

[354] United States v. Green, 8 Mackey (D. C.) 230; Williams v. City Council of Augusta, 4 Ga. 509; Floyd v. City of Eatonton Com'rs, 14 Ga. 354; Hill v. City of Dalton, 72 Ga. 314; Wagner v. City of Rock Island, 146 Ill. 139, 21 L. R. A. 519, affirming 45 Ill. App. 444; City of Lansing v. Chicago, M. & St. P. R. Co., 85 Iowa, 215; City of Monroe v. Hardy, 46 La. Ann. 1232, 15 So. 696; City of Monroe v. Meuer, 35 La. Ann. 1192; Shafer v. Mumma, 17 Md. 331; State v. Glenn, 54 Md. 572; Giardina v. City of Greenville, 70 Miss. 896; Delione v. Long Branch Com'rs, 55 N. J. Law, 108; Roderick v. Whitson, 51 Hun, 620, 643, 4 N. Y. Supp. 112; Mathews v. Tripp, 12 R. I. 56. "Trial by jury is a well known kind of trial. The right of trial by jury, as secured by the constitution, is in our opinion, simply the right to that kind of trial. And the right remains inviolate so long as the jury continues to be constituted substantially as the jury was constituted when the constitution was adopted, and so long as all such cases as were then triable * * * without any restrictions or conditions which materially hamper or burden the

trial.[355] The offenses legislated against by municipal corporations are not regarded as crimes or of such a character as to bring them within the constitutional provision in respect to the right of a trial by jury and those familiar with the conditions surrounding police courts and their volume of business will recognize the expediency of adopting a rule of law which affords a reasonable dispatch in the transaction of their affairs.[356] A municipality, however, cannot create a civil liability for a failure to perform a duty imposed by an ordinance passed through the exercise of its police powers.[357]

§ 555. Enforcement by civil action.

The other mode of enforcing an ordinance is through the agency of a civil action brought against the offending party and designed to recover a penalty fixed by law.[358] These actions are civil in their

right." State v. Williams, 40 S. C. 373; State v. Prescott, 27 Vt. 194; Lincoln v. Smith, 27 Vt. 328.

[355] Natal v. Louisiana, 139 U. S. 621, affirming State v. Natal, 39 La. Ann. 439; Hunt v. City of Jacksonville, 34 Fla. 504; State v. City of Topeka, 36 Kan. 76; In re Kinsel, 64 Kan. 1, 56 L. R. A. 475; State v. Grimes, 83 Minn. 460; City of St. Louis v. Stern, 3 Mo. App. 48; Vaughn v. Scade, 30 Mo. 600; Delaney v. Kansas City Police Ct., 167 Mo. 667; Liberman v. State, 26 Neb. 464; State v. Ruhe, 24 Nev. 251; Greeley v. City of Passaic, 42 N. J. Law, 87; People v. McCarthy, 45 How. Pr. (N. Y.) 97. "Both in England and in this state, long prior to the earliest of our state constitutions, vagrants and disorderly persons, as defined by statute, were made subject to summary trials without jury, and frequently from time to time, in both countries, additions have been made by statute to the classes known as disorderly persons, with provisions subjecting them to arrest and trial in the same form." People v. Justices of Ct. of Sp. Sessions, 74 N. Y. 406; Inwood v. State, 42 Ohio St. 186; Wong v. City of Astoria, 13 Or. 538; Ex parte Schmidt, 24 S. C. 363; Ex parte Marx, 86 Va. 40; State v. Kennan, 25 Wash. 621; Ogden v. City of Madison, 111 Wis. 413. See, also, cases cited under preceding note.

[356] Boring v. Williams, 17 Ala. 510; Lavey v. Doig, 25 Fla. 611; Vaughn v. Scade, 30 Mo. 600; Frazee v. Beattie, 26 S. C. 348.

[357] Moran v. City of Atlanta, 102 Ga. 840; State v. Von Sachs, 45 La. Ann. 1416; Flynn v. Canton Co., 40 Md. 312; Taylor v. Lake Shore & M. S. R. Co., 45 Mich. 74; Sanders v. Southern Elec. R. Co., 147 Mo. 411, 48 S. W. 855; Young, McShea Amusement Co. v. Atlantic City, 60 N. J. Law, 125; Philadelphia & B. R. Co. v. Borough of Brigantine, 60 N. J. Law, 127.

[358] Goldsmith v. City of Huntsville, 120 Ala. 182, 24 So. 509. No execution may issue for an unpaid fine. Knowles v. Village of Wayne

nature, not criminal, and are generally brought in special courts of limited jurisdiction and possessing, as a rule, no general power to determine or pass upon civil rights.[359] A penalty incurred un-

City, 31 Ill. App. 471; Gipps Brewing Co. v. City of Virginia, 32 Ill. App. 518. Attorneys' fees cannot be incorporated in a judgment for costs rendered in an action to recover the penalty for the violation of a city ordinance. Anderson v. Schubert, 55 Ill. App. 227; City of Newton v. Bergbower, 63 Ill. App. 201; Miller v. O'Reilly, 84 Ind. 168; City of Davenport v. Bird, 34 Iowa, 524; People v. Vinton, 82 Mich. 39; In re Bushey, 105 Mich. 64; Moran v. Pullman Palace Car Co., 134 Mo. 641, 36 S. W. 659, 33 L. R. A. 755. No civil liability can be created by ordinance against a person violating it.

In re Miller, 44 Mo. App. 125; City of De Soto v. Brown, 44 Mo. App. 148; City of St. Louis v. Knox, 74 Mo. 79; City of Monett v. Beaty, 79 Mo. App. 315; People v. Garabed, 20 Misc. 127, 45 N. Y. Supp. 827. As a proceeding to recover a penalty fixed for the violation of an ordinance is civil in its character, not criminal, it is not necessary to allege in the complaint or action that the defendant wrongfully and unlawfully did the act charged.

Town of Columbia v. Harrison, 2 Mill Const. (S. C.) 215; City of Sioux Falls v. Kirby, 6 S. D. 62, 25 L. R. A. 621; City of Huron v. Carter, 5 S. D. 4, 57 N. W. 947. "A preliminary question, however, is presented by respondent's motion to dismiss this appeal on the ground that the action is criminal and can be brought to this court only by writ of error. Upon this question, whether generally an action for the recovery of a fine for the violation of a municipal ordinance is a civil or criminal action, the expressions of the courts have not always been harmonious. Municipal authorities can and ought to protect the lives, health and property of its subjects against jeopardy, by regulating and even prohibiting altogether many acts which are allowable and innocent under the general laws of the state. Local or temporary causes will often justify such action but it may be going too far to say that a city council may, upon its own judgment, make an act criminal in its character which by the law of the state is not criminal. The possession of such power is not necessary for the enforcement of its ordinances."

[359] Ex parte Reed, 4 Cranch, C. C. 582, Fed. Cas. No. 11,634; City of Hartford v. Talcott, 48 Conn. 525; Walton v. City of Canon City, 13 Colo. App. 77, 56 Pac. 671; Brink's Chicago City Exp. Co. v. Kinnare, 168 Ill. 643; Chicago, R. I. & P. R. Co. v. Kennedy, 2 Kan. App. 693; Brophy v. City of Perth Amboy, 44 N. J. Law, 217; State v. White, 76 N. C. 15; State v. Threadgill, 76 N. C. 17; Vandyke v. City of Cincinnati, 1 Disn. (Ohio) 532. See, also, authorities cited in preceding note.

Com. v. Thompson, 110 Pa. 297; City of Lead v. Klatt, 11 S. D. 409, 75 N. W. 896; Id., 13 S. D. 140; Sparta Corp. v. Lewis, 91 Tenn. 370; Jenkins v. City of Cheyenne, 1 Wyo. 287; Village of Platteville v. Bell, 43 Wis. 488. But see Brown v. City of Mobile, 23 Ala. 722, which holds that such proceedings are quasi-

der an ordinance may be enforced after the expiration of the period it was intended to regulate.[360]

§ 556. Pleading and procedure.

The pleadings and procedure used in such actions are usually prescribed either by some special provision of the general law,[361] or, in their absence or of charter requirements, are the result of attempts by the municipal authorities to formulate a code of court rules based upon analogous proceedings in courts of higher jurisdiction.[362] They are characterized by informality,[363] but the rule usually holds that the proceedings should recite all jurisdictional essentials,[364] including allegations establishing the existence of the ordinance upon which the action or proceeding is based [365] and in some cases setting out the section or sections alleged to have been violated,[366] though ordinarily a complaint

criminal in their character. See, also, holding the same, State v. Keenan, 57 Conn. 286, and Jaquith v. Royce, 42 Iowa, 406. See, also, 33 Am. Rep. 726, 74 Am. Dec. 682.

[360] City of Kansas v. White, 69 Mo. 26; Stevens v. Dimond, 6 N. H. 330.

[361] Western & A. R. Co. v. Hix, 104 Ga. 11; Metropolitan St. R. Co. v. Johnson, 90 Ga. 500; Johnson v. Finley, 54 Neb. 733.

[362] Town of Tipton v. Norman, 72 Mo. 380.

[363] State v. Baker, 44 La. Ann. 79, 10 So. 405; State v. Richardson, 37 La. Ann. 261; State v. Finnegan, 50 La. Ann. 549, 23 So. 621; City of New Orleans v. Rinaldi, 105 La. 183, 29 So. 484; Rowland v. City of Greencastle, 157 Ind. 591, 62 N. E. 474.

[364] Stroup v. Pruden, 104 Ga. 721; Mahoney v. Dankwart, 108 Iowa, 321; Village of Elbow Lake v. Holt, 69 Minn. 349; City of St. Louis v. Dorr, 136 Mo. 370; Giardina v. City of Greenville, 70 Miss. 896, 13 So. 241; Massinger v. City of Millville, 53 N. J. Law, 123, 43 Atl. 443; City of Cape May v. Cape May Transp. Co., 64 N. J. Law, 80, 44 Atl. 948; State v. Wilson, 106 N. C. 718; Joske v. Irvine, 91 Tex. 574, 44 S. W. 1059.

[365] Saner v. People, 17 Colo. App. 307, 69 Pac. 76; Town of Whiting v. Doob, 152 Ind. 157; Missouri Pac. R. Co. v. Chick, 6 Kan. App. 481, 50 Pac. 605. A petition alleging June 13th, 1887, as the date of approval of an ordinance upon which certain proceedings are based is not prejudicial to the defendant only in that it was approved June 15th, 1877, the petition describing the ordinance by title and number. State v. Finnegan, 50 La. Ann. 549; City of Philipsburg v. Weinstein, 21 Mont. 146; Cate v. Martin, 69 N. H. 610, 45 Atl. 644; State v. Cruickshank, 71 Vt. 94, 42 Atl. 983; State v. Bosworth, 74 Vt. 315, 52 Atl. 423.

[366] Collins v. Hall, 92 Ga. 411, 17 S. E. 622; Green v. City of Indianapolis, 25 Ind. 490; City of St. Louis v. Stoddard, 15 Mo. App. 173. A municipal ordinance must be set out

charging the violation of an ordinance is sufficient if it refers clearly and definitely to the ordinance and sets out in full its title.[367] The acts involved are of a trivial or minor character and do not include a determination of civil or property rights or an invasion of personal rights guaranteed by the constitution.[368] These conditions naturally result in respect to court practice in what has been termed a "deplorable state of confusion" and the cases as decided in different jurisdictions are not usually available in any other as authority.

§ 557. Appeal or review.

Since municipal peace ordinances deal only with petty offenses against the good order of a community, and do not involve the loss of civil rights, the right of appeal or review of a judgment of conviction on the weight of evidence does not usually exist.[369] Judgments or rulings dealing with property or civil rights are subject to review and appeal;[370] in either case the manner and the time when the judgment may be appealed from or reviewed is

in full; it cannot be pleaded by title and date of passage. Fink v. City of Milwaukee, 17 Wis. 26; Rowan v. State, 30 Wis. 129.

[367] Ex parte Davis, 115 Cal. 445. It is not necessary to plead the ordinance it is here held, the court will take judicial notice of it. Village of Fairmont v. Meyer, 83 Minn. 456, 86 N. W. 457, distinguishing from State v. Hammond, 40 Minn. 43. "Gen. St. 1894, § 1252, provides that it shall be a sufficient pleading of an ordinance of any village of this class, with 3,000 inhabitants, to refer to the chapter and section thereof and further, that when passed, such ordinance shall have the force and effect of general laws within the jurisdiction of the village. In the complaint, the ordinance was described by its title and date of passage. Setting out the title, with date of approval, was ample and sufficient. It directed the attention of the defendant to the ordinance he was charged with violating and nothing more was necessary. If the statute in question were mandatory, this would be true; but it is not for it does not require that the allegation be in this form. At most, it is simply permissive."

[368] Wright v. Town of Victoria, 4 Tex. 375.

[369] City of St. Louis v. R. J. Gunning Co., 138 Mo. 347, 39 S. W. 788; City of St. Charles v. Hackman, 133 Mo. 634; City of Water Valley v. Davis, 73 Miss. 521; Village of Bellefontaine v. Vassaux, 55 Ohio St. 323, 45 N. E. 321. But see City of New Orleans v. Chappuis, 105 La. 179, 29 So. 721, which holds that persons convicted under a municipal ordinance have the right to test its legality and constitutionality in the supreme court. City of Rome v. Lumpkin, 5 Ga. 447.

[370] State v. Graves, 19 Md. 351; Bigelow v. Hillman, 37 Me. 52.

prescribed by the general statutes of the state.[371] On appeal, the same rule as to informality as the procedure does not apply as to the original proceedings, and appellate courts follow their own rules of practice and exercise their own powers.[372] The record or transcript on appeal or review should show all of the jurisdictional facts which, it has been held, include the commission of an offense, a hearing before a competent tribunal and a legal conviction.[373] Other questions than those raised by the appeal cannot be considered by the court of review.[374]

§ 558. Defenses.

The validity of the ordinance under which a conviction or proceeding is had may be raised as a manner of defense and determined by the numerous principles suggested in preceding sections respecting and discussing the validity of ordinances. A few miscellaneous defenses may be properly stated here. Where the state and a municipality have concurrent power to deal with certain offenses, it is usually no defense in an action or proceeding brought by one authority that a conviction or adverse judgment has been given in a proceeding or trial based upon the same act and brought by the other authority.[375] This rule has been held

[371] Reiff v. Conner, 10 Ark. 241; Golden City v. Hall, 68 Mo. App. 627; Van Buskirk v. City of Newark, 26 Ohio St. 37.

[372] City of Talladega v. Fitzpatrick, 133 Ala. 613, 32 So. 252; City of Mobile v. Barton, 47 Ala. 84; City of Centralia v. Nagele, 181 Ill. 151, reversing 81 Ill. App. 334; Village of Elbow Lake v. Holt, 69 Minn. 349, 72 N. W. 564; Johnson v. Finley, 54 Neb. 733, 74 N. W. 1080.

[373] Stroup v. Pruden, 104 Ga. 721; City of New Orleans v. Chappuis, 105 La. 179, 29 So. 721; State v. Judge Cr. Dist. Ct., 105 La. 758. A record of appeal should contain a copy of the ordinance alleged to be invalid. Village of Elbow Lake v. Holt, 69 Minn. 349; City of Trenton v. Devorss, 70 Mo. App. 8; Salter v. City of Bayonne, 59 N. J. Law, 128, 36 Atl. 667; Massinger v. City of Millville, 63 N. J. Law, 123, 43 Atl. 443; Jersey City v. Neihaus, 66 N. J. Law, 554, 49 Atl. 444; Treasurer of Elizabeth v. Central R. Co., 66 N. J. Law, 568, 49 Atl. 682.

[374] Saner v. People, 17 Colo. App. 307, 69 Pac. 76; City of New Orleans v. Rinaldi, 105 La. 183, 29 So. 484. But see Grossman v. City of Oakland, 30 Or. 478, 41 Pac. 5, 36 L. R. A. 593, where it is held that one does not waive his right to attack the validity of an ordinance on appeal.

[375] City of Mobile v. Allaire, 14 Ala. 400; Fant v. People, 45 Ill. 259; City of Indianapolis v. Huegele, 115 Ind. 581; Town of Tipton v. Norman, 72 Mo. 380; Riley v. Inhabitants of Trenton, 51 N. J. Law, 498, 18 Atl. 116, 5 L. R. A. 352.

in a number of cases not a violation of that constitutional provision prohibiting one from twice being placed in jeopardy for the same offense.[376] The fact that city authorities may show a discrimination in the enforcement of certain ordinances constitutes no defense.[377] A conviction based upon the violation of one city ordinance where the charge was the violation of another is erroneous.[378] A contract held invalid because made for a longer term than authorized cannot be ground for the reversal of a conviction for removing garbage without a license.[379] The pro-

[376] Tuberson v. State, 26 Fla. 472; De Haven v. State, 2 Ind. App. 376.

[377] Wagner v. City of Rock Island, 146 Ill. 139, 21 L. R. A. 519, affirming 45 Ill. App. 444; People v. Baker, 115 Mich. 199, 73 N. W. 115. "Respondent sought to show that the police officers had failed to enforce this ordinance in some cases; that one company had been permitted to work several men under one license; that, for less than the amount fixed by the ordinance, the city officials had granted licenses; and that the mayor had made a similar proposition to the company for which respondent was peddling. This testimony was properly excluded. It is certainly a novel proposition that the validity of laws and ordinances is to be affected by what police officers and city officials do or do not do in regard to their enforcement." City of Buffalo v. New York, L. E. & W. R. Co., 152 N. Y. 276, affirming 6 Misc. 630, 27 N. Y. Supp. 297.

[378] City of Columbus v. Arnold, 30 Ga. 517; Lesterjelle v. City of Columbus, 30 Ga. 936; Gates v. City of Aurora, 44 Ill. 121. "The city charter of Aurora provides that in the suits brought for a violation of the city ordinances, the summons shall state the ordinance violated. An action was brought for a violation of the ordinance entitled 'streets and alleys,' and on the trial this ordinance was excluded from the jury and the city allowed to proceed against the defendant on another city ordinance of a different character. Held, that this was error. The ordinance mentioned in the summons as having been violated, is the cause of action and it cannot be shifted without consent, to another cause, even if the magistrate has jurisdiction of that other cause."

[379] City of Grand Rapids v. De Vries, 123 Mich. 570, 82 N. W. 269. "Whether or not the contract with Herrington be invalid for the reason that it is for a longer period than one year is of no importance here. The ordinance itself does not attempt to provide that the board of health may enter into a contract for a longer period than one year. It is true that the board attempted to do so by providing that Herrington should have the exclusive right for the period of three years, with the option of two more years, the license to be issued from year to year; but whether the contract be valid or not cannot affect the rights of the respondent. He was acting without a license and at a time when there was a duly-licensed person to do the work." River Rendering Co. v. Behr, 7 Mo. App. 345.

ceedings under municipal peace ordinances are usually of a summary and informal character but this will not warrant the arbitrary conviction and punishment of offenders upon insufficient or incompetent evidence,[380] or a conviction without proof of an ordinance making the act an offense.[381] The employment of an attorney other than the one elected to conduct prosecutions is not a matter of defense.[382] In the absence of good faith or fraud, the motives impelling individual members of a local legislative body in the passing of legislative acts cannot be made a matter of defense in prosecutions or proceedings based upon such acts.[383] The fact that the offense is committed by an agent or employe or with the unauthorized consent of a public official does not constitute a defense.[384] An irregularity in the organization of a corporation is no defense or, to state the principle in another way, a de facto public corporation possessing the power may enforce its ordinances legally passed to the same extent and in the same manner as one de jure.[385] The fact that an ordinance is partly ambigous is no defense in a proceeding based upon a provision of the

[380] Ex parte Ah Lit, 26 Fed. 512; Taylor v. Americus, 39 Ga. 59; O'Brien v. Louer, 158 Ind. 211, 61 N. E. 1004; State v. Finnegan, 52 La. Ann. 694; City of Hagerstown v. Startzman, 93 Md. 606, 49 Atl. 838; Com. v. Elliott, 121 Mass. 367; City of St. Charles v. Meyer, 58 Mo. 86; People v. Wilson, 62 Hun, 618, 16 N. Y. Supp. 583.

[381] Arkadelphia Lumber Co. v. City of Arkadelphia, 56 Ark. 370, 19 S. W. 1053; Stevens v. City of Chicago, 48 Ill. 498; Village of Gilberts v. Rave, 49 Ill. App. 418.

[382] People v. Vinton, 82 Mich. 39, 46 N. W. 31.

[383] See authorities cited under § 508. People v. Cregier, 138 Ill. 401, 28 N. E. 812; Lilly v. City of Indianapolis, 149 Ind. 648; Dreyfus v. Lonergan, 73 Mo. App. 336; Consumers' Gas & Elec. Light Co. v. Congress Spring Co., 61 Hun (N. Y.) 133.

[384] Dane v. City of Mobile, 36 Ala. 304; Powers v. City of Decatur, 54 Ala. 214; Fire Dep. of N. Y. v. Buffum, 2 E. D. Smith (N. Y.) 511.

[385] Town of Decorah v. Gillis, 10 Iowa, 234. In this case, plaintiff sued defendants for keeping a ball alley without a license. Defendants answer by attacking the incorporation of plaintiff town. The court said: "And a further thought is that defendants cannot raise the question here made in this collateral proceeding. It might as well be claimed that the plat of the village had not been properly acknowledged or recorded; that there was fraud in the proceedings leading to the town organization, or in the passage of the ordinance in question. If the town exists as a corporation de facto, the regularity of its incorporation cannot be inquired into, in this collateral manner." Parker v. Zeisler, 73 Mo. App. 537.

same ordinance but which is clear in its terms or as to the application of which there is no ambiguity.[386]

§ 559. Validity; by whom raised.

The validity of a municipal ordinance or resolution may only be raised by one whose rights are affected.[387] Such a person is entitled to a hearing in the courts, it has been held, to determine the legality of an ordinance even before any attempt has been made to enforce it.[388] It is not necessary that he should wait until his liability has been fixed by the operation of the ordinance. Where an ordinance is complex in its provisions, the validity of a

[386] Webber v. City of Chicago, 148 Ill. 313, 36 N. E. 70. "But it is urged that the ordinance is invalid by reason of ambiguity and uncertainty in its classification of the various amusements upon which it imposes a license fee and because it delegates legislative power to the mayor by section 911 which authorizes him to determine in every case where application for a license is made, the class to which the entertainment belongs and the person or persons to whom the license may be granted. * * * Even if there is uncertainty as to the class to which certain other amusements properly belong there is none as to the class in which horse races are included. And even if section 911 should be held to be invalid by reason of its making an improper delegation of legislative power to the mayor * * * the validity of those provisions of the ordinance by which a license fee is imposed upon horse races is in no degree impaired as the class to which horse races belong is clearly determined, * * * and the license fee to be charged is also fixed and ascertained by the ordinance itself."

[387] Shoemaker v. Hodge, 111 Ky. 436, 63 S. W. 979; Lathrop v. Town of Morristown, 67 N. J. Law, 247, 51 Atl. 852, affirming 65 N. J. Law, 467, 47 Atl. 450.

[388] Associates of Jersey Co. v. Jersey City, 34 N. J. Law, 31; Danforth v. City of Paterson, 34 N. J. Law, 163. "It is said that the prosecutor has no standing in this court; that he has not shown that anything has been done or will be done to injure him; that his action is premature; that the time for him to act is when the commissioners begin to contract and purchase under the resolution; that the mere enactment of this ordinance or resolution does him no harm, and he cannot thus interfere with or suspend the appropriate duties of the board of aldermen. The certiorari having been allowed and the parties being actually present in court there should be good cause shown to induce the court to send the prosecutor away without hearing his complaint and determining his right. * * * It is not necessary for a person to wait until his liability is fixed before he can have redress. It is enough that he may be affected by an illegal ordinance or resolution to entitle him to a hearing before any attempt has been made to enforce it." State v. Jersey City, 29 N. J. Law (5 Dutch.) 170.

portion not affecting the rights of an individual cannot be attacked by him even if other portions of the ordinance are invalid.[389] If the portions affecting the rights of a person can be separated and enforced, the validity of other portions cannot be questioned.

§ 560. Validity; how raised.

The common principle obtains here that the validity of an ordinance is secure from attack in a collateral proceeding;[390] neither can its validity be made an issue in a case involving and determining the rights of third parties alone,[391] but the violation of a municipal ordinance may be made the basis of an action between third parties.[392] The question of the legality of an ordinance may be raised in a criminal proceeding or prosecution based upon it,[393] or where practice permits, in an appeal or writ of error from a conviction or judgment.[394] The question again can be raised in habeas corpus proceedings where the court will investigate and determine the constitutionality and validity of the ordinance under the provisions of which the arrest was made and the defendant

[389] See authorities cited under § 563.

[390] City of Indianapolis v. Consumers' Gas Trust Co., 140 Ind. 246, 39 N. E. 943; Clark v. City of Elizabeth, 61 N. J. Law, 565, 40 Atl. 616, 737. "Contracts such as those presented in this case the city was authorized to enter into in virtue of the act of 1874 and the ordinance in question was an ordinance such as the city council was authorized to pass. The contracts were duly made, the ordinance was passed as ordinances are usually passed and the work has been done in compliance with it. The relator and those whose property was injured by the change of grade had no means of ascertaining by what vote the ordinance was passed, except by inspecting the record of the common council. Under these circumstances the city will not be allowed in this proceeding and in this collateral manner to assail its own ordinance for irregularity after the object of the ordinance was completely accomplished."

[391] Burnett v. Com., 21 Ky. L. R. 695, 52 S. W. 965; Home Const. Co. v. Duncan, 111 Ky. 914, 64 S. W. 997; Hardwicke v. Young, 110 Ky. 504, 62 S. W. 10.

[392] Oldstein v. Firemen's Bldg. Ass'n, 44 La. Ann. 492, 10 So. 928; Jelley v. Pieper, 44 Mo. App. 380. But see Moran v. Pullman Palace Car Co., 134 Mo. 641, 36 S. W. 659, 33 L. R. A. 755.

[393] State v. Morris, 47 La. Ann. 1660; City of Austin v. Austin City Cemetery Ass'n, 87 Tex. 330, 47 Am. St. Rep. 114.

[394] State v. Hohn, 50 La. Ann. 432. Where the legality of a municipal ordinance is not attacked in the court below, the supreme court cannot, on the appeal, inquire into the correctness of the judgment rendered.

held a prisoner.[395] Ordinarily, in quo warranto proceedings, the legality of an ordinance cannot be raised.[396] An injunction will lie, usually, to prevent the operation or the enforcement of an ordinance or resolution,[397] and in the proceedings to make permanent, all the questions involved in the validity of an ordinance may be raised.[398] Some states have statutes providing a special procedure for the determination of the legality of ordinances and resolutions, notably Kentucky, where a writ of prohibition is the method established by law.[399] A writ of certiorari in New Jersey and Georgia is the remedy commonly adopted to obtain an adjudication upon the validity of a municipal law.[400]

§ 561. Ordinances; on whom and what binding.

Municipal ordinances and resolutions being laws are binding upon all persons[401] and interests[402] temporarily or permanently

[395] Badkins v. Robinson, 53 Ga. 613. After conviction for the violation of an ordinance, its validity cannot be inquired into on the hearing in habeas corpus proceedings. Flack v. Fry, 32 W. Va. 364; Ex parte Smith, 135 Mo. 223, 58 Am. St. Rep. 576, 33 L. R. A. 606.

[396] State v. City of Newark, 57 Ohio St. 430. But see State v. City Council of Charleston, 1 Mill. Const. (S. C.) 36.

[397] Burnett v. Craig, 30 Ala. 135. A court of chancery has no jurisdiction to restrain quasi-criminal proceedings on the part of municipal authorities for the violation of an alleged invalid ordinance. City of Baltimore v. Gill, 31 Md. 375. But see Schulz v. City of Albany, 27 Misc. 51, 57 N. Y. Supp. 963, where it is held that the enforcement of an alleged illegal ordinance cannot be restrained until its illegality has been determined in an action at law.

[398] Cleveland City R. Co. v. City of Cleveland, 94 Fed. 385; City of Americus v. Perry, 114 Ga. 871, 40 S. E. 1004, 57 L. R. A. 230; City of Cincinnati v. Cincinnati St. R. Co., 2 Ohio N. S. 298.

[399] Bybee v. Smith, 22 Ky. L. R. 467, 57 S. W. 789.

[400] Stroup v. Pruden, 104 Ga. 721, 30 S. E. 948; Mohrman v. City Council of Augusta, 103 Ga. 841. A party applying for a writ of certiorari is under no obligation to give a bond with good security as required by Civ. Code, § 4639; this applies exclusively to civil cases. Treasurer of Camden v. Mulford, 26 N. J. Law (2 Dutch) 49; Gregory v. Jersey City, 34 N. J. Law, 390; Danforth v. City of Paterson, 34 N. J. Law, 163.

[401] North Birmingham St. R. Co. v. Calderwood, 89 Ala. 247; Com. v. Worcester, 20 Mass. (3 Pick.) 462; Bott v. Pratt, 33 Minn. 323; Town of Knox City v. Whiteaker, 87 Mo. App. 468; City Council of Charleston v. King, 4 McCord (S. C.) 487; Grace v. Walker, 95 Tex. 39, 64 S. W. 930, 65 S. W. 482.

[402] Folmar v. Curtis, 86 Ala. 354; City of Cartersville v. Lanham, 67

within the limits of municipal jurisdiction. Aliens or transients equally with citizens and residents are bound by, and it is their duty to respect and obey, the laws of that government or governmental agency within whose borders they may be.[403] They cannot evade, in organized or civilized communities, their duty to society.

(a) Notice. All persons upon whom ordinances are binding are chargeable with notice of their existence and the extent of their operation.[404] An ordinance is a law and the familiar maxim that ignorance of the law excuses no one applies.[405]

(b) Licenses. This rule applies to the imposition of licenses and the exaction of fees for the transaction of business or the carrying on of any occupation within the municipal limits.[406] Nonresidents cannot escape the payment of a license or occupation tax because of that condition or circumstance.[407] Ordi-

Ga. 753; City & Suburban R. Co. v. City of Savannah, 77 Ga. 731; Horney v. Sloan, Smith (Ind.) 136; Gosselink v. Campbell, 4 Iowa, 296; McKee v. McKee, 47 Ky. (8 B. Mon.) 433; Gilmore v. Holt, 21 Mass. (4 Pick.) 258; Parker v. City of New Brunswick, 30 N. J. Law, 395; Rose v. Hardie, 98 N. C. 44. "It is the hog that is not permitted to run at large and whether it be the property of a resident or nonresident the mischief is the same and there can be no difference." City of Knoxville v. King, 75 Tenn. (7 Lea) 441. But see exceptions to the general application of estray ordinances, Spitler v. Young, 63 Mo. 42, and Plymouth Com'rs v. Pettijohn, 15 N. C. (4 Dev.) 591.

[403] In re Vandine, 23 Mass. (6 Pick.) 187. "The by-laws which are made by corporations having a local jurisdiction are to be observed and obeyed by all who come within it in the same manner as aliens and strangers within the commonwealth are bound to know and obey the laws of the land notwithstanding they may not know the language in which they are written." Plymouth Com'rs v. Pettijohn, 15 N. C. (4 Dev.) 591; Whitfield v. Longest, 28 N. C. (6 Ired.) 268; Town of Marietta v. Fearing, 4 Ohio, 427.

[404] North Birmingham St. R. Co. v. Calderwood, 89 Ala. 247; Central R. & Banking Co. v. Brunswick & W. R. Co., 87 Ga. 386; Mather v. City of Ottawa, 114 Ill. 659; Inhabitants of Palmyra v. Morton, 25 Mo. 593; Jackson v. Grand Ave. R. Co., 118 Mo. 199.

[405] Central of Georgia R. Co. v. Bond, 111 Ga. 13; Trigally v. City of Memphis, 46 Tenn. (6 Cald.) 382.

[406] In re Vandine, 23 Mass. (6 Pick.) 187; Wilmington Com'rs v. Roby, 30 N. C. (8 Ired.) 250; Edenton Com'rs v. Capeheart, 71 N. C. 156; State v. Wernwag, 116 N. C. 1061, 21 S. E. 683, 28 L. R. A. 297. But see City of St. Charles v. Noelle, 51 Mo. 122, and Garden City v. Abbott, 34 Kan. 283.

[407] City of Charleston v. Pepper, 1 Rich. Law (S. C.) 364.

nances, however, imposing a license fee upon nonresidents only have generally been held invalid because of such discrimination,[408] and also because, in some cases, such ordinance or resolution is in effect a regulation of interstate commerce.[409]

§ 562. Ordinances; where operative.

On the other hand, municipal ordinances or resolutions can have no extra territorial force or effect,[410] and this is true even in cases where a municipality may have acquired property outside its geographical limits. But within the territorial limits municipal ordinances or resolutions apply to every part included within their operation.[411] Where the power to pass them exists, ordinances or resolutions applying only to certain restricted and designated parts of the municipality are valid.[412] These include the greater number of peace ordinances. Many acts done upon private premises cannot be controlled by a municipality, that can, however, prohibit or regulate the doing of the act in a public place or upon the streets.[413] The condition of drunkenness illustrates well this proposition.[414] The rule also applies to local improvement ordinances. On the contrary many authorities hold that ordinances passed by virture of the police power can be made to apply to every place within the limits of the municipality including private property. This rule has been applied more frequently in connection with regulations respecting the speed of

[408] Bennett v. Borough of Birmingham, 31 Pa. 15.

[409] Caldwell v. City of Alton, 33 Ill. 416; City of Nashville v. Althrop, 45 Tenn. (5 Cold.) 554.

[410] South Pasadena v. Los Angeles Terminal R. Co., 109 Cal. 315; Taylor v. City of Americus, 39 Ga. 59; Strauss v. Town of Pontiac, 40 Ill. 301; Robb v. City of Indianapolis, 38 Ind. 49; Wells v. City of Weston, 22 Mo. 384; Gass v. City of Greenville, 36 Tenn. (4 Sneed) 62.

[411] The Palmetto, 1 Biss. 140, Fed. Cas. No. 10,699. Municipal ordinances concerning vessels have, however, no force in admiralty courts. Gilmore v. Holt, 21 Mass. (4 Pick.) 258; Ex parte McNair, 13 Neb. 195.

[412] Richmond, F. & P. R. Co. v. City of Richmond, 96 U. S. 521; Barbier v. Connolly, 113 U. S. 27; L'Hote v. City of New Orleans, 177 U. S. 587; City of Chicago v. Brownell, 146 Ill. 64; City of Chicago v. Stratton, 162 Ill. 494, 35 L. R. A. 84; Com. v. Patch, 97 Mass. 221; People v. Lewis, 86 Mich. 273; City of Chattanooga v. Norman, 92 Tenn. 73; Grace v. Walker, 95 Tex. 39, 64 S. W. 930, 65 S. W. 482.

[413] Hayden v. Noyes, 5 Conn. 391.

[414] State v. Sevier, 117 Ind. 338; State v. Garrett, 80 Iowa, 589; Com. v. Morrisey, 157 Mass. 471;

steam railroad cars and engines.[415] It is, of course, within the power of the state legislature to authorize subordinate corporations to pass ordinances or laws which shall have a restricted effect beyond their limits.[416] This has been done in some cases for

City of Gallatin v. Tarwater, 143 Mo. 40.

[415] Whitson v. City of Franklin, 34 Ind. 392; Crowley v. Burlington, C. R. & N. R. Co., 65 Iowa, 658; Merz v. Missouri Pac. R. Co., 88 Mo. 672; Pacific R. Co. v. James, 81 Pa. St. 194. "It may be said that the public has no right to inhibit the speed of train within the company's own domain, provided the company checks up and crosses the street at the legal rate of speed. But in the exercise of police power such as this, the actual state of affairs must be taken into account; thus not only the difficulty, perhaps impossibility, of reducing a speed at the rate of twenty-five miles an hour to four or five miles an hour in the short space of three or four hundred feet, but also the fact that (though without right) many persons are found walking upon the tracks of the railroads at all hours. Now as a matter of police regulation it will not do to answer, 'Let the people, who go where they have no right, take care of themselves.' The police power is enacted not only for those who exercise a proper degree of reflection, but for those who may not. Life is too sacred to place its security on a basis so uncertain. * * * The safety of a dense population is to be guarded by the police power in a great city, even though in doing this the power may be called into exercise within the dwellings, the lots and private ways of the citizens. We do not see that the railroad company has greater rights within the city than others." But see Meyers v. Chicago, R. I. & P. R. Co., 57 Iowa, 555, and Green v. Delaware & H. Canal Co., 38 Hun (N. Y.) 51.

[416] Snell v. Town of Belleville, 30 U. C. Q. B. 81; Chicago P. & P. Co. v. City of Chicago, 88 Ill. 221; Town of Centerville v. Miller, 51 Iowa, 712; State v. Shroeder, 51 Iowa, 197; Town of Toledo v. Edens, 59 Iowa, 352. "In February, 1878, the town passed an ordinance providing 'that no person shall sell within the limits of said town, or of any territory over which the town may have jurisdiction for that purpose, any beer or wine, or any malt or vinous liquors, the sale of which is not prohibited by the laws of the state of Iowa, without first producing from the mayor a license, etc.' On the 3rd day of September, 1878, the defendant sold beer outside of * * * the corporate limits of the town, and without any license to make such sale. Chapter 119 of the acts of 1878 became a law on the 4th day of July of that year and it contains the following among other provisions. 'Sec. 9. The power and jurisdiction of every municipal corporation, whether acting under general or special charter to regulate, prohibit and license the sale of ale, wine and beer and of the courts and officers thereof to enforce said regulations, hereby extended two miles beyond the city limits of said corporation, * * * .' The ques-

the purpose of enabling a particular municipal corporation to suppress nuisances detrimental to the public health and morals.[417] Upon the annexation of territory to a municipal corporation, the operation and force of then existing ordinances without any affirmative action in respect to them extends over and applies to such new territory. The ordinances or resolutions of public corporations designed for the regulation of the corporation at large operate at all times throughout its actual boundaries and this rule is not affected by the fact that these may be enlarged or diminished at times.[418]

§ 563. Ordinances invalid in part.

It often happens that certain provisions or sections of a municipal ordinance are invalid while other sections and portions are valid. This fact or condition does not authorize a court to declare or hold void parts distinct and separate which can be enforced.[419] In these cases the separable provisions or parts that are valid must stand as the law,[420] while the others should be held

tion to be determined is, did the ordinance in question operate to prohibit unlicensed sales within two miles of the city limits? We think it did. The section above quoted is an absolute extension of the jurisdiction of the city to all points within the two miles' limit and an absolute extension of the jurisdiction and power of the courts and officers of the city two miles beyond the city limits."

[417] Skinker v. Heman, 64 Mo. App. 441.

[418] Virginia v. Smith, 1 Cranch, C. C. 47, Fed. Cas. No. 16,967; Swift v. Klein, 163 Ill. 269; St. Louis Gaslight Co. v. City of St. Louis, 46 Mo. 121.

[419] McQuillin, Mun. Ord. § 295, and many cases cited.

[420] Cooper v. District of Columbia, 4 McArthur & M. (D. C.) 250; City of Birmingham v. Alabama G. S. R. Co., 98 Ala. 134, 13 So. 141; In re Ah Toy, 45 Fed. 795; Shelton v. City of Mobile, 30 Ala. 540; City of Eureka Springs v. O'Neal, 56 Ark. 350, 19 S. W. 969; Ex parte Holmquist (Cal.) 27 Pac. 1099, following Ex parte Christensen, 85 Cal. 208; In re Mansfield, 106 Cal. 400, 39 Pac. 775; San Luis Obispo v. Greenberg, 120 Cal. 300, 52 Pac. 797; City of Tampa v. Salomonson, 35 Fla. 446, 17 So. 581; Canova v. Williams, 41 Fla. 509, 27 So. 30; State v. Dillon, 42 Fla. 95, 28 So. 781; Harbaugh v. City of Monmouth, 74 Ill. 367; City of Alton v. Foster, 74 Ill. App. 511; Illinois Cent. R. Co. v. People, 161 Ill. 244; City of Belleville v. Citizens' Horse R. Co., 152 Ill. 171, 26 L. R. A. 681; Schofield v. City of Tampico, 98 Ill. App. 324; City of Rushville v. Rushville Natural Gas Co., 132 Ind. 575, 28 N. E. 853, 15 L. R. A. 321; City of Indianapolis v. Bieler, 138 Ind. 30, 36 N. E. 857; City of Eureka v.

inoperative and, therefore, of no effect.[421] If, however, an ordinance is in part invalid and that part is so commingled with the valid portions as to render a separation impossible, the whole will be regarded as fatally defective.[422] This principle is also true where the ordinance is to be considered as an entirety and where each part has some bearing or influence over the rest.[423]

§ 564. Construction of ordinances.

An ordinance or resolution is a local law and, therefore, those rules of construction which ordinarily apply to statutes or laws of a higher grade are adopted by the courts in determining the force and effect of doubtful or ambiguous words, phrases, and

Jackson, 8 Kan. App. 49; Baker v. City of Lexington, 21 Ky. L. R. 809, 53 S. W. 16; State v. Riley, 49 La. Ann. 1617; Village of Wykoff v. Healey, 57 Minn. 14, 58 N. W. 685; State v. Schoenig, 42 Minn. 528; City of Rockville v. Merchant, 1 Mo. App. Rep'r, 84; City of Lamar v. Weidman, 57 Mo. App. 507; Magneau v. City of Fremont, 30 Neb. 843, 47 N. W. 280, 9 L. R. A. 786; Bailey v. State, 30 Neb. 855, 47 N. W. 208; Doran v. City of Camden, 64 N. J. Law, 666, 46 Atl. 724; Sterling v. City of Camden, 65 N. J. Law, 190, 46 Atl. 781; Haynes v. City of Cape May, 52 N. J. Law, 180; Rahway Gaslight Co. v. City of Rahway, 58 N. J. Law, 510; Anderson v. City of Camden, 58 N. J. Law, 515; Town of Rutherford v. Swink, 96 Tenn. 564; Wade v. Nunnelly, 19 Tex. Civ. App. 256; City of Eureka v. Wilson, 15 Utah, 67, 48 Pac. 150.

[421] State v. Hardy, 7 Neb. 377; Magneau v. City of Fremont, 30 Neb. 843, 9 L. R. A. 786; Bailey v. State, 30 Neb. 855; In re Langston, 55 Neb. 310, 75 N. W. 828. "It is urged that the portion of said ordinance is invalid which makes it a crime for one to conduct or carry on a business upon which there is imposed an occupation tax, without first paying such tax and procuring a license. Whether the provision relating to the occupation tax is valid or void is not now important, inasmuch as the petitioner was not prosecuted for having failed to pay his occupation tax. Eliminate from the ordinance the clause or provision relating to such tax, the remainder is a complete ordinance in itself, capable of being enforced, and is valid." State v. Earnhardt, 107 N. C. 789, distinguishing State v. Hunter, 106 N. C. 796, 8 L. R. A. 529.

[422] City of Birmingham v. Alabama G. S. R. Co., 98 Ala. 134; Lucas v. City of Macomb, 49 Ill. App. 60; Town of Kirkwood v. Meramec Highlands Co., 94 Mo. App. 637, 68 S. W. 761; Chamberlain v. City of Hoboken, 38 N. J. Law, 110; State v. Webber, 107 N. C. 962.

[423] City of Chicago v. Stratton, 58 Ill. App. 539; Cicero Lumber Co. v. Town of Cicero, 176 Ill. 9, 42 L. R. A. 696; Second Municipality v. Morgan, 1 La. Ann. 111; City of Omaha v. Harmon, 58 Neb. 339, 78 N. W. 623.

clauses.[424] That construction is ordinarily adopted which gives a reasonable meaning and effect[425] and this is especially true where the validity of the ordinance is questioned because of its alleged unreasonableness.[426] It is not necessary for courts to go beyond the plain and ordinary meaning of words or phrases employed. A strained, or forced interpretation, where unnecessary to sustain the validity of an ordinance, should be avoided.[427] Where the power to regulate only an act or occupation is granted, the right to pass prohibitive ordinances cannot be implied.[428]

That construction of the ordinance should be given if possible which will sustain or uphold the validity, not only of the different parts or clauses, but considering it as a whole. This applies, as a general rule, to all legislation but especially to ordinances and resolutions passed by inferior legislative bodies.[429] In many cases

[424] Village of Vicksburg v. Briggs, 102 Mich. 551, 61 N. W. 1; Denning v. Yount, 62 Kan. 217, 61 Pac. 803, affirming 9 Kan. App. 708, 59 Pac. 1092; Heath v. Hall (Tex. Civ. App.) 27 S. W. 160.

[425] First Municipality v. Cutting, 4 La. Ann. 335; Rounds v. Mumford, 2 R. I. 154.

[426] City of Chicago v. Wilson, 195 Ill. 19, 57 L. R. A. 127; Stafford v. Chippewa Valley Elec. R. Co., 110 Wis. 331, 85 N. W. 1036. "It is elementary that the power of the city council to enact ordinances is not unlimited. It may go within the field delegated to it by the state legislature to the boundaries of reason. Within such field its discretionary power is supreme but it cannot legitimately go beyond. If it does in so far its enactments are void. Whether, in any given case, where the facts are undisputed a city council has exceeded its power by the enactment of an unreasonable ordinance is purely a judicial question to be considered substantially the same as that of whether the legislature has exceeded its constitutional authority, reasonable doubts being resolved in favor of municipal power." Citing Hayes v. City of Appleton, 24 Wis. 542; Barling v. West, 29 Wis. 307; Clason v. City of Milwaukee, 30 Wis. 316.

[427] Stadler v. Fahey, 87 Ill. App. 411; Village of Hyde Park v. Borden, 94 Ill. 26; People's Gaslight & Coke Co. v. Hale, 94 Ill. App. 406; Village of Vicksburg v. Briggs, 102 Mich. 551; City of Rockville v. Merchant, 60 Mo. App. 365; Town of Wesson v. Collins, 72 Miss. 844.

[428] Virgo v. City of Toronto, 22 Can. Sup. Ct. 447; Platte & D. Canal & Milling Co. v. Lee, 2 Colo. App. 184; Wagner v. City of Rock Island, 146 Ill. 139, 21 L. R. A. 519; Crawford v. City of Topeka, 51 Kan. 756, 20 L. R. A. 692; City of Newport v. Newport & C. Bridge Co., 90 Ky. 193, 8 L. R. A. 484; State v. Robertson, 45 La. Ann. 954; Citizens' Elec. Light & Power Co. v. Sands, 95 Mich. 551, 20 L. R. A. 411.

[429] Burr v. Town of Newcastle, 49 Ind. 322; Seaboard Nat. Bank v. Woesten, 147 Mo. 467, 48 S. W. 939, 48 L. R. A. 279; Boice v. Inhabitants of Plainfield, 38 N. J. Law, 95; Cope

members are neither well educated nor familiar with legislative forms and procedure and, therefore, the result of their action is not as artificially and properly expressed as the action of higher legislative bodies.[430] But the doctrine of implication should not be applied to give an ordinance effect in whole or in part,[431] and the question of construction is one of law for the courts to decide.[432]

§ 565. Same subject continued.

A construction adopted by the people or their representative officers should be followed, the principle of estoppel applying in so far as it can.[433] In cases of doubt and of ambiguity, a cotemporaneous construction should be given great weight. The intent of the legislative body is to be ascertained and this intent is best evidenced by a construction made cotemporaneously with the passage of legislation.[434] That construction should also be given which is based upon a state of things existing at the date of the

v. Atlantic City (N. J. Law) 47 Atl. 440; Grace v. Walker, 95 Tex. 39, 64 S. W. 930, 65 S. W. 482.

[430] Whitlock v. West, 26 Conn. 406.

[431] Morton v. City of Burlington, 106 Iowa, 50, 75 N. W. 662; City of Austin v. Austin City Cemetery Ass'n, 87 Tex. 330, 47 Am. St. Rep. 114.

[432] Denver & R. G. R. Co. v. Olsen, 4 Colo. 239; Denning v. Yount, 9 Kan. App. 708; Long v. Jersey City, 37 N. J. Law, 348; Wilson v. New York, N. H. & H. R. Co., 18 R. I. 598.

[433] Harrison v. People, 97 Ill. App. 421; Goodrich v. City of Milwaukee, 24 Wis. 422.

[434] Ho Ah Kow v. Nunan, 5 Sawy. 552, Fed. Cas. No. 6,546. "The statements of supervisors in debate on the passage of the ordinance cannot, it is true, be resorted to for the purpose of explaining the meaning of the terms used; but they can be resorted to for the purpose of ascertaining the general object of the legislation proposed, and the mischiefs sought to be remedied. Besides we cannot shut our eyes to matters of public notoriety and general cognizance. When we take our seats on the bench we are not struck with blindness and forbidden to know as judges what we see as men; and where an ordinance though general in its terms, only operates upon a special race, sect or class, it being universally understood that it is to be enforced only against that race, sect or class, we may justly conclude that it was the intention of the body adopting it that it should only have such operation, and treat it accordingly. We may take notice of the limitation given to the general terms of an ordinance by its practical construction as a fact in its history, as we do in some cases that a law has practically become obsolete."

Brown v. Piper, 91 U. S. 37; Scott v. Sandford, 19 How. (U. S.) 393; Barnes v. City of Mobile, 19 Ala. 707; In re Langston, 55 Neb. 310;

passage of the ordinance, not upon conditions before or after.[435] Every word, phrase or clause should be given some force and effect if possible, which is perhaps simply another way of expressing the principle that the validity of the whole should be sustained.[436] If two interpretations or meanings are possible as determined by the rules of construction, that should be adopted which would make the ordinance lawful,[437] and ordinances should also be construed in connection with the city charter and public laws.[438]

§ 566. When strictly construed.

Ordinances that are penal in their character that provide some punishment, either a fine or imprisonment,[439] or that impose a for-

Saunders v. City of Nashua, 69 N. H. 492, 43 Atl. 620; Clark v. City of Elizabeth, 61 N. J. Law, 565.

[435] Hazlehurst v. City of Baltimore, 37 Md. 199.

[436] Whitlock v. West, 26 Conn. 406; Metropolitan Life Ins. Co. v. Darenkamp, 23 Ky. L. R. 2249, 66 S. W. 1125. "The particular phraseology of the ordinance which we are asked to construe, 'Premiums received on business done,' is very obscure and if any meaning is to be attached to the words 'on business done,' we must conclude that they refer to premiums paid upon new policies issued by the company between May 1 and December 31, 1900. If the ordinance did not mean this, they should have been omitted altogether. There is no clearer or more reasonable rule of construction than that every clause or word of an ordinance should be presumed to have been intended to have some force and effect."

[437] Swift v. City of Topeka, 43 Kan. 671, 8 L. R. A. 772; Lowry v. City of Lexington, 113 Ky. 763, 68 S. W. 1109. "It is further objected that the ordinance in question undertakes to change the compensation of other officers recognized and authorized by the act. This objection would be clearly well taken * * * if we construed the ordinance to apply to the persons who were incumbents of those offices at the date of the passage of the ordinance. This construction, however, should not be given the ordinance under the well known rule which requires legislation to be so construed, if possible, as to make it valid; and the provision for the change of salaries will, therefore, be held not to take affect until the expiration of the terms of the incumbents." Merriam v. City of New Orleans, 14 La. Ann. 318; City of St. Louis v. Herthel, 88 Mo. 128.

[438] Pittsburg, C. & St. L. R. Co. v. Hood (C. C. A.) 94 Fed. 618; City of San Luis Obispo v. Fitzgerald, 126 Cal. 279; First Municipality v. Cutting, 4 La. Ann. 335; City of Moberly v. Hoover, 93 Mo. App. 663; Sparks v. Stokes, 40 N. J. Law, 487; State v. Austin, 114 N. C. 855, 19 S. E. 919, 25 L. R. A. 283; Town Council of McCormick v. Calhoun, 30 S. C. 93; Gabel v. City of Houston, 29 Tex. 335.

[439] City of Chicago v. Rumpff, 45

which is based upon a state of things existing at the date of the feiture for their violation, should be construed strictly.[440] All ordinances also that are passed by virtue of the exercise of an implied power of a municipal corporation should be given a strict construction.[441] Where ordinances grant remedial rights or prescribe methods for establishing rights which follow because of action indicated, they should also be given a strict construction,[442] and this rule unquestionably applies to all legislative action that affects individual, personal, contract or property rights as established and protected by either the common law or constitutional provisions.[443]

§ 567. Liberal construction; when adopted.

A municipal corporation has for its purpose the better protection of public interests within its jurisdiction, and ordinances or resolutions passed in conservation of such should be construed liberally in favor of the public.[444] The same rule also applies to all legislative acts which directly or indirectly confer grants, franchises or privileges to private parties in derogation of common right or which partake of the nature of a monopoly or are exclusive in their character.[445]

Ill. 90; Com. v. Brooks, 99 Mass. 434; City of St. Louis v. Goebel, 32 Mo. 295; City of Rockville v. Merchant, 60 Mo. App. 365; State v. Gritzner, 134 Mo. 512; City of St. Louis v. Dorr, 145 Mo. 466, 42 L. R. A. 686; Giardina v. City of Greenville, 70 Miss. 896, 13 So. 241; McConvill v. Jersey City, 39 N. J. Law, 38; People v. Rosenbery, 138 N. Y. 410.

[440] Board of Health of Glen Ridge v. Werner, 67 N. J. Law, 103, 50 Atl. 585. "Penal ordinances are construed strictly, and will not be held to create a liability where the words are not clear in fixing it."

[441] Smith v. City of Madison, 7 Ind. 86; Kyle v. Malin, 8 Ind. 34; Sharp v. Johnson, 4 Hill (N. Y.) 92; Lake v. Trustees of Williamsburgh, 4 Denio (N. Y.) 520.

[442] Denning v. Yount, 6 Kan. 217; State v. Kirkley, 29 Md. 85.

[443] Fowler v. City of St. Joseph, 37 Mo. 228; Seaboard Nat. Bank v. Woesten, 147 Mo. 467, 48 L. R. A. 279; German-American Fire Ins. Co. v. City of Minden, 51 Neb. 870; City of Omaha v. Harmon, 58 Neb. 339; Slaughter v. O'Berry, 126 N. C. 181, 35 S. E. 241, 48 L. R. A. 442.

[444] State Tryon, 39 Conn. 183; Doane v. City of Omaha, 58 Neb. 815.

[445] Freeport Water Co. Freeport City, 180 U. S. 587; Danville Water Co. v. Danville City, 180 U. S. 619; Milne v. Davidson, 5 Mart. (N. S.; La.) 409; Traverse City Gas Co. v. Traverse City, 130 Mich. 17, 89 N. W. 574.

II. EXECUTIVE.

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§ 568. Introductory.

The second branch of our form of government is the executive whose business and duty it is to enforce legislation passed by law-making bodies and administer the executive and ministerial duties appertaining to this department. The judicial branch determines the methods and manner of the application of laws and, in many cases, acting under constitutional provisions, determines also their validity. In connection with the legislative branch, it might be said that a high order of creative talent is not necessary to make a good legislator but, on the other hand, such talents are essential to the making of an efficient executive. The executive department, it is needless to say, is subject to statutory and constitutional provisions and to the judgment of the judiciary. It not only administers and enforces the law but carries on or manages the business affairs of the government including the power of appointing subordinate officers and employes, which power,[446] it has been held, it shares with the legislative branch.[447]

[446] State v. Hyde, 121 Ind. 20; State v. Gorby, 122 Ind. 17; State v. Barker, 116 Iowa, 96, 57 L. R. A. 244; Beasley v. Ridout, 94 Md. 641; State v. Washburn, 167 Mo. 680. "The act of filling a public office by appointment is essentially an administrative or executive act and

[447] People v. Freeman, 80 Cal. 233; City of Americus v. Perry, 114 Ga. 871, 57 L. R. A. 230; State v George, 22 Or. 142, 16 L. R. A. 737; Reed v. Dunbar, 41 Or. 509.

In the performance of these duties it is constantly before the citizen and resident to whom it tangibly represents the government in the enforcement of laws and the management of the business of the state. To foreigners or foreign nations the executive department represents, broadly speaking, the state, and its duty is to protect the interests, not only of the state, but also of its citizens.

The attributes of an efficient executive are honesty and sincerity of purpose and the avoidance at all times of a manipulation of public affairs or of public duties for personal aggrandizement; energy and force of character in an enforcement of the law and an aptitude for the performance of ministerial duties and the management of business affairs and details. Executive officials are too apt to display energy and force of character in enforcing laws only as they, and when they, desire, and then in accordance with a personal interpretation, in many cases, based upon or leading to personal and political preferment.

The line between the duties required of executive officials distinguished from those performed by legislative and judicial officers is clearly marked and one of the most essential of attributes for an efficient and just executive official is a recognition of the limitations imposed upon him by law; of the existence of two co-ordinate branches and of his place in the general scheme or plan of government. The application of these principles of law and good government to the powers and the actions of executive officers enables courts to determine the validity of their action and the existence of reciprocal rights.[448]

under the constitution can be exercised only by an officer charged with the duty of executing the laws."

State v. Swift, 11 Nev. 128. An act incorporating the city and naming the persons who are to organize the city government and conduct its affairs through the first year is not unconstitutional as being an assumption of executive power on the part of the legislature.

[448] Mississippi v. Johnson, 71 U. S. (4 Wall.) 475. "A ministerial duty, the performance of which may, in proper cases, be required of the head of a department, by judicial process, is one in respect to which nothing is left to discretion. It is a simple, definite duty, arising under conditions admitted or proved to exist, and imposed by law. * * * Very different is the duty of the president in the exercise of the power to see that the laws are faithfully executed, and among these laws the acts named in the bill. By the first of these acts he is required to assign generals to command in the several military districts, and to detail suffi-

§ 569. Source of power.

To the legislative department of government is given the sole power of making laws; to the executive, the sole power of enforcing them, and to the judicial, the exclusive power of interpretation. Executive action, therefore, to be legal, must not only be warranted but authorized by some grant of power or through the imposition of some duty, otherwise it will be considered illegal and

cient military force to enable such officers to discharge their duties under the law. By the supplementary act, other duties are imposed on the several commanding generals and these duties must necessarily be performed under the supervision of the president as commander-in-chief. The duty thus imposed on the president is in no just sense ministerial. It is purely executive and political.

"An attempt on the part of the judicial department of the government to enforce the performance of such duties by the president might be justly characterized, in the language of Chief Justice Marshall, as 'an absurd and excessive extravagance.'

"It is true that in the instance before us the interposition of the court is not sought to enforce action by the executive under constitutional legislation, but to restrain such action under legislation alleged to be unconstitutional But we are unable to perceive that this circumstance takes the case out of general principles which forbid judicial interference with the exercise of executive discretion. * * * The congress is the legislative department of the government; the President is the executive department. Neither can be restrained in its action by the judicial department; though the acts of both, when performed, are, in proper cases, subject to its cognizance." Green v. Mills, 25 U. S. App. 383: Tennessee & C. R. Co. v. Moore, 36 Ala. 371; Fox v. McDonald, 101 Ala. 51, 21 L. R. A. 529; Hawkins v. Governor, 1 Ark. 570; Ex parte Allen, 26 Ark. 9; Middleton v. Low, 30 Cal. 596; Ex parte Schrader, 33 Cal. 279; Greenwood Cemetery Land Co. v. Routt, 17 Colo. 156, 15 L. R. A. 369; State v. Staub, 61 Conn. 568; State v. Drew, 17 Fla. 67; McWhorter v. Pensacola & A. R., 24 Fla. 417, 2 L. R. A. 504; Hilliard v. Connelly, 7 Ga. 179; State v. Towns, 8 Ga. 360; People v. Bissell, 19 Ill. 229; Gray v. State, 72 Ind. 567; State v. Hyde, 121 Ind. 20; Brown v. Duffus, 66 Iowa, 193; State Auditor v. Atchison, T. & S. F. R., 6 Kan. 500; State v. Warmoth, 22 La. Ann. 1; State v. Shakespeare, 41 La. Ann. 156; In re Dennett, 32 Me. 508; City of Baltimore v. State, 15 Md. 457; Magruder v. Swann, 25 Md. 173; In re Sup'rs of Election, 114 Mass. 247; People v. Hurlbut, 24 Mich. 63; People v. Governor, 29 Mich. 320; State v. Dike, 20 Minn. 363 (Gil. 314); State v. Hathaway, 115 Mo. 36; State v. Stone, 120 Mo. 428, 23 L. R. A. 194; Vicksburg & M. R. Co. v. Lowry, 61 Miss. 102; Miller v. Wheeler, 33 Neb. 765; Merrill v. Scherburne, 1 N. H. 199; State v. Governor, 25 N. J. Law (1 Dutch.) 331; In re Cleveland, 51 N. J. Law, 311; Clark v. Miller, 54 N. Y. 528;

a usurpation of power.[449] The extent and scope of their powers and the performance of their duties with the manner and time is designated by law. The measure or the test of the validity of

In re New York El. R. Co., 70 N. Y. 327; State v. Chase, 5 Ohio St. 528; Taylor v. Place, 4 R. I. 338; Mauran v. Smith, 8 R. I. 192; State v. McMillan, 52 S. C. 69; State v. Thorson, 9 S. D. 149, 33 L. R. A. 582; Houston T. & B. R. Co. v. Randolph, 24 Tex. 317.

Attorney General v. Brown, 1 Wis. 513. Where a subject, power or duty is expressly given to or imposed upon the executive department, its action is free from interference of other branches of the government. The court say: "The policy of our constitution and laws has assigned to the different departments of the state government, distinct and different duties, in the performance of which it is intended that they shall be entirely independent of each other; so that whatever power or duty is expressly given to or imposed upon the executive department is altogether free from the interference of the other branches of the government. Especially is this the case where the subject is committed to the discretion of the chief executive officer, either by the constitution or by the laws. So long as the power is vested in him it is to be by him exercised and no other branch of the government can control its exercise."

Wyman, Administrative Law, §§ 17-25; Wyman, Administrative Laws, § 22. "In every government of the United States, then, we find these three departments, the legislative, the executive, and the judicial. Our concern is to separate the executive department from the others, to disentangle the functions of the administration from the others. In a general way, the one follows upon the other. For the legislative department in a general way, all legislation—that is what it is most fit for, deliberation; for the judicial department in a general way, all adjudication—that, too, is what it is best formed for, judgment; and for the executive department in the same way, administration—that also is what it is adapted for, enforcement. Then does the legislative department alone lay down all rules; does the judiciary decide all issues; does the executive confine itself altogether to action?"

[449] Dash v. Van Kleeck, 9 Johns. (N. Y.) 477; Lamar v. Browne, 92 U. S. 194; Kilbourn v. Thompson, 103 U. S. 191. "It may be said that these are truisms which need no repetition here to give them force. But, while the experience of almost a century has in general shown a wise and commendable forbearance in each of these branches from encroachment upon the others, it is not to be denied that such attempts have been made, and, it is believed, not always without success. The increase in the number of states, in their population and wealth, and in the amount of power, if not in its nature to be exercised by the federal government, presents powerful and growing temptations to those to whom that exercise is intrusted to overstep the just boundaries of their own department and enter upon the domain of one of the others, or to assume

powers not intrusted to either of them."

Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co., 110 U. S. 682. "A court of chancery is not any more than is a court of law clothed with legislative power. It may enforce in its own appropriate way the specific performance of an existing legal obligation arising out of contract, law or usage, but it cannot create the obligation."

Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 418, where the supreme court of the United States in passing upon the contention that the finding of a state railroad and warehouse commission was final and conclusive in respect to rights and charges fixed by it disapproved this because it "deprived the company of its right to a judicial investigation * * * under the forms and with the machinery provided by the wisdom of successive ages for the investigation judicially of the truth of a matter in controversy and substituted therefor as an absolute finality the action of a railroad commission which in view of the powers conceded to it by the state court could not be regarded as clothed with judicial functions or possessing the machinery of a court of justice." In re Neagle, 135 U. S. 1; Logan v. United States, 144 U. S. 295; Reagan v. Farmers' Loan & Trust Co., 154 U. S. 362; In re Debs, 158 U. S. 579; Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. Co., 167 U. S. 499; United States v. Mullin, 71 Fed. 686.

Holmes v. Sheridan, 1 Dill. 351, Fed. Cas. No. 6,644; Parham v. Justices, 9 Ga. 341; In re Sims, 54 Kan. 1, 37 Pac. 135, 25 L. R. A. 110. "The advancement in the science of government made in modern times is due to the separation of the three great co-ordinate departments. If the legislature may confer on the county attorney one of the highest and most distinctive attributes of judicial power—that of punishing for contempt,—to aid him in ascertaining from witnesses the facts with reference to violations of law, might the legislature not also confer on any attorney the power to examine witnesses in civil cases in the same manner, and to commit them for contempt if they refuse to answer his questions? Might it not also give to any executive officer from the the governor down, the power to subpoena witnesses to inform his judgment and to aid him in any executive decision or determination? And, if the rule is established, can it be doubted that the division between executive and judicial offices will be completely broken down, and all constitutional barriers removed from those forms of oppression which have always attended this combination? * * * This is a commingling and confusing of executive and judicial functions in a manner incompatible with the constitution, obnoxious to its whole spirit * * * of free institutions and the act to that extent is void." In re Huron, 58 Kan. 152, 48 Pac. 574, 36 L. R. A. 822; State v. McBride, 4 Mo. 303; State v. Gear, 5 Ohio Dec. 569; State Treasurer v. Weeks, 4 Vt. 222.

Paley, Moral Philosophy, bk. 6, c. 8. "The first maxim of a free state is that the laws be made by one set of men and administered by another; in other words, that the legislative and judicial characters be kept separate."

1 Bl. Comm. 269. "In this distinct and separate existence of the judicial power in a peculiar body

executive or administrative action is the existence of a law or a custom or usage having the force and effect of law.[450] The subject of the section has been recently considered by the United States circuit court of appeals of the Eighth circuit,[450a] where the court in its opinion by Judge Hook say in part: "The distinction between legislative and judicial functions is a vital one, and it is not subject to alteration or change, either by legislative act or by judicial decree, for such distinction inheres in the constitution itself and is as much a part of it as though it were definitely defined therein. When the legislature has once acted, either by itself or through some supplemental and subordinate board or body, and has prescribed a tariff of rates and charges, then whether its action is violative of some constitutional safeguard or limitation is a judicial question, the determination of which involves the exercise of judicial functions. The question is then beyond the province of legislative jurisdiction. As applied to this case, the

of men, nominated, indeed, but not removable at pleasure, by the crown, consists one main preservative of the public liberty, which cannot subsist long in any state unless the administration of common justice be in some degree separated from the legislative and also from the executive power. Were it joined with the legislative, the life, liberty and property of the subject would be in the hands of arbitrary judges, whose decisions would be then regulated only by their own opinions, and not by any fundamental principles of law, which, though legislators may depart from, yet judges are bound to observe. Were it joined with the executive, this union might soon be an overbalance for the legislative."

Montesquieu, Spirit of Laws, bk. 11, c. 6. "When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty, because apprehensions may arise lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner. Again, there is no liberty if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined with the executive power, the judge might behave with violence and oppression. There would be an end of everything were the same man, or the same body, whether of nobles or of the people, to exercise these three powers—that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals."

[450] Harbin v. Stewart, 4 Port. (Ala.) 370; Haynes v. Butler, 30 Ark. 69; People v. Hays, 4 Cal. 127; Backman v. Town of Charlestown, 42 N. H. 125.

[450a] Western Union Tel Co. v. Myatt, 98 Fed. 335.

power of the state to fix or limit the charges of telegraph companies for the transmission and delivery of telegraphic messages is a legislative one, but whether the rates so fixed or limited are unreasonable to the extent that the enforcement of their observance would amount to a deprivation of the complainant of its property without due process of law and a denial of the equal protection of the laws, and therefore violative of the first section of the fourteenth amendment to the constitution, is a question for the courts. Whatever deprives an owner of the beneficial use of property lawfully acquired and held, or denies him a reasonable compensation for such use, in effect deprives him of the property itself, for, generally speaking, the chief value of property lies in the use and employment thereof; and to require of an owner or a class of owners the use of their property for public benefit without reasonable compensation, while others are not subjected to such restrictions, is a denial of that equal protection of the laws which is one of the safeguards of the constitution. Concisely stated, to prescribe a tariff of rates and charges is a legislative function; to determine whether existing or prescribed rates and charges are unreasonable is a judicial function. That this is the settled doctrine in this country is no longer open to question. It is firmly fixed in the body of our jurisprudence. It follows, therefore, as a corollary of this doctrine, that courts have no power to prescribe a schedule of rates and charges for persons engaged in a public or quasi-public service, because that is a legislative perorgative, and that the legislature has no power to forestall the judgment of the courts by declaring that a tariff or schedule prescribed by it is a finality, and thus prevent an inquiry into the reasonableness thereof by the courts in a controversy properly challenging such reasonableness. The legislative perogative is the power to make the law, to prescribe the regulation or rule of action. The jurisdiction of the courts is to construe and apply the law or regulation after it is made. The two functions are essentially and vitally different. * * * The fact that the legislature denominated the tribunal a court is not conclusive as to its true character, nor as to the nature of the jurisdiction and powers conferred upon it. That question is not determined by the terminology employed in the act, although the legislative purpose and intent may be evidenced thereby, but it is determined rather by the ascertainment of the essential nature of the jurisdiction and powers themselves. The

constitution of the state of Kansas authorizes the creation of courts inferior to the supreme court by act of the legislature, and, by necessary implication, the defining of the jurisdiction of the courts so created. Article 3, § 1. Nevertheless such jurisdiction must, in all essential particulars, be judicial in its character, and the constitutional authority for other courts than those specifically named in the constitution must be so construed and limited. Under the constitution, the legislature may not create a court for the exercise of its own legislative functions, or for the performance of purely administrative or executive duties; and though a tribunal, as constituted by legislative act, may be denominated a court, may possess a seal, and be clothed with the usual and customary vesture of a judicial tribunal, yet its real character is determined by its jurisdiction and the functions it is empowered to exercise. The legislature may create a court of visitation, but it can only be a court in respect of matters of a judicial nature, and such as are properly incidental thereto. It is clear, however, that it was the intention of the legislature in the enactment of the law to confer certain judicial powers upon the court of visitation in respect to the same matters over which that court was authorized to exercise legislative and administrative functions. It was clearly the legislative intent to confer upon the court of visitation not only the power to prescribe rules and regulations for the government of railroads and telegraph companies in their relations to the public and to each other, but also the power to pass judicially upon the validity of such rules and regulations, to render judgment accordingly, and full power to execute their orders and judgments. By the language of the act under consideration, the court of visitation can prescribe a tariff of rates and charges, judicially determine the reasonableness thereof, and then enforce their judicial determinations in as radical and complete a method as could be devised. Concisely stated, the court of visitation may make laws, sit judicially upon their own acts, and then enforce their enactments which have received their judicial sanction. Can this be done? Can there be vested in one body such a union of powers of the different departments or branches of government, to be exercised respecting the same subject-matter and in the same proceeding? Counsel for defendants contend that in cases where 'the duties of the departments are so intermingled and interwoven that it is difficult to determine to which department they belong,

and it is absolutely necessary for the administration of justice that the duties of one be performed by the officers of the other, * * * it is within the power of the legislature—and its duty—to provide that the officers of one department shall perform the duties of another; and where this is done, and there is no express prohibition in the constitution against it, it is certainly valid."

Judge Hook in passing on this point on page 360 says "That a proceeding in a court of visitation to determine judicially the validity and reasonableness of a body of rates established by it in the exercise of its legislative functions is not due process of law, within the meaning of the fourteenth amendment to the Federal constitution. An active potential agency of the legislative power of a state cannot be empowered to sit in judgment upon the validity of its own enactments, and to enforce its decrees with reference thereto by the exercise of the extraordinary powers of a court of chancery." The organization of the executive branch of a modern governmental agency is complex; there are many needs to be supplied to a community requiring the existence of separate executive departments. Public education, the construction and maintenance of good roads, the protection of public and private property from fire, the policing of a community, and in municipal corporations proper the establishment of park systems and other departments, are a few of the many divisions of this branch and in which the right of the executive or administrative officials created by law is limited and restricted by the statutes creating them. Politically and from a governmental standpoint, it is well to remember that unity is an essential feature or characteristic of an efficient administrative or executive office; that an avoidance of responsibility, a weakness and vacillation of policy and action and an opportunity for the concealment of mistakes or corruption will follow a multiplication of executive officials.

§ 570. The governor and mayor.

The governor of a state and the mayor of a city are each the highest executive official respectively in their different organizations. Each as the highest executive official represents the community abroad and the government at home. The nature, extent and character of particular duties and the manner of their per-

formance will be considered in that chapter discussing public office and officials.[451] Their powers with reference to the public corporation are analogous to those of the president of a private corporation so far as such analogy is pertinent. Within the range of their discretionary powers and duties, as given them by law or custom, the expediency of their performance in respect to it, and the manner, is a matter of which they are the exclusive judges and their judgment is not to be interfered with by the courts except in cases of fraud or gross abuse of power.[452] Courts are not

[451] See chapter VIII, post; Covington & M. R. Co. v. City of Athens, 85 Ga. 667, 11 S. E. 663. Under the authority to lay out streets and pass all ordinances respectively and make any other regulations that shall appear necessary and proper, a mayor in conjunction with the city council cannot make a contract to obtain the right of way through the city for a railway.

Bazemore v. Davis, 55 Ga. 504; Fletcher v. Collins, 111 Ga. 253. A mayor has no authority to grant an exclusive right to sell liquor within the city limits. Pedrick v. Bailey, 78 Mass. (12 Gray) 161. A mayor may, under authority conferred by a vote of the common council, remove an awning erected in violation of the city ordinance although ordinarily a street commissioner should perform such duties.

Tryon v. Pingree, 112 Mich. 338, 70 N. W. 905, 37 L. R. A. 222. It is an indictable offense for any person to prevent the mayor of a city from performing duties authorized and directed to be done by its charter.

Lockwood v. Wabash R. Co., 122 Mo. 86, 26 S. W. 698, 24 L. R. A. 516. Where the charter grants the right to a mayor and assembly to issue permits for the construction and operation of railroads through the streets of the city, a permit from the mayor alone is void.

State v. May, 106 Mo. 488; People v. Gregg, 59 Hun, 107, 13 N. Y. Supp. 144. The mayor though ex officio the head of the police force is not a police officer within the meaning of New York laws of 1890, c. 163, § 1, making it unlawful for such officers to be interested in the manufacture and sale of intoxicating liquors.

Elyria Gas & Water Co. v. City of Elyria, 57 Ohio St. 374. The performance of matters vested by the legislature in a city council cannot be delegated in turn by them through resolution to the mayor.

[452] Halbut v. Forrest City, 34 Ark. 246; In re Inquires of Governor, 58 Mo. 369. In issuing a commission the governor acts in a political or executive capacity as he is the sole judge of the necessity for the acts. Courts can never control nor interfere with him in the exercise of the right. City of St. Louis v. Brown, 155 Mo. 545. Courts cannot review the action of the mayor and assembly of the city of St. Louis in passing upon the necessity for or the policy of constructing local improvements. Jane v. Alley, 64 Miss. 446; Briggs v. City of New York, 2 Daly (N. Y.) 304.

at liberty to determine whether such discretion is exercised wisely or unwisely; they act in this respect as the agents of a corporate organization and those persons and interests included within it and the familiar rule of principal and agent apply. The performance of duties can be compelled where they do not involve the elements of discretion or judgment and where the law requires them to be done.[453] The mayor of a city or town is usually made a member of the local legislative body[454] with veto powers,[455] but with the right to vote as a member of such body only in case of a tie.[456] In some states he is authorized to arrest and try offenders against certain local ordinances passed by virtue of the police power.[457] In these cases, it has been held that the exercise of the

[453] Frederick v. People, 83 Ill. App. 89; Harrison County Com'rs v. Benson, 83 Ind. 469; Kansas Pac. R. Co. v. Reynolds, 8 Kan. 628; State v. King, 136 Mo. 309; Salmon v. Haynes, 50 N. J. Law, 97, 11 Atl. 151; Ahrens v. Fiedler, 43 N. J. 400; People v. Booth, 49 Barb. (N. Y.) 31.

[454] City of St. Louis v. Withaus, 16 Mo. App. 247. By charter provision, the mayor of St. Louis may, by proclamation, call special sessions of the assembly giving not less than three days' notice and shall specially state the objects for which it has convened.

Martin v. State, 23 Neb. 371. The presence of the mayor will be presumed when it is his official duty to preside at all meetings of a city council. But see Cochran v. McCleary, 22 Iowa, 75.

[455] State v. Pinkerman, 63 Conn. 176, 22 L. R. A. 653; Brown v. Foster, 88 Me. 49, 31 L. R. A. 116; Magneau v. City of Fremont, 30 Neb. 843, 9 L. R. A. 786; Cate v. Martin, 70 N. H. 135, 46 Atl. 54, 48 L. R. A. 613. The veto power under N. H. Pub. St. c. 47, § 7, does not apply to the determination of the aldermen in matters pertaining to their election. A mayor is an official whose duties are properly and formally executive and administrative. He is not an alderman in contested election cases. Padavano v. Fagan, 66 N. J. Law, 167, 48 Atl. 998; Lawrence v. Ingersoll, 88 Tenn. 52, 6 L. R. A. 308.

[456] State v. Kirk, 46 Conn. 395; State v. George, 23 Fla. 585; Carroll v. Wall, 35 Kan. 36; Brown v. Foster, 88 Me. 49, 31 L. R. A. 116; Hecht v. Coale, 93 Md. 692, 49 Atl. 660; Bishop v. Lambert, 114 Mich. 110, 72 N. W. 35; Smedley v. Kirby, 120 Mich. 253, 79 N. W. 187; State v. Yates, 19 Mont. 239, 47 Pac. 1004, 37 L. R. A. 205; People v. Brush, 83 Hun, 613, 31 N. Y. Supp. 586. Although the mayor may have the right to vote in case of a tie, he is not to be included when counting the aldermen present in ascertaining a quorum. Lawrence v. Ingersoll, 88 Tenn. 52, 6 L. R. A. 308, 17 Am. St. Rep. 870.

[457] Mitchell v. City of Gadsden, 109 Ala. 390, 19 So. 808; Ex parte Smith, Hempst. 201, Fed. Cas. No. 12,967a; Green v. Talbot, 36 Iowa, 499; Com. v. Leight, 40 Ky. (1 B. Mon.) 107; Maguire v. Hughes, 13 La. Ann. 281; State v. Monroe, 16

power does not make him a part of the judiciary; the act is but an exercise of the police power.[458] As a rule he has no jurisdiction to try civil cases unless it has been especially conferred upon him by the act of incorporation of the municipality. However, such a power is exceptional.[459]

§ 571. Police and fire boards.

The abstract right to provide these boards for municipal corporations is generally conceded, as the necessity for them in such organizations exists without doubt. The legality of the manner of their selection or creation may be called in question because of a supposed violation of constitutional provisions with reference to special or uniform legislation.[460] They have general charge of

La. Ann. 395; City of Hagerstown v. Witmer, 86 Md. 293, 39 L. R. A. 649; Willis v. City of Boonville, 28 Mo. 543; Wertheimer v. City of Boonville, 29 Mo. 254; State v. Higgs, 126 N. C. 1014, 48 L. R. A. 446; Warwick v. Mayo, 15 Grat. (Va.) 528. See, also, 39 L. R. A. 661-667, and cases therein cited and discussed.

[458] Howard v. Shoemaker, 35 Ind. 111; Reynolds v. Baldwin, 1 La. Ann. 162; Shafer v. Mumma, 17 Md. 331.

[459] Robinson v. Benton County, 49 Ark. 49; City of Madison v. Hatcher, 8 Blackf. (Ind.) 341; Smith v. Deweese, 41 Tex. 594. For the history and the nature of the powers of a mayor see Norton's "Commonwealth," pp. 90, 402, 403.

[460] Hinze v. People, 92 Ill. 406; City of Evansville v. State, 118 Ind. 426, 4 L. R. A. 93; Mitchell v. City of Topeka (Kan. App.) 54 Pac. 292. Laws 1887, c. 100, creating boards of police commissioners as amended by Laws 1889, c. 181, is not in violation of article 12, §§ 1-5, Kan. Const. forbidding the passage of any special act conferring corporate powers. State v. Downs, 60 Kan. 788.

State v. Mason, 153 Mo. 23. Laws 1899, p. 51, reorganizing police department of the city of St. Louis is not special legislation in violation of the constitution, art. 4, §§ 53, 54. Citing Kansas City v. Stegmiller, 151 Mo. 189, 52 S. W. 723; Ewing v. Hoblitzelle, 85 Mo. 64; State v. Higgins, 125 Mo. 364; Kenefick v. City of St. Louis, 127 Mo. 1, and Spaulding v. Brady, 128 Mo. 653.

State v. Moores, 55 Neb. 480, 76 N. W. 175, 41 L. R. A. 624. An act which seems to confer authority upon the governor of a state to appoint members of a board of fire and police commissioners is void as being an illegal attempt to deprive the people of cities of the metropolitan class of the right of local self-government. People v. Coler, 71 App. Div. 584, 76 N. Y. Supp. 205. Laws 1901, c. 33, is not repugnant to the constitution, art. 3, § 16, providing that no local bill shall embrace more than one subject. Rathbone v. Wirth, 150 N. Y. 459, 34 L. R. A. 408; State v. Jones, 66 Ohio St. 453, 64 N. E. 424.

the protection of property and persons [461] and the range of their duties may include not only the administrative management of their respective departments [462] but the exercise of quasi legislative duties in respect to the making and enforcement of regulations tending to their better efficiency.[463] These rules or regulations when once formally adopted remain binding and in force until changed or repealed in the manner prescribed by law.[464] Their duties may also include a general oversight of subordinate em ployes and officials,[465] but these are generally protected by civil service rules, and removals cannot be made without a charge, a hearing and a decision.[466] The power to punish is not inherent

[461] Fowler v. Athens City Waterworks Co., 83 Ga. 222; Heller v. City of Sedalia, 53 Mo. 159.

[462] Haynes v. Covington, 21 Miss. (13 Smedes & M.) 408; Odineal v. Barry, 24 Miss. 9; People v. Jewett, 15 Misc. 227, 36 N. Y. Supp. 778. The discretionary acts of a police board in the performance of administrative duties is not subject to review by the courts.

[463] People v. French, 32 Hun (N. Y.) 112.

[464] People v. Welles, 14 Misc. 226, 35 N. Y. Supp. 672. "The learned counsel for the relator urges that as the present police commissioner had never adopted as his own and promulgated the rules and regulations issued by his predecessor, there were no rules of the department in existence under which the relator could be diciplined by the present commissioner. This contention cannot be sustained. The police department is a continuous body and while the executive head thereof may be changed from time to time, such change never contemplated the readoption of all previous rules and regulations in order to make them binding on the force. Those rules and regulations stood, not as the act or declaration of an individual but of the official head of the department and they continued to be binding on the police force till altered or repealed by the proper authority. The fact that a charge of intoxication made by the police captain against the relator before the police magistrate was pending and undetermined cannot constitute a bar to the commissioners proceeding with the trial of charges against the relator nor can the final decision of the police magistrate acquitting the relator have any effect in this proceeding. The commissioner had a right to try the relator for a violation of the rules of the police department and to punish him in his discretion if the charge was sustained."

[465] People v. McClave, 57 Hun, 587, 10 N. Y. Supp. 561. "The admissions of the relator show that he violated the rules of the police department and it is no excuse to say that such violation was a mere mistake of judgment. The board of police was the judge of the amount of punishment to be inflicted for such violation with which this court cannot interfere."

[466] Oldham v. City of Birmingham, 102 Ala. 357, 14 So. 793. Such a restriction, however, does not pre-

but dependent upon statutory provisions.[467] It is unnecessary to add that their powers are limited strictly to the performance of the special duties with which they are charged, and they have no authority to conduct their departments contrary to laws or rules which may have been formulated by some superior legislative body.[468]

Having once been legally created, they cannot be arbitrarily removed or deprived of the right to exercise specific powers which may include the control, as suggested above, of subordinate officials or employes.[469]

§ 572. Highway officers.

The right of a highway board or of a highway official to perform certain duties and maintain specific rights is dependent, as usual, with all executive or administrative officials, upon the existence of some law creating the office and prescribing its duties and powers.[470] Those properly attached to highway officers per-

vent the exercise by the city of its granted powers to abolish certain offices or employments. Lyon v. Fire Com'rs of Newark, 53 N. J. Law, 92; People v. French, 55 Hun, 608, 8 N. Y. Supp. 456; People v. City of Brooklyn (N. Y.) 13 N. E. 28; People v. Purroy, 61 N. Y. Super. Ct. (29 J. & S.) 284, 19 N. Y. Supp. 713; People v. Board of Fire Com'rs, 100 N. Y. 82. See, also, People v. Common Council of Brooklyn, 77 N. Y. 503, 33 Am. Rep. 659.

[467] Tyng v. City of Boston, 133 Mass. 372. The right to impose a fine gives no power to exact a forfeiture. People v. Purroy, 61 N. Y. Super. Ct. (29 J. & S.) 284, 19 N. Y. Supp. 713; People v. Board of Fire Com'rs, 100 N. Y. 82.

[468] Ex parte Danley, 24 Ark. 1; State v. Hyman, 19 Ohio Circ. R. 622; Gaines v. Galbreath, 82 Tenn. (14 Lea) 359.

[469] South v. Sinking Fund Com'rs, 86 Ky. 186; State v. Ramos, 10 La. Ann. 420.

[470] Spann v. State, 14 Ala. 588. Nonresidents or mere sojourners cannot be required to act as overseers on public roads. People v. Carver, 5 Colo. App. 156, 38 Pac. 332; Phinizy v. Eve, 108 Ga. 360; People v. Whipple, 187 Ill. 547, reversing 87 Ill. App. 145; State v. Sullivan, 74 Ind. 121. Until the commissioners of a county have acquired jurisdiction over a gravel or other similar road, they are without authority to let a contract for work upon such road or to take a bond from the contractor for its performance.

McManus v. Inhabitants of Weston, 164 Mass. 263, 31 L. R. A. 174. Road commissioners as created by acts of 1871, c. 158, are public officers. State v. Gasconade County, 25 Mo. App. 446; City of Vicksburg v. Marshall, 59 Miss. 563; Green v. Kleinhans, 14 N. J. Law (2 J. S. Green) 473; In re Haynes, 54 N. J. Law, 6, 22 Atl. 923; People v. Randall, 91 Hun, 266, 36 N. Y. Supp.

tain to the making [471] and maintenance [472] of all public ways.[473] Within the scope of their powers, their action in this respect is conclusive, as the exercise of all administrative duties involves the use of judgment and discretion and a familiar principle of law applies protecting them in the honest use of their judgment and discretion.[474]

202; Jensen v. Polk County Sup'rs, 47 Wis. 298.

[471] Webb v. Town of Rocky-Hill, 21 Conn. 468; Brown v. Robertson, 123 Ill. 631, 15 N. E. 30; Inhabitants of Princeton v. Worcester County Com'rs, 34 Mass. (17 Pick.) 154; Kruger v. Le Blanc, 70 Mich. 76, 37 N. W. 880; State v. McLeod County Com'rs, 27 Minn. 90. Commissioners appointed to lay out a state road are without authority to act until sworn in the manner provided in the statute.

Rousey v. Wood, 57 Mo. App. 650. A road overseer is bound to know the law and take notice that he has a valid writ authorizing him to open the road.

Onderdonk v. Inhabitants of Plainfield, 42 N. J. Law, 480. The power to contract for the survey of a highway is implied from a grant of authority by the legislature to lay out roads and incur the expense thereof. Huggans v. Riley, 51 Hun (N. Y.) 501; Talmage v. Huntting, 29 N. Y. 447; Bliss v. Sears, 24 Pa. 111. An order authorizing the pathmaster to open a road without specifying the width is void. Hyde v. Town of Jamaica, 27 Vt. 443. A highway must be laid out in the manner provided by a law.

[472] Bibb County v. Reese, 115 Ga. 346, 41 S. E. 636; People v. Vermilion County Sup'rs, 47 Ill. 256; State v. Chappell, 2 Hill (S. C.) 391. Where it is the duty of road commissioners to keep roads and bridges within their jurisdiction in repair, they may be indicted for their neglect in this respect. Young v. Road Com'rs, 2 Nott & McC. (S. C.) 537. Road commissioners are not liable to a private action for a neglect of duty in keeping roads in repair. State v. St. Helena Road Com'rs, 4 McCord (S. C.) 5. Roads commissioners have the power to change the direction of a road for short distances.

[473] Balke v. Bailey, 20 Iowa, 124; Ritterskamp v. Stifel, 59 Mo. App. 510; Andrews v. Auditor, 5 Ohio Dec. 242.

[474] Irving v. Ford, 65 Mich. 241. The discretion of the trustees of a village in the laying of sidewalks will not be controlled by the courts as this is a matter confided to them by the legislature. The court says: "The court of chancery has no jurisdiction to control the discretion of the municipal authorities of the village of Birmingham as to when or where walks shall be laid in the streets of the village. That is a matter of municipal regulation confided by the law to the board of trustees of the village."

People v. Highway Com'rs of Montgomery, 48 App. Div. 550, 62 N. Y. Supp. 993. Duties imposed by law cannot be neglected. Beardslee v. Dolge, 143 N. Y. 160. But where a highway commissioner makes false statements in his return to a writ of certiorari to review pro-

The care of public highways includes not only the making of repairs as ordinarily understood but also the employment of those means, financial or other, as may be found necessary to maintain them in a safe condition and protect them from injury.[475] The employment of the necessary materials and men to accomplish this, it has been held, is a proper exercise of these duties.[476] The effecting of such a result will not justify, however, the use of agencies not authorized by law[477] or the incurring of unauthor-

ceedings for laying out highways, he is liable in an action for such false return and that his intentions were honest is immaterial.

[475] Willey v. Inhabitants of Windham, 95 Me. 482. A de facto road commissioner has full power to bind the highway district for legitimate expenditures.

Putnam v. Valentine, 5 Ohio, 187. Supervisors of highways have no authority to invoke the aid of a court of equity through an injunction in proceedings injurious to a public road. State v. Fayette County Com'rs, 37 Ohio St. 526.

[476] Clark v. McCarthy, 1 Cal. 453; Ludy v. Colusa County (Cal.) 41 Pac. 300. "Plaintiff was road overseer of road district number six, Colusa county. As such road overseer during the fiscal year 1890–1891, he individually performed work upon the roads of that district and employed others to do the same and at his instance and request materials were furnished to be used and which were used, in the repair of the roads of such district. Claims in proper form for the amounts due for this labor and these materials were presented by the various parties to the board of supervisors of Colusa county. These claims were rejected and thereafter, being assigned to this plaintiff, action was brought to recover judgment thereon. Judgment went for defendant, and this appeal is from such judgment and from the order denying the motion for a new trial * * * .

"Section 2645 of the Political Code provides: 'Road commissioners under the direction and supervision and pursuant to orders of the board of supervisors must take charge of the highways within their respective districts and shall employ all men, teams, watering carts and all help necessary to do the work in their respective districts * * * keep them clear from obstructions and in good repair.' Under this statute there is no question but that the road commissioner of this district was authorized to order the work done and the materials furnished which were charged for in the claims presented to the board of supervisors and which form the basis of this action.

[477] Lorillard v. Town of Monroe, 11 N. Y. (1 Kern.) 392; People v. Burrell, 14 Misc. 217, 35 N. Y. Supp. 608. Highway commissioners have no authority to purchase materials on credit of the town for the repair of a highway. "But it is claimed on the part of the relator that by a long course of dealing, the custom has been established in the town of Canisteo of buying materials upon credit for the repair of the highway and that the relator

ized indebtedness,[478] or the expenditure of public funds in excess of those legally appropriated for a particular purpose.[479]

Highway officials in the proper performance of their duties are limited to the public ways within their jurisdiction [480] and cannot interfere with or molest private property when beyond the limits of a public way,[481] or within the limits only when it interferes with the proper use of the public way by the public for its legitimate purpose.[482] They are not considered as judicial or quasi

having sold the lumber in reliance upon that custom, he ought not to be precluded from having his pay. Undoubtedly where one man is dealing with another, and by a long continued course of dealing, a custom has been established between them with regard to their business, upon which one of them relies, he has a right to depend upon that as the basis of the contract with the other man and to appeal to it to enable him to recover when his right is disputed. But that rule of law only applies in a case where the parties have the power to make the contract upon which the recovery is based. That is not the case here. The commissioner of highways is not the agent of the town. He is required only to perform such duties as the law imposes upon him and those duties are public in their nature and are imposed upon him and not upon the town. He may bind the town to be sure, by his negligence in performing those duties; but that is not because he is the agent of the town, but because the law says that the town shall be responsible for his failure to perform the act which the law makes it his duty to do. So far as the town is concerned, his powers are laid down in the statute and the statute nowhere gives him the power to bind the town by contracting a debt. Towns, in this state, are municipal bodies created by the statute. They themselves have no original powers or rights, nor any rights except such as the statute gives them." Morson v. Town of Gravesend, 89 Hun (N. Y.) 52; Wells v. Town of Salina, 119 N. Y. 280, 7 L. R. A. 759.

[478] Smith v. Davis, 30 Cal. 536; Deer Park Highway Com'rs v. O'Sullivan, 16 Ill. App. 34; City of Covington v. Casey, 66 Ky. (3 Bush) 698; City of Baltimore v. Raymo, 68 Md. 569.

[479] Ludy v. Colusa County (Cal.) 41 Pac. 300.

[480] People v. Worth Tp. Com'rs, 52 Ill. 498; Kerr v. Hammer, 61 Hun, 619, 15 N. Y. Supp. 605; Pearsall v. Post, 20 Wend. (N. Y.) 111; Grove v. Mikesell, 13 Ohio St. 158. A road supervisor is a local ministerial officer whose duty it is to open, repair and control public roads including those only within his own district. Road Com'rs v. Durant, 11 Rich. Law (S. C.) 440.

[481] Highway Com'rs v. Sweet, 77 Ill. App. 641; Jewett v. Sweet, 178 Ill. 96. In making improvements, highway commissioners cannot commit trespass upon or injure private property. Moore v. Hawk, 57 Mo. App. 495; Beckwith v. Beckwith, 22 Ohio St. 180.

[482] West Boston Bridge v. Middlesex County Com'rs, 27 Mass. (10 Pick.) 270; Winter v. Peterson, 24

judicial officers and, therefore, can pass upon and determine matters in connection with the laying out or discontinuance of highways in which they may be interested as adjoining or damaged property owners.[483] Moneys coming into their hands must be accounted for to the proper officer or officers.[484]

§ 573. Park and street boards.

The creation of a park board is a special exercise of what may be termed the power to minister to the local wants or needs of a particular community and the laws creating park districts or departments and placing their administration and control in special boards are construed strictly and their rights will depend conversely upon the ordinary interpretation of the statutory authority.[485] The extent and manner of control will depend upon the same authority. An exclusive power of control is usually vested

N. J. Law (4 Zab.) 524; Griffith v. McCullum, 46 Barb. (N. Y.) 561; Eaves v. Terry, 4 McCord (S. C.) 125. Trees reserved for ornament or cultivation for use have always been respected as exempt from the operations of a road act authorizing road commissioners to cut down any timber, wood, etc., in or near highways.

[483] City of Lexington v. Long, 31 Mo. 369; People v. Wheeler, 21 N. Y. 82; Foot v. Stiles, 57 N. Y. 399.

[484] Town of Denver v. Myers, 63 Neb. 107, 88 N. W. 191. A road overseer's report should be so comprehensive and intelligent that it may be inquired into and approved by those whose duty it is to examine it. The court in its opinion say: "The defendant in the performance of his official duties was acting as the agent or trustee of the township and he is and should be held accountable for the faithful discharge of the duties he had undertaken by the acceptance of the trust. It was his duty faithfully to account to the proper officer or officers for all the moneys coming into his hands, the disbursement made, and for what purpose, with sufficient certainty that the correctness of the report so made might be examined into and determined and on his failure to do so, an action would lie for the money so received and failed to be accounted for. It is his duty under the statute to make such report; and it is implied that the report shall be sufficiently comprehensive and intelligent that its correctness may be inquired into and passed upon by those whose duty it is to examine and approve the accounting so made. It is likewise his duty to account to and hand over to his successor all moneys and property in his hands at the close of his term of office."

[485] McCormick v. South Park Com'rs, 150 Ill. 516, 37 N. E. 1075; City of Sandwich v. Dolan, 141 Ill. 430; Barney v. City of New York, 78 Hun, 337, 29 N. Y. Supp. 175; Matter of Central Park Com'rs, 51 Barb. (N. Y.) 277.

in these boards and if this does not appear in the statute, it will be conceded by intendment as a manifest confusion will arise from an attempted concurrent exercise of independent authority.[486] Highway officials are deprived directly or by implication of any control which they may have had previously over public ways, boulevards or parks upon the creation of special districts including them [487] and generally upon the organization of a municipal corporation proper from within the limits of some quasi public corporation such as a town or county.[488] The creation of special park districts or boards may be dependent upon a prescribed affirmative vote of the electors to be affected by the proposed organization.[489]

Park commissioners may also perform quasi legislative duties in common with other boards in the formulating of rules regulat-

[486] West Chicago Park Com'rs v. City of Chicago, 170 Ill. 618. But park commissioners may have concurrent jurisdiction with the city over the area covered by the intersection of a street with a boulevard. "By the statute, the most comprehensive powers are given to the city over the streets within its domain and by the park the same power and authority over the boulevard are vested in the commissioners. Each corporation is of equal power and dignity within the limits assigned to it by law and each has an equal right within the area covered by these intersections which belong to both in common. It would be the height of absurdity to say that at each intersection of a street with a boulevard the powers of either cease at the line of intersection and begin again when the intersection is passed. It was unquestionably the design of the legislature that a boulevard, when laid out, should be a continuous driveway for pleasure and that the streets crossing it should be continuous highways. It could not be comtemplated that either authority could cut off or close up the intersecting way without leave of the other. If the commissioners have the power to shut up these streets and compel the public to go around 250 feet north or 400 feet south over a new crossing, they have a right to shut them up absolutely. The principle is the same in either case and the existence of such a power cannot be conceded. The jurisdiction, as we think, is concurrent, the commissioners having jurisdiction over the boulevard for all its uses and purposes and the city having jurisdiction over the intersecting streets subject to any limitations of use that may arise out of the park acts."

[487] Symons v. City & County of San Francisco, 115 Cal. 555; Broadbelt v. Loew, 15 App. Div. 343, 44 N. Y. Supp. 159; Pope v. Road Com'rs, 12 Rich. Law (S. C.) 407.

[488] Philbrick v. Town of University Place, 106 Iowa, 352, 76 N. W. 742.

[489] West Chicago Park Com'rs v. McMullen, 134 Ill. 170, 25 N. E. 676, 10 L. R. A. 215.

ing the use of public property within their jurisdiction,[490] and they also have the power, unless restricted by civil service rules, to hire, discharge and punish their employes.[491] Their action in this respect, unless restricted as suggested, is considered conclusive and no appeal will lie.[492]

The time and manner of doing necessary work and the extent of improvements of this character is ordinarily left to their discretion in the exercise of which courts will not usually interfere.[493]

Where a board of street commissioners is vested with the control of the public ways of a municipal corporation proper, their power with respect to the care and maintenance of public streets is of a discretionary character and quasi legislative as well as administrative.[494] Unless restricted by charter or other statutory provisions, they can determine the width and extent of public ways,[495] and the time and manner in which they shall be improved, and when the necessity arises for street improvements.[496] It has been held that an act establishing park commissioners and giving them authority to determine the work and of what material sidewalks and roadbeds shall be constructed is not a delegation of legislative power and the same rule undoubtedly applies to all similar discretionary powers.[497] The legislature may properly give

[490] Gushee v. City of New York, 42 App. Div. 37, 58 N. Y. Supp. 967, and cases therein discussed.

[491] People v. Robb, 55 Hun, 425, 8 N. Y. Supp. 502; People v. Tappen, 15 Misc. 23.

[492] People v. Robb, 55 Hun, 425, 8 N. Y. Supp. 502; People v. Tappen, 15 Misc. (N. Y.) 23.

[493] West Chicago Park Com'rs v. City of Chicago, 152 Ill. 392; West Chicago Park Com'rs v. City of Chicago, 170 Ill. 618. Where park commissioners have recognized streets and roads acquired by the people, for a period of eight years, they cannot then question their legal existence. In re Knaust, 101 N. Y. 188; Brickwell v. Hamele, 57 Wis. 490.

[494] Murphy v. City of Peoria, 119 Ill. 509.

[495] Lofland v. Orten, 4 Houst. (Del.) 622; Murphy v. City of Peoria, 119 Ill. 509; City of Philadelphia v. Hinckley, 9 Pa. Dist. R. 125.

[496] Fuller v. City of Atlanta, 66 Ga. 80; Humes v. Town of Knoxville, 20 Tenn. (1 Humph.) 403.

[497] People v. Hurlbut, 24 Mich. 69; Turner v. City of Detroit, 104 Mich. 326, 62 N. W. 405. "The act establishing the board of park commissioners gives them the power to lay out driveways and walks, canals and flower beds; to set out trees and to determine where and of what material sidewalks and roadbeds shall be constructed. This is not such a legislative power as is conferrable under the constitution on the common council alone and the power may be conferred by the legislature upon the board." Kan-

to park boards or commissioners large powers in respect to the regulation and control of the use of public parks and boulevards though this right cannot be granted to such an extent as to authorize the exclusion of that traffic or use which is in keeping with the character of and purpose for which the public parks and boulevards may be created and maintained.[498]

§ 574. County boards, commissioners or supervisors.

A county or political division of similar character, under the classification of public corporations, is regarded as a public quasi corporation and, therefore, possesses small powers of local initiative. This condition tends to restrict county supervisors or commissioners in the performance of duties with which similar officers of other political organizations are charged.[499] At the same time because of this fact, such county boards and officers are usually vested with a greater diversity of duties and powers than officers of similar grades in other political organizations. Their powers and duties are not only administrative in their character but also quasi legislative and where they are vested with this power, quasi judicial in respect to the consideration and allowance of claims against the county.[500] As a general rule, a board of county com-

sas City v. Ward, 134 Mo. 172, 35 S. W. 600.

[498] Cicero Lumber Co. v. Town of Cicero, 176 Ill. 9, 42 L. R. A. 696; Quick v. Louisville Park Com'rs, 20 Ky. L. R. 1457, 49 S. W. 483; State v. Waddell, 49 Minn. 500. "The power to exclude from any street taken possession of by the board any kind of travel, or travel with any vehicle ordinarily used for travel, can only be found in the power given to close or vacate. And while the board may probably make a parkway of any established street, and may regulate the use of and the travel upon such parkway, it cannot vacate or close it, nor exclude from it vehicles which otherwise have a right to travel upon it. If it could, it might take possession of any street in the city, and exclude from it all vehicles except those used for purposes of pleasure—a power that cannot well be implied from the provisions of section eight (8)."

[499] People v. Hester, 6 Cal. 679; Martin v. Townsend, 32 Fla. 327; Neal v. Franklin County, 43 Ill. App. 267; Platter v. Elkhart County Com'rs, 103 Ind. 369; Hawkins v. Carroll County Sup'rs, 50 Miss. 735; 7 Am. & Eng. Enc. Law, p. 975, and cases therein cited.

[500] Betts v. Town of New Hartford, 25 Conn. 180. A county commissioner, however, is not a judge within the meaning of Connecticut constitution, art. 5, § 3, which provides that no judge shall be capable of holding his office after he reaches the age of seventy years.

Rhode v. Davis, 2 Ind. 53; Gas-

missioners or supervisors is clothed with the legal authority to do whatever the corporate or political entity, the county, can do, except in respect to those acts or matters the transaction or cognizance of which is exclusively vested by the constitution or statutes in some other officer or person.[501] The county board is considered as the representative of the county in the management and control of its policing and its financial interests including both the making of a fiscal budget, the collection of taxes and

ton v. Marion County Com'rs, 3 Ind. 497; Rosenthal v. Madison & G. Plankroad Co., 10 Ind. 359; Warren County Com'rs v. Gregory, 42 Ind. 32; People v. Wright, 19 Mich. 351. County boards of supervisors have no general power to establish claims against townships and in favor of the county they represent.

Brown v. Otoe County Com'rs, 6 Neb. 111; State v. Buffalo County Com'rs, 6 Neb. 454; Stenberg v. State, 48 Neb. 299, 67 N. W. 190; State v. Ormsby County Com'rs, 7 Nev. 392; Richmond County Sup'rs v. Wandel, 6 Lans. (N. Y.) 33. A board of supervisors does not act judicially in passing upon the accounts of the county treasurer and their acts or omissions will have no affect upon the liability of the treasurer in respect to defaults.

People v. Dutchess Sup'rs, 9 Wend. (N. Y.) 508; Martin v. Greene County Sup'rs, 29 N. Y. 645; People v. Haws, 34 Barb. (N. Y.) 69; Rensselaer County Sup'rs v. Weed, 35 Barb. (N. Y.) 136. County boards of supervisors can only audit a claim for services and issue a certificate therefor.

People v. Schenectady County Sup'rs, 35 Barb. (N. Y.) 408. A board of supervisors act judicially in apportioning taxes among the different towns. People v. Stocking, 50 Barb. (N. Y.) 573. The action of a board of supervisors when examining, settling and allowing claims properly chargeable against the county is a judicial act and the board as such are not liable in a civil action however erroneous or wrongful their determination may be. A member of such board, however, who corruptly and knowingly votes for the allowance of an illegal claim against the county is guilty of a misdemeanor and may be indicted and punished under the law. People v. Oneida County Sup'rs, 170 N. Y. 105; Warner v. Outagamie County Sup'rs, 19 Wis. 611; La Pointe Sup'rs v. O'Malley, 47 Wis. 332.

[501] Hornblower v. Duden, 35 Cal. 664. A county board of supervisors has the power to employ counsel other than the district attorney to assist in the prosecution or defense of suits in which the county is interested. Their action in this respect is not subject to review by the courts. Williams v. Doe, 2 Ill. (1 Scam.) 502; Carleton v. People, 10 Mich. 250; Jackson v. Hartwell, 8 Johns. (N. Y.) 330. County supervisors have no capacity to take and hold lands for any other use or purpose than that of the county which they represent. Shanklin v. Madison County Com'rs, 21 Ohio St. 575; Vankirk v. Clark, 16 Serg. & R. (Pa.) 289; Mansel v. Nicely, 175 Pa. 367.

their disbursement.[502] Their duties include the general management of the finances and the property of the county including its protection and maintenance, the purchase of the necessary supplies for such public institutions as may be within their jurisdiction, and the hiring of the necessary employes.[503] In addition to the duties which usually devolve upon them, they may be vested with the power of maintaining highways and other public ways,[504]

[502] Curtis v. Butler County, 24 How. (U. S.) 435. County commissioners authorized to subscribe for stock of the railroad constructed through the county. Yant v. Brooks, 19 Iowa, 87; People v. St. Lawrence County Sup'rs, 30 How. Pr. (N. Y.) 173. It is held here that the duty of a board of supervisors in auditing and allowing claims against the county is (1) to examine and determine whether an account is properly verified; (2) to ascertain if it is properly chargeable against the county; (3) to settle or fix its amount; (4) if properly chargeable against the county to allow it as settled; (5) to provide means for its payment.

People v. Oneida County Sup'rs, 170 N. Y. 105. The legislature may, by special act, deprive a board of county supervisors of the power to build a county court house.

[503] Cherokee County Com'rs v. Wilson, 109 U. S. 621. In Kansas, in the absence of a trustee, it is the duty of the county commissioners to levy a tax sufficient to pay a judgment to recover against the township upon railroad aid bonds, and if they fail in this respect, they may be compelled by mandamus to perform the duty. Holten v. Lake County Com'rs, 55 Ind. 194. County commissioners have the prima facie right to buy a tract of land to be used as a home for the county poor and this right cannot be questioned in a collateral proceeding.

Greene County Com'rs v. Axtell, 96 Ind. 384; Mitchell v. Leavenworth County Com'rs, 18 Kan. 188. Guards may be employed for a county jail when in the judgment of the county commissioners there exists a public necessity for the employment of such persons.

Worcester County Com'rs v. Melvin, 89 Md. 37. County commissioners under the general laws cannot refuse to pay the amount of a fee allowed by the judge to an attorney appointed by the court to defend a person against a crime. State v. Dixon County Sup'rs, 24 Neb. 106, 37 N. W. 936. Advertising delinquent tax list. Chemung Canal Bank v. Chemung County Sup'rs, 5 Denio (N. Y.) 517; People v. Albany County Sup'rs, 12 Wend. (N. Y.) 257.

County supervisors or commissioners have the power to employ attorneys on behalf of the county other than the regular officers. See Hopkins v. Clayton County, 32 Iowa, 15; Ellis v. Washoe County, 7 Nev. 291; People v. Schoharie Sup'rs, 6 Wend. (N. Y.) 505; People v. Delaware County Sup'rs, 45 N. Y. 196; State v. Franklin County Com'rs, 21 Ohio St. 648.

[504] Webb v. Town of Rocky-Hill, 21 Conn. 468; Dingwall v. Weld County Com'rs, 19 Colo. 415; Smith v. Highway Com'rs, 150 Ill. 385;

including bridges,[505] making appropriation for these purposes and for establishing roads extending into different towns.

§ 575. Character of duties.

The performance of their duties is regarded as personal and, because involving this element, are not capable of delegation to subordinate agents or employes; it is the judgment and discretion of the individual that is trusted by the electors rather than that of some unknown person to be selected by him.[506] Where the

Kennedy v. Dubuque, C. & M. R. Co., 34 Iowa, 421; Everett v. Pottawattamie County Sup'rs, 93 Iowa, 721, 61 N. W. 1062; Devoe v. Smeltzer, 86 Iowa, 385; Larson v. Fitzgerald, 87 Iowa, 402; Willis v. Sproule, 13 Kan. 257. The proceedings of county commissioners in the establishment of county roads are judicial in their nature and when they act either in a judicial or quasi-judicial capacity, their proceedings are entitled to the same respect from superior courts as proceedings of other tribunals of special limited and inferior jurisdiction.

Inhabitants of New Vineyard v. Somerset County, 15 Me. 21; Cyr v. Defour, 62 Me. 20. The right of county commissioners to locate a highway cannot be questioned in a collateral proceeding. Hughes v. Mermod, 121 Mo. 98; Mitchell v. Holderness, 34 N. H. 209; Conover v. Bird, 56 N. J. Law, 228; State v. Treasurer of Wood County, 17 Ohio, 184; Com. v. Kline, 162 Pa. 499; Van Antwerp v. Dell Rapids Tp., 3 S. D. 305, 53 N. W. 82; Robinson v. Winch, 66 Vt. 110.

[505] Pierce v. Elmore County Com'rs, 117 Ala. 569; Spier v. Baker, 120 Cal. 370, 41 L. R. A. 196; City of Lansing v. State Auditors, 111 Mich. 327; State v. Tibbets, 52 Neb. 228; State v. Stewart, 52 Neb. 243; Bryant v. Dakota County, 53 Neb. 755; Seabolt v. Northumberland County Com'rs, 187 Pa. 318; Alexandria County Sup'rs v. City Council of Alexandria, 95 Va. 469; McEldowney v. Wyatt, 44 W. Va. 711, 45 L. R. A. 609.

[506] Attorney General v. Lowell, 67 N. H. 198, 38 Atl. 270; French v. Dunn County, 58 Wis. 402. But the power to purchase a suitable farm for a county poor house may be delegated by a board of county commissioners to a committee of its members. "The statute also declares that the powers of a county as a body corporate can only be exercised by the county board 'or in pursuance of a resolution or ordinance by them adopted.' Section 652. The power to purchase the farm was exercised by the committee pursuant to a resolution adopted by the board. The action taken seems to conform to both the letter and the spirit of the law in respect to the execution of corporate authority unless there is something in the nature of the act to be performed which rendered it essential it should be executed by the entire board. There are, doubtless, powers vested in the county board which could not be delegated to any committee. * * * The statute must have a reasonable interpretation so as to make it practic-

performance of a duty is obligatory, the element of discretion is not involved and upon a refusal its performance may be compelled by mandamus issued by the proper authorities.[507] These county boards of administration are bodies of limited jurisdiction legally capable of performing only such duties and exercising those powers that may be expressly granted to them by statutory or constitutional authority.[508] The rule of strict construction applies to their acts and, without doubt, action by them in excess of their authority is void and legally incapable of creating rights or liabilities.[509]

able in the transaction of county business. The power to purchase a poor-farm can be as well exercised by a competent committee as by the whole body." Following Rockwood v. Woodford, 25 Wis. 443, and distinguishing Lauenstein v. City of Fon du Lac, 28 Wis. 336; Lord v. City of Oconto, 47 Wis. 386.

[507] People v. La Salle County Sup'rs, 84 Ill. 303. The construction of a jail can be compelled by mandamus if there is no suitable one in existence. People v. Superior Ct., 5 Wend. (N. Y.) 114; Hull v. Oneida County Sup'rs, 19 Johns. (N. Y.) 259.

[508] McDonald v. Maddux, 11 Cal. 187; People v. Bircham, 12 Cal. 50; McDaniel v. Yuba County, 14 Cal. 444; Robinson v. City & County Sup'rs of Sacramento, 16 Cal. 208; San Joaquin County v. Jones, 18 Cal. 327; Territory v. Cass County Com'rs, 6 Dak. 39. The legislature has power to increase or decrease the number of county commissioners, re-arrange the districts, enlarge or diminish their duties. Pulaski County v. Thompson, 83 Ga. 270. 9 S. E. 1065; Strange v. Bell, 11 Ga. 103; Potts v. Henderson, 2 Ind. 327; Games v. Robb, 8 Iowa, 193; Feek v. Bloomingdale Tp., 82 Mich. 393, 10 L. R. A. 69; Wilcox v. Paddock, 65 Mich. 23; Bray v. Chosen Freeholders of Hudson County, 50 N. J. Law, 82; State v. Gracey, 11 Nev. 223; People v. Schenectady County Sup'rs, 35 Barb. (N. Y.) 408; Ruckles v. State, 1 Or. 347; Frost v. Cherry, 122 Pa. 417; Cunningham v. Squires, 2 W. Va. 422.

[509] Coman v. State, 4 Blackf. (Ind.) 241. County commissioners have no authority to extend the time provided by law for the payment of revenues received by the collector and county revenues.

White v. Conover, 5 Blackf. (Ind.) 462. County commissioners are authorized by statute to establish roads of a width not exceeding forty feet. An order establishing a road of indefinite width is void.

Cushing v. Inhabitants of Stoughton, 60 Mass. (6 Cush.) 389. A town having appointed a committee for an illegal purpose but with authority to defend all actions growing out of it is liable for professional services rendered by counsel employed by the committee in defense of such action. Mitchell v. St. Louis County Com'rs, 24 Minn. 459; State v. Clarke, 73 N. C. 255; Auerbach v. Salt Lake County, 23 Utah, 103, 63 Pac. 907. It does not always follow that under no circumstance can a liability be created when some of the members

§ 576. Character of duties continued.

Within the scope of their discretionary powers and duties, however, their determination is ordinarily conclusive [510] either in respect to the nature or kind and manner of work to be performed as well as the compensation to be paid therefor,[511] but where the statutes fix the compensation, any allowance in excess is void.[512] Since such boards are bodies of limited jurisdiction, it is also equally clear that they cannot, even in the performance of duties legally assigned to them, violate statutory provisions, incur indebtedness or take any action that can be considered as contrary to law.[513] Within their power, contracts made by them cannot be

are guilty of fraud with reference to some part of the transaction.

[510] People v. Marin County Sup'rs, 10 Cal. 344. County supervisors are authorized to require "new bonds whenever they deem it necessary." The question of necessity is left to their sound legal discretion exercised after examination of facts in each particular case.

Waugh v. Chauncey, 13 Cal. 11; Schuyler County Sup'rs v. People, 25 Ill. 181; Colton v. Hanchett, 13 Ill. 615; Andrews v. Knox County Sup'rs, 70 Ill. 65; Sims v. Monroe County Com'rs, 39 Ind. 40; Dudley v. Blountsville & D. Turnpike Co., 39 Ind. 288; Carroll County Com'rs v. Richardson, 54 Ind. 153; Rothrock v. Carr, 55 Ind. 334. This discretion is a legal, not a personal one; they cannot make an allowance for that which there is no legal authority.

Hunting County Com'rs v. Beaver, 156 Ind. 450, 60 N. E. 150; Brewer v. Boston, C. & F. R. Co., 113 Mass. 52. The action of county commissioners upon a subject within their jurisdiction cannot be impeached collaterally and is conclusive upon all parties in an action at law.

Ragoss v. Cuming County, 36 Neb. 375; People v. Carpenter, 24 N. Y. 86. The presumption of law is in favor of the validity of legislative action by a board of county supervisors and the burden of proving its illegality is upon the party impeaching the act.

Long v. Richmond County, 76 N. C. 273. So long as county commissioners act within their powers, the courts will not assume to control the exercise or their discretion and will not, therefore, inquire into a charge that a tax levied by them is insufficient. Burwell v. Vance County Com'rs, 93 N. C. 73; Boran & Guckes v. Darke County, 21 Ohio St. 311.

[511] Washington County v. Porter, 128 Ala. 278, 29 So. 185; People v. La Salle County Sup'rs, 84 Ill. 303. A county board of supervisors has the sole and discretionary power under Illinois statutes to determine the size, cost and quality of materials of which a county jail shall be constructed.

[512] People v. Dutchess County Sup'rs, 9 Wend. (N. Y.) 508. Neither can county supervisors refuse to pay the compensation allowed by law.

[513] Laforge v. Magee, 6 Cal. 285; Foster v. Coleman, 10 Cal. 279; Mc-

arbitrarily rescinded or impaired without creating a liability against the county which they represent.[514] They equally with other public officers have no power to impair, destroy or interfere with private property without taking such action, if any, as may be required by the statutes or constitution.[515] They must act not only within the scope of their authority but also as a body and at some regular or special meeting called and held in the manner provided by rule or by law.[516] But this will not preclude them ordinarily from transacting business on other days unless the rule or statute is mandatory fixing their time of meeting.[517]

§ 577. Performance of duties.

Motives that may have influenced the official conduct of the members of a board of county commissioners cannot be made the subject of judicial inquiry for the purpose of impeaching their official acts; this rule, it will be remembered, applies to all mem-

Donald v. Maddux, 11 Cal. 187; Colton v. Hanchett, 13 Ill. 615; Perry v. Kinnear, 42 Ill. 160. Supervisors are not authorized to appropriate any portion of the county funds to the compensation of the circuit judge. Rothrock v. Carr, 55 Ind. 334; District Attorney v. Bristol County Com'rs, 80 Mass. (14 Gray) 138; Chemung Canal Bank v. Chemung County Sup'rs, 5 Denio (N. Y.) 517. County supervisors have no authority to issue bills of exchange. Jackson v. Cory, 8 Johns. (N. Y.) 301.

[514] McDaniel v. Yuba County, 14 Cal. 444; Jackson County Com'rs v. King, 7 Ind. 721; People v. Edmonds, 15 Barb. (N. Y.) 529; Id., 19 Barb. 468.

[515] Bibb County Com'rs v. Harris, 71 Ga. 250; Plum v. Morris Canal & Banking Co., 10 N. J. Eq. (2 Stockt.) 256. No city has the right in a proper exercise of its corporate powers to occupy or appropriate private property without compensation or damage directly or incidentally private property. Allen v. Smith (Tenn. Ch. App.) 47 S. W. 206.

[516] Douglass v. Baker County Com'rs, 23 Fla. 419; Oliver v. Keightley, 24 Ind. 514; Torr v. State, 115 Ind. 188; Mitchell County Sup'rs v. Horton, 75 Iowa, 271; Stafford County Com'rs v. State, 40 Kan. 21; Joslyn v. Franklin County Com'rs, 81 Mass. (15 Gray) 567; Cassin v. Zavalla County, 70 Tex. 419.

[517] People v. Murray, 15 Cal. 221. "The rule is general that when time is prescribed to a public body in the exercise of a function in which the public is concerned, the period designated is not of the essence of the authority but is a mere directory provision." Tuohy v. Chase, 30 Cal. 524; People v. Allen, 6 Wend. (N. Y.) 486; People v. Peck, 11 Wend. (N. Y.) 604; People v. Green, 75 N. C. 329; State v. Raborn, 60 S. C. 78, 38 S. E. 260.

bers of legislative bodies.[518] Their duties are so numerous and diverse and so dependent upon the special terms of particular legislation that no more than a general statement of the principles governing their action can be given in this connection.[519] While the duties of county commissioners or supervisors are numerous in extent and diverse in character, being either quasi legislative, judicial or executive, yet, in all matters relating to the exercise of the police power and in all fiscal regulations they are generally allowed to perform the duties that may be enjoined upon them by law without any particular or searching examination into the character of the powers conferred and whether it is proper and legal that they should be exercised by such boards.[520] Encroachment, however, by them upon the duties legally assigned to other branches of the government, will not be sustained.[521] In the exercise of their various duties, those rules or principles of law which apply generally may apply to the particular duty under consideration whether executive, administrative or legislative in its character.[522]

§ 578. Legal character.

These as well as other boards created by law have been considered sometimes of themselves as public quasi corporations [523] and,

[518] Page v. Hardin, 47 Ky. (8 B. Mon.) 648; Webster v. Washington County, 26 Minn. 220. "The principle invoked by plaintiffs that no man shall be a judge in his own cause, and the authorities cited in its support have no application to the facts of this case. Whatever may be thought of the propriety of Cover's conduct in the premises he violated no legal principle nor any statute that has been brought to the attention of the court. In respect to the motives that may have governed his official conduct and action, that is not a subject of which the courts can take any cognizance in a matter of this kind." Shannon v. City of Portsmouth, 54 N. H. 183.

[519] See the title "County Commissioners, 7 Am. & Eng. Enc. Law (2d Ed.) p. 975.

[520] Willis v. Sproule, 13 Kan. 257. In respect to ministerial acts, while superior courts or bodies should adhere to the principle that they are tribunals of special and inferior legislation, yet their proceedings should be considered liberally so as not invalidate them for immaterial irregularities. Chaska Co. v. Carver County Sup'rs, 6 Minn. 204 (Gil. 130); State v. Ormsby County Com'rs, 7 Nev. 392.

[521] Rodman v. Harcourt, 43 Ky. (4 B. Mon.) 224.

[522] People v. Whipple, 47 Cal. 592; Plummer v. Inhabitants of Waterville, 32 Me. 566. The right of a board of county commissioners to act must appear from their records which must show jurisdictional facts.

[523] People v. Hester, 6 Cal. 679; Stermer v. La Plata County Com'rs,

therefore, endowed with those powers pertaining to such organizations, including perpetuity of existence notwithstanding a change in the individuals who may compose them at any one time.[524] Their action within their authority and in accordance with the rules of law ordinarily laid down is binding upon their successors in office.[525]

§ 579. Miscellaneous boards.

For the accomplishment of various results in the proper government and regulation of a community, it may be deemed advisable to create still other bodies or boards or sets of officials than those suggested in the preceding sections. They are clothed with the power to accomplish the necessary results as set out in the instrument creating them.[526] To them is generally entrusted the performance of duties not only administrative or executive in their character but also quasi legislative or judicial,[527] and they also have the power of enforcing their rules and regulations made when acting in such a capacity.[528] They are differently called as

5 Colo. App. 379, 38 Pac. 839. A board of commissioners is not subject to garnishment. Mesa County Com'rs v. Brown, 6 Colo. App. 43, 39 Pac. 989. County commissioners not subject to garnishment. Jackson v. Hartwell, 8 Johns. (N. Y.) 330. A board of county supervisors is a corporation of special powers. State v. Clarke, 73 N. C. 255; Vankirk v. Clark, 16 Serg. & R. (Pa.) 289.

[524] Armstrong v. Landers, 1 Pen. (Del.) 449, 42 Atl. 617; Cook v. Houston County Com'rs, 54 Ga. 163; Chapman v. York County Com'rs, 79 Me. 267, 9 Atl. 728; Elmendorf v. City of New York, 25 Wend. (N. Y.) 693; Pegram v. Cleveland County, 65 N. C. 114; Miller v. Ford, 4 Rich. Law (S. C.) 376.

[525] Elkin v. People, 4 Ill. (3 Scam.) 207, 36 Am. Dec. 541; Com. v. Clark, 4 Ky. (1 Bibb.) 533; Clark v. Pratt, 55 Me. 546; Chenango Sup'rs v. Birdsall, 4 Wend. (N. Y.) 453. "The idea that one board of supervisors may rejudge the matters passed upon by a former board is not to be tolerated, though there has been a succession of members, the board of supervisors of Chenango in 1828, is the same body to all legal effects as that which was assembled in 1815 or 1816, and the board of 1828 are as much bound by the acts of a preceding board as if the same natural persons constituted the board at the two distinct periods." People v. Wells, 14 Misc. 226, 35 N. Y. Supp. 672; Scotio Com'rs v. Gherky, Wright (Ohio) 494.

[526] Miner's Lesse v. Cassat, 2 Ohio St. 199.

[527] People v. Justices of Ct. of Special Sessions, 7 Hun (N. Y.) 214. A board of health may be authorized to enact and enforce ordinances. Trimmier v. Winsmith, 23 S. C. 449.

[528] Den d. Osborne v. Tunis, 25 N. J. Law (1 Dutch.) 633.

the occasion for the existence of the board may determine; boards of health,[529] water departments,[530] of delegates,[531] of police,[532] of managers of different state institutions,[533] of medical examiners,[534]

[529] Boston Beer Co. v. Massachusetts, 97 U. S. 25; People v. Perry, 79 Cal. 105; Davock v. Moore, 105 Mich. 120, 63 N. W. 424, 28 L. R. A. 783; State v. Gregory, 83 Mo. 123. The granting of a license to practice medicine is a discretionary matter not enforceable by mandamus where by statute the state board of health has the authority to require from applicants proof of their medical standing and learning. Metropolitan Board of Health v. Schmades, 10 Abb. Pr. (N. S.; N. Y.) 205; Board of Health v. Hutchinson, 39 N. J. Eq. (12 Stew.) 218; Inhabitants of Perth Amboy Tp. v. Smith, 19 N. J. Law (4 Har.) 52; People v. Justices of Ct. of Special Sessions, 7 Hun (N. Y.) 214.

[530] Continental Const. Co. v. City of Altoona, (C. C. A.) 92 Fed. 822; City of Lafayette v. State, 69 Ind. 218; State v. Barker, 116 Iowa, 96, 89 N. W. 204, 57 L. R. A. 244; Nelson v. City of New York, 63 N. Y. 535. Powers of Croton aqueduct board considered. Ampt. v. City of Cincinnati, 17 Ohio Circ. R. 516; Ashby v. City of Erie, 85 Pa. 286.

[531] People v. Board of Delegates, 14 Cal. 479. "The fire department is a public body created by and under the law. It is a part of the government of the city and county of San Francisco. The chief engineer is a public officer holding his office under and by virtue of the law, receiving a salary like all other city officers, payable out of the city treasury. The board of delegates of the fire department of San Francisco have such powers and such only as the law gives them. Any person injured by their unauthorized and illegal action may resort to the courts for redress." Citing People v. El Dorado County Sup'rs, 11 Cal. 170; People v. Woodbury, 14 Cal. 43.

[532] People v. Wright, 70 Ill. 388; State v. Fox, 158 Ind. 126, 63 N. E. 19, 56 L. R. A. 893. Ind. Acts 1901, p. 132, creating boards of public safety for cities of over 35,000 population and less than 49,000 is void as an infringement of the right of local self-government vested in the people of such cities. The members of such boards to be appointed by the governor of the state and to have exclusive control and the care and management of the fire and police force with power to purchase at the expense of the respective cities all necessary supplies and apparatus and to make all needed repairs. City of Baltimore v. Howard, 20 Md. 335; People v. McClave, 57 Hun, 587, 10 N. Y. Supp. 561.

[533] People v. Mallary, 195 Ill. 582; George v. Lillard, 21 Ky. L. R. 483, 51 S. W. 793, 1011; In re Conditional Discharge of Convicts, 73 Vt. 414, 51 Atl. 10, 56 L. R. A. 658.

[534] State v. Wilcox, 64 Kan. 789, 68 Pac. 634. Kans. Laws 1901, c. 254, creating a board of medical registration and examination, is not unconstitutional as operating to prevent some persons from following their chosen professions, citing State v. Creditor, 44 Kan. 565, and Williams v. People, 121 Ill. 87. The court say: "It is said that the board of examination and registration may act arbitrarily and unjustly in passing upon the suffi-

and of public safety, arid land commissioners,[535] road commissioners,[536] state boards of charities,[537] boards of rapid transit com-

ciency of the diplomas presented and in determining the qualifications of proposed practitioners, but this is a presumption which the courts cannot indulge. On the contrary we are to presume that this board like all other tribunals, vested with such powers, will act with judgment and conscience and will deal justly with all applicants for license. It is vested with discretion to determine the standing of medical schools from which the diploma comes and also whether a physician who submits to an examination possesses the requisite character, learning and skill; but it is not an arbitrary, capricious and unrestrained discretion. The law requires that the board shall exercise an honest and impartial judgment and discretion, in accordance with just rules and if the board should depart from this course and should act arbitrarily and unjustly toward applicants for license, the courts are open to them and will award them relief and protection."

[535] State v. Wright, 17 Mont. 565. "The United States had the power to make the offer to the state, to grant it the lands provided the state would reclaim them. Of this there can be no doubt. Now if the state could accept the offer of the United States at all, it could only act through its legislature, in the exercise of power requisite to making its acceptance effective. That it has attempted to accept the offer is expressed by the first section of the law of 1895, which recites 'that for the purpose of enabling the state to accept the offer of the United States * * * and for the purpose of reclaiming the lands * * * in accordance with the terms of said act (of congress) a commission shall be and is hereby created under the name of the State Arid Land Commission,' etc. We know of no constitutional limitation forbidding the legislature of the state from receiving the benefits of congress by way of this offer, where it is especially provided in the law of acceptance that no debts and no liabilities, other than for limited incidental expenses of the commission can ever accrue to the state under its provisions. We believe the acceptance was valid. The legislature having accepted the offer, its next right in the premises was to provide a detailed method whereby the state could execute that acecptance and make it operative. This they have done." State v. Cook, 17 Mont. 529, 43 Pac. 928.

[536] Keyes v. Inhabitants of Westford, 34 Mass. (17 Pick.) 273. A committee appointed by the vote of a town to "let out and superintend the making of a new highway" describing it and its character is limited strictly to the authority and provisions or action in excess of the authority imposes no obligation on the town. Ackerly v. Jersey City, 54 N. J. Law, 310, 23 Atl. 666; State v. Davis, 129 N. C. 570, 40 S. E. 112.

[537] In re New York Juvenile Asylum, 30 Misc. 633, 74 N. Y. Supp. 364. "The state board of charities is a constitutional body. Its powers and duties are defined by the same instrument which creates the legislature. It is not an inferior

missioners,[538] county canvassers,[539] boards of railroad and warehouse commissioners,[540] commissioners or boards of public works,[541] boards of auditors and examiners,[542] high school boards,[543] levee [544] or tax commissioners,[545] and many others each

board or body to which the legislature has attempted to delegate powers possessed by it and so the line of authorities cited to establish the proposition that the legislature cannot delegate its powers does not apply." People v. City of Brooklyn, 152 N. Y. 410; People v. Fitch, 154 N. Y. 14, 38 L. R. A. 591.

[538] Sun Printing & Pub. Ass'n v. City of New York, 8 App. Div. 230, 40 N. Y. Supp. 607.

[539] Hankins v. City of New York, 64 N. Y. 18.

[540] Moran v. Ross, 79 Cal. 159; Georgia R. Co. v. Smith, 70 Ga. 694; Pacific Exp. Co. v. Cornell, 59 Neb. 364; People v. Ulster & D. R. Co., 58 Hun (N. Y.) 266; Railroad Commission v. Houston & T. C. R. Co., 90 Tex. 340.

[541] Martin v. Townsend, 32 Fla. 327; Hathaway v. City of Des Moines, 97 Iowa, 333; Sherman v. City of Des Moines, 100 Iowa, 88; Damon v. Inhabitants of Granby, 19 Mass. (2 Pick.) 345. Building committee appointed by town. Upjohn v. Inhabitants of Taunton, 60 Mass. (6 Cush.) 310; Simpson v. City of North Adams, 174 Mass. 450, 54 N. E. 878; Hawkins v. Carroll County Sup'rs, 50 Miss. 735; State v. Borden, 164 Mo. 221, 64 S. W. 172; State v. May, 106 Mo. 488; State v. Hastings, 37 Neb. 96, 55 N. W. 774. Action of a board of public lands and buildings is quasi judicial in passing upon claims against the state and selecting the subordinate officers and employes. People v. Oneida County Sup'rs, 24 Hun, 413, 73 N. Y. Supp. 1098, affirmed 68 App. Div. 650, 74 N. Y. Supp. 1142; Nelden v. Clark, 20 Utah, 382; Territory v. Stewart, 1 Wash. St. 98, 8 L. R. A. 106.

[542] Lewis v. Colgan (Cal.) 44 Pac. 1081. "The board of examiners is a creature of the statute, possessing no authority except that conferred upon it by the law of its creation. In its relation to the several departments of the government it is simply a local board exercising limited powers, taking to itself nothing of authority not clearly conferred or necessarily implied from the language of the statute under which it acts and from which its authority emanates." Citing Colusa County v. De Jarnett, 55 Cal. 373; Newcomb v. City of Indianapolis, 141 Ind. 451, 40 N. E. 919, 28 L. R. A. 732.

[543] Hanrick v. Board of Education, 28 Kan. 388.

[544] People v. Lodi High School Dist., 124 Cal. 694, 57 Pac. 660; Murphy v. City of Peoria, 119 Ill. 509; Davis v. City of Litchfield, 155 Ill. 384; Police Jury v. Tardos, 22 La. Ann. 58. Containing a review of Louisiana legislation relative to the appointment of duties and powers of levee commissioners. Bass v. State, 34 La. Ann. 494; Brown v. Levee Com'rs, 50 Miss. 468; Richardson v. Levee Com'rs, 68 Miss. 539; Egyptian Levee Co. v. Hardin, 27 Mo. 495; Raymond's Estate v. Borough of Rutherford, 55 N. J. Law, 441.

[545] State v. Hannibal & St. J. R. Co., 97 Mo. 348, 10 S. W. 436. A determination of a state board of

of which is charged by the instrument of their creation with the performance of certain specific duties.[546] They are bodies of limited authority and jurisdiction.[547] Questions usually arising in connection with them are not those involving the scope or extent of their powers but the legality of the legislation creating them and whether it conflicts with constitutional provisions prohibiting special legislation,[548] the performance of which cannot be delegated.[549]

taxation or equalization that a bridge is a toll bridge is not conclusive. Virginia & T R. Co. v. Ormsby County Com'rs, 5 Nev. 341.

[546] Blanchard v. Hartwell, 131 Cal. 263, 63 Pac. 349; Wilkison v. Children's Guardians of Marion County, 158 Ind. 1, 62 N. E. 481; Renaud v. State Court of Mediation & Arbitration, 124 Mich. 648, 83 N. W. 620, 51 L. R. A. 458. A rehearing cannot be granted in a trial determined by the state court of mediation and arbitration for the reason that such a power was not conferred upon it by Comp. Laws, §§ 559–568, under which it was created.

State v. Scott, 18 Neb. 597. The discretionary action of a board of educational lands and funds in refusing a lease at a less rate to one who has refused to carry out the bid at a higher rate will not be interfered with by the courts.

In re Assessment of City of Passaic, 54 N. J. Law, 156, 23 Atl. 517; State v. City of Cincinnati, 23 Ohio St. 445. Where, by act of the legislature, the management and control of a public hospital in Cincinnati is vested in the board of trustees as an independent body, the city can take no part in its government.

[547] Town Council of Livingston v. Pippin, 31 Ala. 542; State v. Tryon, 39 Conn. 183.

[548] In re Inman, 8 Idaho, 398, 69 Pac. 120; People v. Wright, 70 Ill. 388; People v. Mallary, 195 Ill. 582. An act which authorizes the board of managers of the state reformatory to transfer to the penitentiary those who subsequent to their committal can be shown to have been more than twenty-one years of age is unconstitutional because conferring judicial power on the board.

State v. Fox, 158 Ind. 126, 63 N. E. 19, 56 L. R. A. 893; Davock v. Moore, 105 Mich. 120, 63 N. W. 424, 28 L. R. A. 783. Act Feb. 27, 1895, creating a board of health for Detroit does not contravene Mich. Const. art. 15, § 14, which provides that "judicial officers of cities and villages shall be appointed at such time and in such manner as the legislature may direct."

State v. Borden, 164 Mo. 221, 64 S. W. 172. Mo. Act March 14, 1901, entitled "an act creating a board of public works in cities of 100,000 and less than 150,000 inhabitants," is unconstitutional as violating that

[549] Chase v. City Treasurer, 122 Cal. 540; Knight v. City of Eureka, 123 Cal. 192; In re Taxpayers & Freeholders of Plattsburgh, 27 App. Div. 353, 50 N. Y. Supp. 356; Attorney General v. Lowell, 67 N. H. 198; Ampt v. City of Cincinnati, 17 Ohio Circ. R. 516.

§ 580. Powers generally.

Each, as suggested, is especially charged with certain governmental functions or duties as a part of a general scheme or plan of government, the performance of which cannot be delegated.[550] Within the scope of their authority their power is ample to accomplish the purpose for which they were created considered from the legal standpoint and nature of the board, viz., that primarily it is executive or administrative in its character and neither legislative nor judicial, although the duties to be performed by the members of such board may partake somewhat of such a nature.[551] Since these boards as well as others, considered in the preceding paragraphs are organizations or bodies of limited authority, their acts to be legal must be expressly authorized or impliedly existing because absolutely necessary and essential either to the existence

provision that no bill shall contain more than one subject which shall be expressed in its title.

McLean v. Gibson, 55 N. J. Law. 11, 25 Atl. 935. Act March 23, 1892, creating a municipal board of public works in cities of second class having a population exceeding 50,000 is not special legislation. Perkins v. City of Philadelphia, 156 Pa. 539. An act abolishing commissioners of public buildings which applies to but one set of officers, those of the city of Philadelphia, with a possibility of there being more, is unconstitutional as violating constitution, art. 3, § 7, forbidding local or special laws regulating the size of cities.

State v. Milwaukee County Sup'rs, 25 Wis. 339. Wis. Laws 1869, c. 372, appointing three commissioners "to superintend the location of a court house in the county of Milwaukee" conflicts with that clause of the Wisconsin Constitution declaring "that the legislature shall establish but one system of town or county government which shall be as nearly uniform as practicable."

[550] City of Baltimore v. Radecke, 49 Md. 228.

[551] Elliott v. City of Chicago, 48 Ill. 293. The board of public works of Chicago in making an assessment acts in a quasi judicial capacity and cannot be called on by any tribunal to give reasons for their action or otherwise impeach it.

Ampt. v. City of Cincinnati, 17 Ohio Circ. R. 516. A board of water commissioners selected to build a system of waterworks can lawfully delegate to a chief engineer employed by them the power to determine certain technical matters. The duties which he performs as such chief engineer are done as the agent of the commissioners; he is entirely subject to their control and what is done by him is done by their authority and is the equivalent of an exercise of power by them. Northern Trust Co. v. Snyder, 113 Wis. 516, 89 N W. 460.

of the board as such or the performance of the duties with which they are charged.[552]

§ 581. Board action; appeals from.

All boards considered in the preceding sections are administrative or executive in their nature and the manner and extent of the performance of their duties is left largely or entirely to the sound judgment and the wise discretion of the individual members of the board. Under such circumstances the right of appeal from their action or the right to have their action reviewed does not exist unless expressly granted by statute.[553] The privilege of appeal is usually statutory and it must be exercised in the manner [554] and

[552] Continental Const. Co. v. City of Altoona (C. C. A.) 92 Fed. 822. A water board have no power under Pa. Act of May 23, 1898, to enter into a contract for the construction of a water reservoir without the previous consent of the city council.

Green v. Beeson, 31 Ind. 7. Statutory authority conferred on a board of officers must be strictly followed, otherwise their action is void.

McCortle v. Bates, 29 Ohio St. 419. The action of a township board of education in making an agreement before hand as to their action at a future meeting is illegal and void, being contrary to the public policy.

[553] Araphoe County Com'rs v. Graham, 4 Colo. 201; Catron v. Archuleta County Comr's, 18 Colo. 553; Meller v. Logan County Com'rs, 4 Idaho, 44, 35 Pac. 712; Reynolds v. Oneida County Com'rs, 6 Idaho, 787, 59 Pac. 730; Fountain County Com'rs v. Wood, 35 Ind. 70; Dudley v. Blountsville & W. Turnpike Co., 39 Ind. 288; Potts v. Bennett, 140 Ind. 71, 39 N. E. 518; Huntington County Com'rs v. Beaver, 156 Ind. 450, 60 N. E. 150. An appeal will not lie to the circuit court from a settlement made by the board of county commissioners in its administrative capacity.

Myers v. Gibson, 147 Ind. 452, 46 N. E. 914; Gemmill v. Arthur, 125 Ind. 258. A discretionary act of a subordinate board cannot be appealed from; it is for the appellate court to determine this.

Brown v. Lewis, 76 Iowa, 159; Hayes v. Rogers, 24 Kan. 143. An appeal lies to the district court aPc. 120; People v. Wright, 70 Ill. from a rearrangement by the county commissioners of a county. City of Worcester v. Worcester County Com'rs, 167 Mass. 565, 46 N. E. 383; Hoffman v. Gallatin County Com'rs, 18 Mont. 224; Brown v. Otoe County Com'rs, 6 Neb. 111; State v. Buffalo County Com'rs, 6 Neb. 454; Washita County Com'rs v. Haines, 4 Okl. 701, 46 Pac. 561; Hadlock v. G. County Com'rs, 5 Okl. 570, 49 Pac. 1012. An order of a board of commissioners fixing the salary of a county treasurer is appealable.

[554] People v. Hester, 6 Cal. 679. The action of county supervisors may be controlled and supervised

at the time provided.[555] The appeal should also be taken to that official or body to which the right of appeal is granted.[556] To be effectual, the provisions of the statute must be complied with granting the right, and the doctrine of laches or estoppel may determine in proper cases adversely the appellants right of relief from all alleged error.[557]

III. JUDICIAL.

§ 582. Introductory.
583. Municipal courts.
584. Power to organize.
585. Jurisdiction; civil.
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588. Qualification of judges or jurors in municipal courts.
589. Appeals.
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§ 582. Introductory.

The third branch of our form of government is the judicial whose exclusive prerogative it is to pass upon and determine according to constitutional provisions and other established rules of law, the validity of laws passed by legislative bodies and the legality of administrative or executive action.[558] The three-fold

by mandamus, prohibition or injunction; their proceedings cannot be reviewed by certiorari.

Ravenscraft v. Blaine County Com'rs, 5 Idaho, 178, 47 Pac. 942. No accounting is required on an appeal from an order of the county commissioners of the district court under act of March 6th, 1895. Whisenand v. Belle, 154 Ind. 38. The failure to include a transcript of proceedings to set out or refer either to the appeal bond or affidavit required for an appeal renders it incomplete and the appeal imperfect.

[555] Ravenscraft v. Blaine County Com'rs, 5 Idaho, 178, 47 Pac. 942; Siggins v. Com., 85 Pa. 278; Walsh v. Town Council of Johnston, 18 R. I. 88, 25 Atl. 849; Town of Shelburn v. Eldridge, 10 Vt. 123.

[556] Campbell v. Canyon County Com'rs, 5 Idaho, 53, 46 Pac. 1022. The district court on an appeal from a decision of a county board must try their case de novo upon all the evidence presented.

[557] Fouse v. Vandervort, 30 W. Va. 331.

[558] Den d. Murray v. Hoboken Land & Imp. Co., 18 How. (U. S.) 272; Wheat v. Smith, 50 Ark. 266; People v. Judge of Twelfth Dist., 17 Cal. 558; People v. Bennett, 29 Mich. 465.

In re Cleveland, 51 N. J. Law, 311, 17 Atl. 772. N. J. Const. art. 3, provides that "the powers of the government shall be divided into three

division, independence and dependence of each has been discussed

distinct departments: the legislative, executive and judicial, and no person or persons belonging to or constituting one of these departments shall exercise any of the powers properly belonging to either of the others."

Bond v. City of Newark, 19 N. J. Eq. (4 C. E. Green) 376. Legislative or jurisdictional acts within the authority of municipal corporations are beyond the trial of the courts however unwise or impolitic or even when done from unworthy motives. The adoption of an ordinance directing a public improvement is a legislative act, and however absurd it cannot be reviewed. An ultra vires act of a municipal corporation can be, however, restrained or controlled." Attorney General v. City of New York, 10 N. Y. Super. Ct. (3 Duer) 119; Reiser v. William Tell Sav. Fund Ass'n, 39 Pa. 146; State v. Dexter, 10 R. I. 341; Bl. Com. bk. 1, 146.

Story, Const. § 525. "When we speak of a separation of the three great departments of government, and maintain that that separation is indispensable to public liberty, we are to understand this maxim in a limited sense. It is not meant to affirm that they must be kept wholly and entirely separate and distinct, and have no common link of connection or dependence, the one upon the other, in the slightest degree. The true meaning is that the whole power of one of these departments should not be exercised by the same hands which possess the whole power of either of the other departments; and that such exercise of the whole would subvert the principles of a free constitution."

Lewis, Sutherland, Stat. Const. (2d Ed.) § 5. "The power which is entirely and exclusively vested in the judiciary department is the power conferred on judicial courts and tribunals to administer punitive and remedial justice to and between persons subject to or claiming rights under the law of the land. * * * It is part of this judicial power to determine what the law is and all questions involving the validity and effect of statutes when thus determined are authoratively settled."

Lewis, Sutherland, Stat. Const. (2d Ed.) § 2, "In the Federal constitution and in the statue constitutions, the three fundamental powers—the legislative, executive and judicial—have been separated and organized in three distinct departments. This separation is deemed to be of the greatest importance; absolutely essential to the existence of a just and free government. This is not, however, such a separation as to make these departments wholly independent; but only so that one department shall not exercise the power nor perform the functions of another. They are mutually dependent, and could not subsist without the aid and co-operation of each other. Under the constitutions the legislature is empowered to make laws; it has that power exclusively; the executive has the power to carry them by all executive acts into effect, and the judiciary has the exclusive power to expound them as the law of the land between suitors in the administration of justice. The legislature can do no executive acts, but it can legislate to regulate the executive office, prescribe laws to the

to a certain extent in previous sections.[559] As said in a Pennsyl-

executive which that department, and every grade of its officers, must obey. The legislature cannot decide cases, but it can pass laws which will furnish the basis of decision, and the courts are bound to obey them. The functions of each branch are as distinct as the stomach and lungs in our bodies. They are intended to co-operate; not to be antagonistic; they are functions in the same system; when each functionary does its appropriate work no interference or conflict is possible." See, also, Wyman, Adm. Law, §§ 17–25.

[559] Fox v. McDonald, 101 Ala. 51, 21 L. R. A. 529; Greenwood Cemetery Land Co. v. Routt, 17 Colo. 156, 15 L. R. A. 369; Spencer v. Sully County, 4 Dak. 474, 33 N. W. 97. Rev. St. U. S. § 1907 (1878). The act organizing the territory of Dakota provides that the judicial power shall be vested in certain designated courts and in justices of the peace. The legislature, therefore, has no power to confer judicial powers on boards of county commissioners and their decisions cannot, therefore, be pleaded as res adjudicata.

Wells v. City of Atlanta, 43 Ga. 67. To sustain the interference of a court of equity at the instance of a taxpayer in the legislative or administrative action of a municipal corporation within the scope of its powers, it must appear that such action is either ultra vires, fraudulent or corrupt. The mere fact that it is unwise or extravagant is not sufficient. People v. Thompson, 155 Ill. 451; People v. Chase, 165 Ill. 527, 36 L. R. A. 105; State v. Hyde, 121 Ind. 20; Langenberg v. Decker, 131 Ind. 471, 16 L. R. A. 108. "The powers of these departments are not merely equal, they are exclusive, in respect to the duties assigned to each, and they are absolutely independent of each other. The encroachment of one of these departments upon the other is watched with jealous care, and is generally promptly resisted, for the observance of this division is essential to the maintenance of a republican form of government."

White County Com'rs v. Gwin, 136 Ind. 562, 22 L. R. A. 402; State v. Barker, 116 Iowa, 96, 57 L. R. A. 244; State v. Johnson, 61 Kan. 803, 49 L. R. A. 662; Motz v. City of Detroit, 18 Mich. 495. Legislative action of the common council of the city in accepting and approving contract work is not subject to review by the courts so long as the council acts within the limits of its jurisdiction and its members are guilty of no intentional wrong, fraudulent or corrupt conduct in the discharge of their official duties.

State v. Higgins, 125 Mo. 364; Albright v. Fisher, 164 Mo. 56; Ryan v. City of Paterson, 66 N. J. Law, 533, 49 Atl. 587. A judicial inquiry into the legality of municipal action in the absence of fraud or a palpable abuse of discretionary authority cannot be made; the only question which can be considered by the courts is that of a violation of legal principles or a failure to observe statutory formalities.

Board of Health v. Diamond Mills Paper Co., 63 N. J. Eq. 111, 51 Atl. 1019. An act authorizing a state board of health to enjoin the pollution of water used for domestic purposes is not invalid as conferring upon a chancery court a jurisdiction

vania case,[560] the veriest tyro is familiar with this classification and with the broad lines of distinction which separate the three. The difficulty arises as usual in determining the character of acts by either of the three departments which approach in their nature that line of action which should be exercised exclusively by some other branch.[561] Especially in the government of public

which the legislature had no power to confer.

Barhite v. Home Tel. Co., 50 App. Div. 25, 63 N. Y. Supp. 659. A municipal council is supreme when acting within its powers as a legislative body; its deliberations are conclusive and cannot be fettered or obstructed by judicial interference.

Carter v. Com., 96 Va. 791, 45 L. R. A. 310.

Fleming v. Guthrie, 32 W. Va. 1. A secretary of state cannot be enjoined by a court of equity from delivering to the speaker of the house of delegates the returns of an election for governor properly in his hands where this is directed to be done by law. Fox v. McDonald, 101 Ala. 51, 21 L. R. A. 529. See, also, §§ 496–498, ante.

[560] Greenough v. Greenough, 11 Pa. 494. "Every tyro or sciolist knows that it is the province of the legislature to enact, of the judiciary to expound, and of the executive to enforce."

[561] Dainese v. Hale, 91 U. S. 13. Under the various acts of Congress creating and relating to a consular office, U. S. consuls abroad are vested with the judicial powers both civil and criminal.

Wells v. City of Atlanta, 43 Ga. 67. A municipal corporation acting by its proper officers and within the scope of its powers cannot be restrained on the ground that the proposed action is unwise or extravagant, to warrant such interference; the action must be either ultra vires, fraudulent or corrupt.

City of Chicago v. Wright, 69 Ill. 318. The court has no jurisdiction to interfere with public duties of any of the departments of government or over-ride the policy of the state.

Wilkinson v. Childrēn's Guardians of Marion County, 158 Ind. 1, 62 N. E. 481. An act establishing a board of children's guardians to be appointed by the circuit court is not unconstitutional as attempting to delegate executive powers to the judiciary.

Curtis v. City of Portsmouth, 67 N. H. 506, 39 Atl. 439. The courts cannot review or control the determination of a city council in regard to the character or location of a library building authorized by law. In re Smith, 90 Hun, 568, 36 N. Y. Supp. 40. An apportionment of assemblymen by the assembly is subject to review by the supreme court at the suit of any citizen under such reasonable regulations as may be prescribed. Glaspell v. City of Jamestown, 11 N. D. 86, 88 N. W. 1023, Lewis, Sutherland, Stat. Const. (2d Ed.) § 4 with many authorities cited.

A corporation acting through its proper officials performs a discretionary act, judicial in its nature in accepting and approving a plat which is not subject to review by the courts so long as no legal principle or duty has been violated.

quasi corporations, which is committed to boards of limited and diverse powers, this difficulty is particularly noted. It is universally conceded that such administrative or executive boards are frequently possessed not only of executive powers but also of those which are quasi judicial in their character.[562] The power to

See the following cases: Arkadelphia Lumber Co. v. City of Arkadelphia, 56 Ark. 370; City of Atlanta v. Burton, 90 Ga. 486; Keller v. Wilson, 90 Ky. 350; Proprietors of Mt. Hope Cemetery v. City of Boston, 158 Mass. 509; Petz v. City of Detroit, 95 Mich. 169; State v. Govan, 70 Miss. 535; City of Jackson v. Shlomberg, 70 Miss. 47; Funke v. City of St. Louis, 122 Mo. 132, 26 S. W. 1034; Mueller v. Egg Harbor City, 55 N. J. Law, 245; City Council of Charleston v. Werner, 38 S. C. 488.

[562] Guthrie Nat. Bank v. City of Guthrie, 173 U. S. 528. Okl. Laws 1890, c. 14, is not invalid as contrary to the federal statutes prohibiting territorial legislators from passing any law to regulate practice in courts of justice, the Oklahoma law having created a board of commissioners to hear and decide claims against certain municipalities irregularly organized before the organization of the territory.

E. A. Chatfield Co. v. City of New Haven, 110 Fed. 788; Robinson v. Benton County, 49 Ark. 49, 4 S. W. 195. Powers often vested in county commissioners are sometimes given to the executive officials of municipal corporations and incorporated towns and cities, notably mayors. The Ark. Stats. confer upon such mayors "all the powers and jurisdiction of a justice of the peace on all matters civil and criminal arising under the laws of the state to all intents and purposes." See, also, as holding the same, State v. Powell, 97 N. C. 417, 1 S. E. 482; Weber v. Hamilton, 72 Iowa, 577, 34 N. W. 424, and § 570, ante.

Bowen v. Clifton, 105 Ga. 459; People v. Kipley, 171 Ill. 44, 41 L. R. A. 775; State v. Page, 60 Kan. 664; Meffert v. State Board of Medical Registration, 66 Kan. 710; Tyler v. Judges of Registration, 175 Mass. 71, 51 L. R. A. 433; State v. Hathaway, 115 Mo. 36; France v. State, 57 Ohio St. 1. "It would be difficult to draw the precise line between those functions that may be constitutionally devolved upon the other departments and those which pertain strictly to the judiciary; and so far as we are aware, the attempt has not been made. But in numerous instances from an early period in the history of the state the legislature has invested various boards, bodies and officers with the power and charged them with the duty of ascertaining facts, and hearing and deciding questions when deemed necessary or expedient, in order to carry into execution laws enacted to accomplish some public need or purpose, or deemed for the public good. Of this nature are those powers conferred on boards of county commissioners and township trustees, to determine upon the necessity and propriety of establishing, improving, altering and vacating public roads and ditches, and to ascertain and decide whether the necessary steps required by the law have been taken in the proceedings; also, those with which other

punish for contempt is alone possessed by the courts [563] and also the power to punish those who violate the law.

§ 583. Municipal courts.

The idea of local self-government is the predominant one in American law. The necessity for a centralized and general government is conceded for the regulation and control of those matters which are foreign or general in their nature and subject; but the right of the people of a particular community for themselves to determine under proper restrictions and to regulate their local necessities and conduct has been insisted upon and universally obtains. One of these rights of local self-government is the establishment and the maintenance of local courts for the preservation of good order and the local protection of individual and property rights.[564] This particular right, as will be found upon an examina-

boards and officers have been clothed to determine which of several bidders for public works or contracts is the lowest responsible one; those which authorize county auditors to make additions to tax duplicates, and many others of a kindred nature which might be mentioned; all requiring in some manner and degree, and for some purpose, the exercise of the power to hear and determine important questions, sometimes involving large interests."

People v. Hasbrouck, 11 Utah, 291; Milwaukee Industrial School v. Milwaukee County Sup'rs, 40 Wis. 326. A statute which attempts to confer judicial power on officers in whom it cannot be constitutionally vested is void in this respect although in other provisions it may be held valid. See, also, §§ 574–576, ante.

[563] Langenberg v. Decker, 131 Ind. 471, 16 L. R. A. 108; In re Sims, 54 Kan. 1, 25 L. R. A. 110; In re Huron, 58 Kan. 152, 36 L. R. A. 822; In re Davis, 58 Kan. 368, 49 Pac. 160; Roberts v. Hackney, 109 Ky. 265; State v. Shepherd, 177 Mo. 205; People v. Leubischer, 34 App. Div. 577, 54 N. Y. Supp. 869; Carter v. Com., 96 Va. 791, 45 L. R. A. 310. 1 Story, Const. pp. 263, 360, 362, and notes.

[564] Nugent v. State, 18 Ala. 521; Perkins v. Corbin, 45 Ala. 103; Uridias v. Morrill, 22 Cal. 473. A "municipal court" includes mayors and recorders courts as these were commonly and well known to be of such a character when the California Const. was adopted. Vassault v. Austin, 36 Cal. 691; Ex parte Stratman, 39 Cal. 517; People v. Nyland, 41 Cal. 129; People v. Henshaw, 76 Cal. 436; Gray v. State, 2 Har. (Del.) 76; Hill v. City of Dalton, 72 Ga. 314; Myers v. People, 26 Ill. 173; Holmes v. Fihlenburg, 54 Ill. 203; City of New Orleans v. Costello, 14 La. Ann. 37; Callahan v. City of New York, 66 N. Y. 656.

Peck v. Powell, 62 Vt. 296. Where the legislature has divided subordinate state courts into justice, municipal and city, a city court cannot be considered a municipal court. Chahoon v. Com., 21 Grat.

tion of the leading cases, has been considered one of the greatest privileges conferred by and obtained from any government and a right which in a limited way and for certain ends was secured by the Magna Charta and in various forms preserved both in the Federal and in all of the state constitutions.[565] The right of a trial by jury of one's peers and the guaranty that no one shall be deprived of his life, his liberty or his property without due process of law, are best preserved, it has been felt, by local courts. The limits of this work forbid an extended examination into the jurisdiction and powers of courts in general and the discussion here will therefore be limited to what are usually termed municipal courts or that part of a judiciary department maintained in municipal corporations proper.

§ 584. Power to organize.

The power is conceded in this country to the people of a state acting in constitutional conventions or through the state legislature to organize such courts of inferior jurisdiction as may be demanded by and as are necessary in the particular class of public corporations referred to, although within the same territory there may exist other courts of higher and broader jurisdiction.[566]

(Va.) 822. An act creating "The Hustings court of Richmond, Va." is valid.

The term "municipal court" as used in the Constitution of Wisconsin would include a police court with all the powers of justices of the peace and exclusive jurisdiction of all cases arising under a city ordinance or charter. See the following cases: Connors v. Gorey, 32 Wis. 518; Jenkins v. Morning, 38 Wis. 197; Mathie v. McIntosh, 40 Wis. 120.

[565] Brown v. Jerome, 102 Ill. 371; State v. Young, 3 Kan. 445; Shafer v. Mumma, 17 Md. 331; Com. v. Hawkes, 123 Mass. 525; Montross v. State, 61 Miss. 429; Meagher v. Storey County, 5 Nev. 244; Callaghan v. City of New York, 66 N. Y. 656; State v. Pender, 66 N. C. 313.

[566] Bain v. Mitchell, 82 Ala. 304; Hickman v. O'Neal, 10 Cal. 292; People v. Provines, 34 Cal. 520; People v. Sands (Cal.) 35 Pac. 330; People v. Curley, 5 Colo. 412; State v. Hanchett, 38 Conn. 35; Gray v. State, 2 Har. (Del.) 76; Johnson v. Hilton & D. Lumber Co., 103 Ga. 212; Chesney v. McClintock, 61 Kan. 94; Williamson v. Com., 43 Ky. (4 B. Mon.) 146; Allen v. Somers, 68 Me. 247; Hutchings v. Scott, 9 N. J. Law (4 Halst.) 218; International Bank v. Bradley, 19 N. Y. 245; Curtin v. Barton, 139 N. Y. 505; State v. Pender, 66 N. C. 313; Steamboat Northern Indiana v. Milliken, 7 Ohio St. 383; Jenkins v. Morning, 38 Wis. 197; State v. Nohl, 113 Wis. 15, 88 N. W. 1004; Laws Minn. 1889, p. 598.

Such local and inferior courts possess limited powers both or either in respect to the trial of civil or criminal cases.[567] The particular form of organization is a matter of legislative discretion and it has been customary in some localities to give executive officers judicial powers,[568] though this action departs from the reason for the separation of the three classes, namely, that it is inadvisable and inexpedient to vest in one individual the power to make and administer the laws and also to punish for their violation.[569] In every state will be found statutory or constitutional provisions prohibiting special or class legislation,[570] the passage

[567] Uridias v. Morrill, 22 Cal. 473; Ex parte Simpson, 47 Cal. 127; Peck v. Powell, 62 Vt. 296; State v. McArthur, 13 Wis. 386.

[568] Gray v. State, 2 Har. (Del.) 76; Thomas v. Austin, 103 Ga. 701; Cluggish v. Rogers, 13 Ind. 538; Gulick v. New, 14 Ind. 93; City of Lansing v. Chicago, M. & St. P. R. Co., 85 Iowa, 215, 52 N. W. 195; Borough of St. Peter v. Bauer, 19 Minn. 327 (Gil. 282); City of Brookfield v. Tooey, 141 Mo. 619, 43 S. W. 387. Where an executive officer has jurisdiction to try certain offenders against municipal regulations, his title is immaterial. Bocock v. Cochran, 32 Hun (N. Y.) 521; People v. Lane, 53 App. Div. 531, 65 N. Y. Supp. 1004; Louisburg Com'rs v. Harris, 52 N. C. (7 Jones) 281; State v. Wiley, 4 Or. 184; City of Portland v. Denny, 5 Or. 160; Clemmensen v. Peterson, 35 Or. 47, 56 Pac. 1015; Harris County v. Stewart, 17 Tex. Civ. App. 1, 41 S. W. 650; Thomas v. Com., 22 Grat. (Va.) 912.

[569] Bain v. Mitchell, 82 Ala. 304; Robinson v. Benton County, 49 Ark. 49; State v. Maynard, 14 Ill. 419; Howard v. Shoemaker, 35 Ind. 111; Morrison v. McDonald, 21 Me. 550.

[570] McInerney v. City of Denver, 17 Colo. 302, 29 Pac. 516. Different classes or grades of police courts may be established under the constitution. Starnes v. Mutual Loan & Bankling Co., 102 Ga. 597, 29 S. E. 452; Thomas v. Austin, 103 Ga. 701, 30 S. E. 627; Tissier v. Rhein, 130 Ill. 110, 22 N. E. 848; Page v. Millerton, 114 Iowa, 378, 86 N. W. 440. Iowa Code, tit. 3, c. 6, authorizing the establishment of city courts and conferring on them concurrent jurisdiction with the district and circuit court is not invalid under Iowa Const. art. 1, § 6, requiring all laws of a general nature to have a uniform operation. State v. Sullivan, 67 Minn. 379, 69 N. W. 1094; State v. Wofford, 121 Mo. 61, 25 S. W. 851. An act which is to be construed as prospective and applicable to any city which has or which may attain a prescribed population is not special legislation. Spaulding v. Brady, 128 Mo. 653, 31 S. W. 103. An act providing for the compensation of justices of the peace in the city of St. Louis is not special legislation prohibited by Const. Mo. art. 4, § 53. State v. Berka, 20 Neb. 375; State v. Magney, 52 Neb. 508, 72 N. W. 1006. Neb. Sess. Laws, 1897, c. 25, establishing municipal courts in cities of metropolitan classes is in violation of Const. art. 6, § 19, prohibiting special legislation. Gordon

of laws relating to municipal government [571] or those classifying municipal corporations except in accordance with certain prescribed conditions.[572] The legislative power to organize municipal or local police courts is limited and restricted by these provisions and must conform to them.[573] A violation of such constitutional provisions will render the particular legislation in question inoperative.[574]

Conceding the power in the legislature to organize these courts, it follows that their jurisdiction or their procedure can be changed from time to time as the exigencies of an occasion may require or as it may deem expedient.[575] The rule, however, seems to be that although changes may be made, yet they cannot lose their inherent status as courts of limited and inferior jurisdiction.[576]

§ 585. Jurisdiction; civil.

The jurisdiction of municipal courts is commonly limited to the trial of criminal matters and especially to the consideration of violations of local police ordinances and regulations; the punishment of trivial offenses against the good order of the community; acts which are not usually characterized as crimes or perhaps

v. Moores, 61 Neb. 345, 85 N. W. 298.

[571] Perkins v. Corbin, 45 Ala. 103.

[572] Ex parte Giambonini, 117 Cal. 573, 49 Pac. 732. Cal. St. 1891, p. 433, establishing police courts in certain prescribed cities is unconstitutional because not conforming to art. 11, § 6. State v. Higgins, 125 Mo. 364, 28 S. W. 638. Act April 23, 1891, in regard to the establishment of inferior municipal courts is constitutional though it was intended to apply only to the city of St. Louis. Calvo v. Westcott, 55 N. J. Law, 78, 25 Atl. 269; De Hart v. Atlantic City, 63 N. J. Law, 223, 43 Atl. 742.

[573] Meyer v. Kalkmann, 6 Cal. 582; Holmes v. Fihlenburg, 54 Ill. 203; Phillips v. Quick, 63 Ill. 445; Grand Rapids, N. & L. S. R. Co. v. Gray, 38 Mich. 461; Moores v. State, 63 Neb. 345, 88 N. W. 514.

[574] State v. Charles, 16 Minn. 474 (Gil. 426).

[575] Perkins v Corbin, 43 Ala. 103; People v. Henshaw, 76 Cal. 436; Ex parte Sparks, 120 Cal. 395; Vason v. City of Augusta, 38 Ga. 542. A city council cannot abolish a local court established by the legislature for the convenience of a particular community.

Tesh v. Com., 34 Ky. (4 Dana) 522; Boyd v. Chambers, 78 Ky. 140; Alexander v. Bennett, 60 N. Y. 204. An inferior court, however, established by the constitution cannot be abolished by the legislature. Landers v. Staten Island R. Co., 13 Abb. Pr. (N. S.; N. Y.) 338; State v. McArthur, 13 Wis. 386.

[576] Ex parte Stratman, 39 Cal. 517.

even as misdemeanors.[577] Their civil jurisdiction is limited both in respect to the questions at issue [578] and also the amount involved in those cases over which they possess jurisdiction.[579] As a rule, they are not regarded as courts of record and the judges do not possess the powers accompanying judicial positions connected with courts of record.[580] They are usually prohibited from the trial and determination of cases involving the title to real property.[581] The statutory provisions with respect to their powers vary as will be seen from examination of the authorities cited, but it is essentially true, as already stated, that they are regarded in their jurisdiction, in their procedure and in their relations, as courts of inferior or limited powers.[582]

[577] Johnson v. Hilton & Dodge Co., 103 Ga. 212; Gentle v. Atlas Sav. & Loan Ass'n, 105 Ga. 406; City of Burlington v. Stockwell, 1 Kan. App. 414, 41 Pac. 221; People v. Board of Excise, 3 N. Y. State Rep. 253.

[578] Hecht v. P. H. Snook & Austin Funiture Co., 114 Ga. 921, 41 S. E. 74. The city court of Atlanta is not a court of equity and cannot, therefore, consider rights that are equitable in their nature. Worthington v. London Guarantee & Acc. Co., 164 N. Y. 81; Smith v. Silsbe, 53 App. Div. 462, 65 N. Y. Supp. 1083; Lawrence v. Lawrence, 32 Misc. 503, 66 N. Y. Supp. 393; Katz v. Henig, 32 Misc. 672, 66 N. Y. Supp. 530; Kotzen v. Nathanson, 33 Misc. 299, 68 N. Y. Supp. 497; Dechen v. Dechen, 59 App. Div. 166, 68 N. Y. Supp. 1043; Hart v. Metropolitan St. R. Co., 65 App. Div. 493, 72 N. Y. Supp. 797; Gorse v. Lynch, 36 Misc. 150, 72 N. Y. Supp. 1054.

Such inferior courts, as a rule, have no equity jurisdiction. See the following cases: Butler v. Mutual Aid, Loan & Inv. Co., 94 Ga. 562; Gentle v. Atlas Sav. & Loan Ass'n, 105 Ga. 406; Norton v. Beckman, 53 Minn. 456 (unlawful detainer); Hause v. Newel, 60 Minn. 481; Tilleny v. Knoblauch, 73 Minn. 108; People v. Board of Excise, 3 N. Y. State Rep. 253. A city court of New York cannot issue a writ of mandamus.

[579] Wilson v. McKenna, 52 Ill. 43; Smither's Adm'r v. Blanton, 58 Ky. (1 Metc.) 44; State v. Judge of Second City Ct., 37 La. Ann. 583; Bossidy v. Branniff, 135 Mass. 290; Walker v. Cooke, 163 Mass. 401; T. E. Ward & Co. v. American Surety Co., 25 Misc. (N. Y.) 198; Frost v. Weehawken Wharf Co., 33 Misc. 736, 68 N. Y. Supp. 399; Agresta v. Hart, 34 Misc. 784, 69 N. Y. Supp. 1031; Vogel v. Banks, 60 App. Div. 459, 70 N. Y. Supp. 1010; City Council of Charleston v. Ashley Phosphate Co., 33 S. C. 25; Tuffi v. Ralli, 74 Vt. 15, 51 Atl. 1059.

[580] People v. Wilson, 15 Ill. 388; Respublica v. Dallas, 3 Yeates (Pa.) 300.

[581] Minn. Sp. Laws, 1889, p. 98 et seq.

[582] Lewis v. State, 21 Ark. 209; Chipman v. Bowman, 14 Cal. 158; Vassault v. Austin, 36 Cal. 691; City of Santa Barbara v. Stearns, 51 Cal. 499; People v. Wong Wang, 92 Cal

§ 586. Criminal.

As suggested in a preceding paragraph, the jurisdiction of municipal courts is commonly confined to the trial of petty offenses against the good order of a local community and restricted to the punishment of offenders against local regulations.[583] It has already been stated that the power of a municipal corporation to pass local ordinances or regulations for its local government and policing is dependent upon its charter provisions or upon those

277; Hayden v. State, 69 Ga. 731; Maxwell v. Tumlin, 79 Ga. 570; Stewart v. State, 98 Ga. 202; Archie v. State, 99 Ga. 23; Wilson v. McKenna, 52 Ill. 43; Holmes v. Fihlenburg, 54 Ill. 203; Goodrich v. Brown, 30 Iowa, 291; Page v. Millerton, 114 Iowa, 378, 86 N. W. 440. But by law they may have a concurrent jurisdiction with the district and circuit courts of certain questions. In re Rich, 10 Kan. App. 280, 62 Pac. 715.

[583] In re Johnson, 167 U. S. 120. A court is not deprived of its jurisdiction to try one accused of the commission of an offense although he was illegally arrested. Graham v. State, 1 Ark. 79; Ex parte Giambonini, 117 Cal. 573, 49 Pac. 732. A conviction of a police court attempted to be created under an unconstitutional law is absolutely void and it is immaterial that the police judge was also a justice of the peace with similar powers under the state laws. It is necessary to the validity of a judgment of conviction that it should have been rendered by a court of competent jurisdiction.

State v. Hanchett, 38 Conn. 35. Jurisdiction limited strictly to cases arising within the limits of the city. Williams v. City Council of Augusta, 4 Ga. 509; Id., 111 Ga. 849, 36 S. E. 607. The recorder's court of the city of Augusta has no jurisdiction to try an offense which is a violation of the penal statute. Vason v. City of Augusta, 38 Ga. 542; Reeves v. City of Atlanta, 114 Ga. 851, 40 S. E. 1003; Hill v. City of Dalton, 72 Ga. 314; Hood v. Von Glahn, 88 Ga. 405; Town of Lewiston v. Proctor, 23 Ill. 533; Brown v. Jerome, 102 Ill. 371; Davis v. Woolnough, 9 Iowa, 107; City of Emporia v. Volmer, 12 Kan. 622; In re Rolfs, 30 Kan. 758; City of Topeka v. Raynor, 61 Kan. 10; In re Hagan, 65 Kan. 857, 68 Pac. 1104; City of Owensboro v. Simms, 99 Ky. 49; City of New Orleans v. Costello, 14 La. Ann. 37; State v. Fisher, 50 La. Ann. 45; City of New Orleans v. Danneman, 51 La. Ann. 1093; City of New Orleans v. Collins, 52 La. Ann. 973; Shafer v. Mumma, 17 Md. 331; In re Goddard, 33 Mass. (16 Pick.) 504; People v. Jackson, 8 Mich. 110; Borough of St. Peter v. Bauer, 19 Minn. 327 (Gil. 282); Willis v. City of Boonville, 28 Mo. 543; Kansas City v. Neal, 49 Mo. App. 72; City of St. Louis v. Vert, 84 Mo. 204; City of St. Louis v. Schoenbusch, 95 Mo. 618; Stevens v. Kansas City, 146 Mo. 460; Howe v. Treasurer of Plainfield, 37 N. J. Law, 145; Sill v. Village of Corning, 15 N. Y. 297; Louisburg Com'rs v. Harris, 52 N. C. (7 Jones) 281; State v. City of Charleston, 12 Rich. Law (S. C.) 480; State v. Nohl, 113 Wis. 15, 88 N. W. 1004.

general statutes granting powers which are regarded as the equivalent of a special charter.[584] In the different states, different policies have prevailed at different times in regard to the extent of powers granted or to be granted municipal corporations and the result of this is to be seen in the wide range of powers possessed by different municipalities even in the same state.[585] The extent of the jurisdiction of municipal courts will therefore vary widely.[586] In many instances, however, municipal corporations have been given power to deal with matters and offenses also punishable under state laws and, therefore, triable in courts of general jurisdiction.[587] Because of these conditions, some municipal courts may possess not only the power to try the petty offenses against their own local police regulations, but also offenses of a graver nature.[588]

[584] Graham v. State, 1 Ark. 79; Williams v. City Council of Augusta, 4 Ga. 509; People v. Howland, 155 N. Y. 270, 41 L. R. A. 838; People v. Washington County Sup'rs, 155 N. Y. 295.

[585] Smither's Adm'r v. Blanton, 58 Ky. (1 Metc.) 44; State v. Judge of Second City Ct., 37 La. Ann. 583; Walker v. Cooke, 163 Mass. 401. Action in replevin void; Crawford v. Hurd Refrigerator Co., 57 Minn. 187; In re Kerrigan, 33 N. J. Law, 344; Smith v. Silsbe, 53 App. Div. 462, 65 N. Y. Supp. 1083; People v. Fitzpatrick, 35 Misc. 456, 71 N. Y. Supp. 191; City Council of Charleston v. Ashley Phosphate Co., 33 S. C. 25; State v. Galoway, 45 Tenn. (5 Cold.) 326; State v. Haynes, 104 Tenn. 406; Leach v. State, 36 Tex. Cr. R. 248, 36 S. W. 471; Ex parte Coombs, 38 Tex. Cr. R. 648, 44 S. W. 854.

[586] Holmes v. Fihlenburg, 54 Ill. 203; Slaughter v. People, 2 Dougl. (Mich.) 334, note; Rohland v. St. Louis & S. F. R. Co., 89 Mo. 180; Crofut v. Brooklyn Ferry Co., 36 Barb. (N. Y.) 201; People v. Green, 58 N. Y. 295; Connors v. Gorey, 32 Wis. 518.

[587] Williams v. State, 113 Ala. 58, 21 So. 463; Com. v. Walp, 19 Ky. L. R. 1113, 41 S. W. 281; Com. v. Hunter, 19 Ky. L. R. 1109, 41 S. W. 284; Com. v. Uhrig, 167 Mass. 420; Baldwin v. Green, 10 Mo. 410. Unless the act vesting the municipal court with a jurisdiction to try certain cases is exclusive in its terms it does not divest other and general courts of their jurisdiction to try and determine the same causes.

[588] Nugent v. State, 18 Ala. 521; Ex parte Slattery, 3 Ark. 484; Ex parte Stratman, 39 Cal. 517 (criminal libel); People v. Nyland, 41 Cal. 129 (robbery); Welborne v. State, 114 Ga. 793, 40 S. E. 857; Darden v. State, 74 Ga. 842; Myers v. People, 26 Ill. 173 (grand larceny); City of Muscatine v. Steck, 7 Iowa, 505; Tesh v. Com., 34 Ky. (4 Dana) 522 (assault and battery); State v. Recorder of First Recorder's Ct., 30 La. Ann. 450; Brown's Case, 152 Mass. 1; Tierney v. Dodge, 9 Minn. 166 (Gil. 153); State v. Wister, 62 Mo. 592. A municipal court may not have exclusive jurisdiction in proceedings for the trial of certain offenses.

This condition involves, or has involved at times, the constitutional question, where there has been a trial and conviction in a police court for a violation of municipal ordinances with a subsequent trial for the same offense in the state courts, of being twice put in jeopardy for the same act.[589] The weight of authority is to the effect that there can be a double conviction under such circumstances without a violation of the constitutional provision,[590] although there are cases to the contrary.[591]

§ 587. Summary powers.

The Federal and state constitutions contain concise and emphatic provisions against all acts of those in authority resulting in a taking of life, liberty or property without due process of law or in depriving one of that privilege guaranteed by both state and Federal constitutions of a right to a trial by jury of one's peers on all questions of fact. In the organization and procedure of municipal courts there is found a power summary in its character of dealing arbitrarily with all questions relating to the violation of local police ordinances.[592] This arbitrary power of a police or local court in passing upon questions of fact, and upon an adverse determination against the accused of summarily imposing a fine [593] or imprisonment,[594] or, in many cases, a fine or an imprison-

Byers v. Com., 42 Pa. 89; State v. Helfrid, 2 Nott & McC. (S. C.) 233, 10 Am. Dec. 591; Chahoon v. Com., 21 Grat. (Va.) 822; Ex parte Knox (Tex. Cr. App.) 39 S. W. 670. But it is here held that the recorder's court of the city of Galveston has no jurisdiction to try violations of the state penal code. State v. Considine, 16 Wash. 358.

[589] State v. Hattabough, 66 Ind. 226; State v. Wightman, 26 Mo. 516; State v. Cooper, 13 N. J. Law (1 J. S. Green) 361; In re Donahue, 6 Ohio Dec. 389; Hilands v. Com., 114 Pa. 372.

[590] Com. v. Roby, 29 Mass. (12 Pick. 496; People v. Saunders, 4 Parks Cr. R. (N. Y.) 196.

[591] Burns v. Town of La Grange, 17 Tex. 415.

[592] Williams v. City Council of Augusta, 4 Ga. 509; Floyd v. Eatonton Com'rs, 14 Ga. 358; Town of Louisiana v. Hardin, 11 Mo. 551. See, also, authorities cited generally under this section.

[593] Phillips v. City of Atlanta, 87 Ga. 62; Flora v. Sachs, 64 Ind. 155; State v. Boneil, 42 La. Ann. 1110, 10 L. R. A. 60; State v. Whitaker, 48 La. Ann. 527, 35 L. R. A. 561; Ex parte Kiburg, 10 Mo. App. 442; In re Miller, 44 Mo. App. 125; City of Tarkio v. Cook, 120 Mo. 1; Taylor v. State, 35 Wis. 298.

[594] Brieswick v. City of Brunswick, 51 Ga. 639; Carson v. City of Bloomington, 6 Ill. App. 481; City of Miltonvale v. Lanoue, 35 Kan. 603; State v. Bringier. 42 La. Ann. 1095; Brown v. Borough of Asbury

ment,[595] has been questioned as being a violation of those constitutional guarantees noted. The question, however, has been decided by the general weight of authority, both on the grounds of public policy and expediency adversely to the contention that one is entitled to a trial by jury when charged with a violation of a petty police ordinance,[596] the basis of this decision being, as suggested, public policy; the inexpediency of allowing jury trials in the numberless petty cases tried in police courts and also because of the trivial character of the offense.[597] The cases almost universally hold that violations of petty police regulations are not to be considered as crimes or even as misdemeanors and as the constitutional guarantees only apply to such, their existence, therefore, cannot be invoked by the offender against a municipal police regulation.[598] There are offenses, however, sometimes punishable by municipal courts, of a graver nature which come within the category of crimes or misdemeanors and in the trial of which, therefore, the accused is entitled to a trial by jury.[599]

Park, 44 N. J. Law, 162; Merkee v. City of Rochester, 13 Hun. (N. Y.) 157.

[595] Ex parte Slattery, 3 Ark. 484; Newton v. Fain, 114 Ga. 833, 40 S. E. 993; State v. Cantieny, 34 Minn. 1, 24 N. W. 458; Bregguglia v. Borough of Vineland, 53 N. J. Law, 168, 11 L. R. A. 407; State v. Nohl, 113 Wis. 15, 88 N. W. 1004.

[596] People v. Van Houten, 13 Misc. 603, 35 N. Y. Supp. 186; Com. v. Shaw, 1 Pittsb. (Pa.) 492. But see State v. Lockwood, 43 Wis. 403. See, also, §§ 552-553-554, ante, with cases cited.

[597] State v. Powell, 97 N. C. 417. Sedgwick, St. Const. Law, 548. "Extensive and summary police powers are constantly exercised in all the states of the union for the repression of breaches of the peace and petty offenses; and these statutes are not supposed to conflict with constitutional provisions securing to the citizens a trial by jury." See, also, the subject fully considered in McQuillin, Mun. Ord. ch. X.

[598] Williams v. City Council of Augusta, 4 Ga. 509; Vason v. City of Augusta, 38 Ga. 542; Dively v. City of Cedar Falls, 21 Iowa, 565; State v. City of Topeka, 36 Kan. 76; Williamson v. Com., 43 Ky. (4 B. Mon.) 146; City Council of Monroe v. Meuer, 35 La. Ann. 1192; Borough of St. Peter v. Bauer, 19 Minn. 327 (Gil. 282); City of Mankato v. Arnold, 36 Minn. 62; Ex parte Hollwedell, 74 Mo. 395; McGear v. Woodruff, 33 N. J. Law, 213; People v. Justices of Ct. of Special Sessions, 74 N. Y. 406; Byers v. Com., 42 Pa. 89; Borough of Dunmore's Appeal, 52 Pa. 374; Ex parte Schmidt, 24 S. C. 363; Town of Moundsville v. Fountain, 27 W. Va. 182. But see Plimpton v. Town of Somerset, 33 Vt. 283.

[599] Rector v. State, 6 Ark, 187; Lewis v. State, 21 Ark. 211; Stebbins v. Mayer, 38 Kan. 573, 16 Pac. 745; In re Rolfs, 30 Kan. 758; State v. Gutierrez, 15 La. Ann. 190; Welch v. Stowell, 2 Dougl. (Mich.) 334; State v. Moss, 47 N. C. (2

§ 588. Qualifications of judges or jurors in municipal courts.

As has been said, every citizen in a community is interested in the prompt and vigorous enforcement of its local police regulations and in many instances also in the collection of fines imposed as a violation of such regulations in that it operates as a means of increasing the revenues of the municipality and decreasing in the same proportion the amount to be raised by taxation,[600] the larger the fine imposed and their greater frequency tending more favorably to this end. It has been urged that the existence of these conditions with the necessary motive accompanying them are of such a character as to disqualify a resident of that community from acting either as a judge or as a juror in cases where a trial by jury is permitted. The argument, however, is too trivial to be considered and the cases universally hold against it.[601] The theory that municipal courts are inferior and subordinate courts has sustained in some cases the rule that constitutional provisions in regard to the qualifications of members of the state judiciary do not apply to judges of municipal courts.[602]

§ 589. Appeals.

The right of appeal from the findings or decisions of an inferior tribunal in all but exceptional cases is not an inherent one, but

Jones) 66; Plimpton v. Town of Somerset, 33 Vt. 283.

[600] People v. Wilson, 15 Ill. 388; Respublica v. Dallas, 3 Yeates (Pa.) 300.

[601] Deitz v. Central City, 1 Colo. 323; Com. v. Worcester, 20 Mass. (3 Pick.) 462; Thomas v. Town of Mt. Vernon, 9 Ohio, 290; City of Jonesborough v. McKee, 10 Tenn. (2 Yerg.) 167; City Council of Charleston v. Pepper, 1 Rich. Law (S. C.) 364.

[602] People v. Wilson, 15 Ill. 388. "Its (the constitution) language is 'No person shall be eligible to the office of judge of the supreme court of this state who is not a citizen of the United States, and who shall not have resided in this state five years next preceding his election and who shall not for two years next preceding his election have resided in the division, circuit or county in which he shall be elected,' etc. * * *

"The fact that they are called by another name is evidence that the convention did not intend to include justices of the peace in the term judges, as used in the eleventh section. * * * Here, then is a numerous and important class of judges in the state holding courts in numerous places almost constantly and in whom is vested a portion of the judicial power of the state and who are not included in the term judges as used in the eleventh section.

"It follows that the term is used in a restricted sense and does not

dependent upon a statutory or constitutional provision.[603] There are certain formalities attendant upon the perfection of an appeal and certain essential steps as provided by statute are necessary to the exercise of the right.[604] Statutory provisions fixing and prescribing the time [605] or the manner of taking an appeal with attendant formalities such as the giving of a bond,[606] the filing of a record or transcript,[607] must be strictly complied with before the statutory right can be made available. The power to grant new trials is commonly possessed and exercised, although not conferred by either the act creating the court or the general statutes,[608] and the exercise of other corrective powers will depend upon the statutes creating the court.[609] The right of review of a

include all who may properly be called judges of courts in the state."

Respublica v. Dallas, 3 Yeates (Pa.) 300.

[603] Town of Hawkinsville v. Ethridge, 96 Ga. 326; Stewart v. State, 98 Ga. 202; City of Salina v. Wait, 56 Kan. 283, 31 L. R. A. 538; City of Lyons v. Wellman, 56 Kan. 285; City of Topeka v. Wood, 62 Kan. 809, 64 Pac. 630; City of St. Charles v. Hackman, 133 Mo. 634, 34 S. W. 878; City of Water Valley v. Davis, 73 Miss. 521, 19 So. 235; People v. French, 63 Hun, 633, 18 N. Y. Supp. 550.

[604] City of Emporia v. Volmer, 12 Kan. 622; In re Rolfs, 30 Kan. 758; Flanagan v. Treasurer of Plainfield, 44 N. J. Law, 118.

[605] State v. Call, 41 Fla. 450; City of De Soto v. Merciel, 53 Mo. App. 57.

[606] Miller v. O'Reilly, 84 Ind. 168, citing Gavisk v. McKeever, 37 Ind. 484; Railsback v. Greve, 58 Ind. 72, and Corey v. Lugar, 62 Ind. 60.

Irish v. State (Tex. Cr. App.) 24 S. W. 516.

[607] City of Baton Rouge v. Cremonini, 35 La. Ann. 366. The transcript must show the scope of the ordinance violated. State v. Clesi, 44 La. Ann. 85.

[608] Welborne v. State, 114 Ga. 793, 40 S. E. 857. See, however, to the contrary, McFarland v. Donaldson, 115 Ga. 567, 41 S. E. 1000.

[609] Bale v. Pass, 64 App. Div. 302, 72 N. Y. Supp. 93. A municipal court of the city of New York has power under the charter of greater New York to set aside a verdict for a mistake of the jury in rendering a verdict for one party where it was intended for the other. "If the fact alleged is properly before us there should be no doubt either as to the right of the plaintiff to have or the power of the court to grant the relief demanded. It would be a reproach upon the administration of justice if a party could lose the benefit of a trial and a verdict in his favor by the mere mistake of the foreman of the jury in reporting to the court the result of the deliberations of himself and his fellows. The power of a court of record over its records and to make them truthful is undoubted, and has been exercised without question." Following Burhans v. Tibbits, 7 How. Pr. (N. Y.) 21, and Dalrymple v. Williams, 63 N. Y. 361.

decision of a municipal court, whether secured by direct appeal [610] or by certiorari [611] is determined by statutory or constitutional provisions. In all cases, based upon a violation of a municipal ordinance or regulation, the municipality, if defeated, has no right of appeal or review.[612]

§ 590. Methods of procedure.

In the exercise of judicial powers however slight, there must be parties, a cause of action or question to be determined, and a judge, regular allegations, opportunity to answer and a trial according to some regular and settled course of procedure. These are essentials to a legal exercise of the power. The formalities attending the use of any of these essentials may vary according to the nature of the judicial body, the character of its jurisdiction and the questions considered and settled by it. In courts of general jurisdiction where grave questions affecting and concerning both personal action and private property are determined, the law recognizes and insists upon greater formalities and a stricter compliance with them. In municipal courts, as they are universally of limited and inferior jurisdiction, and deal in all cases

[610] City of Emporia v. Volmer, 12 Kan. 622; In re Rolfs, 30 Kan. 758; Flanagan v. Treasurer of Plainfield, 44 N. J. Law, 118.

[611] State v. Call, 41 Fla. 450; Archie v. State, 99 Ga. 23; State v. Recorder of First Recorder's Ct., 30 La. Ann. 450; Swift v. Judges of Wayne County Circ. Ct., 64 Mich. 479; Tierney v. Dodge, 9 Minn. 166 (Gil. 153); Muhlenbrinck v. Long Branch Com'rs, 42 N. J. Law, 364; Watson v. Treasurer of Plainfield, 60 N. J. Law, 260; Reid v. Wood, 102 Pa. 312.

[612] Cranston v. City of Augusta, 61 Ga. 572; Town of Hawkinsville v. Ethridge, 96 Ga. 326; State v. Vail, 57 Iowa, 103; City of Salina v. Wait, 56 Kan. 283, 31 L. R. A. 538; City of Lyons v. Wellman, 56 Kan. 285, 43 Pac. 267; Village of Northville v. Westfall, 75 Mich. 603; City of Water Valley v. Davis, 73 Miss. 521; City of St. Louis v. Marchel, 99 Mo. 475; Village of Platteville v. McKernan, 54 Wis. 487. But see the following cases: City of Greeley v. Hamman, 12 Colo. 94; City of Durango v. Reinsberg, 16 Colo. 327; City of Leavenworth v. Weaver, 26 Kan. 392.

Com. v. Ingraham, 70 Ky. (7 Bush) 106. An appeal can be taken by the municipality when the decision is against the validity of any ordinance or by-law of said city but in no other case. City of Kansas v. Clark, 68 Mo. 588; City of St. Charles v. Hackman, 133 Mo. 634; Village of Van Wert v. Brown, 47 Ohio St. 477; State v. Rouch, 47 Ohio St. 478.

either civil or criminal with petty and trivial questions, a less degree of strictness and formality is required in their procedure.[613] This because of the nature of the offense and questions considered by them and also because that under the conditions surrounding them and which calls them into existence, all reasonable and legal means must be used to facilitate the transaction of their business. That their jurisdiction is restricted both in regard to the issuance of process and a determination of cases to the limits of the municipality is self-evident.[614]

[613] People v. Burns, 19 Misc. 680, 44 N. Y. Supp. 1106. A warrant is necessary in misdemeanor cases where the offense is not committed in the presence of the officer making the arrest. Following People v. Howard, 13 Misc. (N. Y.) 763; People v. Pratt, 22 Hun (N. Y.) 300.

[614] Brandon v. Avery, 22 N. Y. 469; Waters v. Langdon, 40 Barb. (N. Y.) 408; Baird v. Helfer, 12 App. Div. 23, 42 N. Y. Supp. 484; Ziegler v. Corwin, 12 App. Div. 60, 42 N. Y. Supp. 855. "It is easily perceived that the effort of the legislature has been to confer upon the local courts of Rochester jurisdiction over the people of Monroe county outside of the city in both civil and criminal matters. In People v. Upson, 79 Hun, 87, as we have seen, the jurisdiction of the police court in criminal matters outside of the city was denied. The question remains whether the legislative command carrying the jurisdiction in civil matters into that portion of Monroe county which lies outside of the city of Rochester can be upheld. The judiciary of the state will not nullify the acts of the legislature unless the plain violation of the letter or the spirit of the state constitution is apparent. The legislature is primarily the judge of the validity of its own acts, as is asserted in many cases, and courts will not overrule that judgment, unless a plain duty exists to preserve the integrity of the constitution itself; but when that duty is apparent, the courts do not hesitate to meet the responsibility. It may be admitted that there is nothing in the constitution in terms absolutely forbidding the exercise of the legislative power which is here challenged. But was it not a violation of the intent and plan of the constitution in the organization and operation of the courts of this state? A statute which is opposed to the spirit and purpose of the constitution is as much within the condemnation of the organic law as though the intention to violate the constitution were written in bold characters upon the face of the statute itself. The question we are considering has in substance been before the courts of this state in many cases and those cases seem to establish beyond cavil or dispute that the court of the kind we are considering is not a court of general jurisdiction, but of local and inferior jurisdiction and limited to the territory embraced within the locality for which the court is constituted." Geraty v. Reid, 78 N. Y. 64; People v. Upson, 79 Hun (N. Y.) 87.

IV. Public Records.

§ 591. Public records.
592. Right of access or inspection.
593. Custody.
594. Amendment of public records.
595. Municipal records as evidence.

§ 591. Public records.

All public corporations in the proper exercise of their granted powers, act at times in such a manner as to affect arbitrarily, or otherwise, the personal or property rights of private persons. To afford the latter protection by securing an accurate and certain account of what has been done, the law requires public corporations to keep a true record of all their proceedings.[615] The necessity for this rule exists not only for the reason stated but also to enable these corporations to assert their rights in proper tribunals.[616] A further reason for the principle also obtains in that they are corporations, artificial persons, and can only speak by the records which have been kept of their acts.[617] The presump-

[615] Becker v. City of Henderson, 100 Ky. 450, 38 S. W. 857; Brewer v. Boston, C. & F. R. Co., 113 Mass. 52. The record of commissioners is conclusive upon all parties in an action at law; it cannot be impeached collaterally. Com. v. Sullivan, 165 Mass. 183; Auditor General v. Longyear, 110 Mich. 223, 68 N. W. 130. The presumption of law is that public records are accurate and true. State v. Sovereign, 17 Neb. 173. An index of duties required to be kept becomes a public record. Lincoln Land Co. v. Ackerman, 24 Neb. 46, 38 N. W. 25.

[616] Perryman v. City of Greenville, 51 Ala. 507; Pugh v. City of Little Rock, 35 Ark. 75; South School Dist. v. Blakeslee, 13 Conn. 227; Barker v. Fogg, 34 Me. 392.

[617] Fayette County Com'rs v. Chitwood, 8 Ind. 504. "It is assigned for error that the circuit court should have granted a new trial because the proof was insufficient to sustain the verdict. This error we think well assigned. The certificate above recited seems to have been regarded as evidence of the correctness of the account as no other proof was offered on that subject. * * * The civil township is a corporation represented by a board of trustees who are required to keep a true record of all their proceedings. They, like the board of commissioners, can only speak by their record. The certificate given in evidence did not purport to be a transcript from that record. Whether as a board they have any power to pass upon claims it is not necessary to decide. So far as appears they have not attempted to do so. If they have any power to act upon claims their action is evidently not conclusive. The commissioners are the guard-

tion of law exists that such records are accurate reports of particular proceedings and that the facts therein recited are true.[618]

The necessity for a fullness of detail may depend upon statutory provisions prescribing the form and the manner of keeping them and further upon the character of the body acting. The record of acts of judicial and legislative action must be precise, definite, full and true in order that the laws which they enact and interpret may operate as intended.[619] The record of proceedings of administrative bodies need not be so full and complete though they must be accurate and truthful.[620] It is generally necessary

ians of the county treasury and it is their duty to protect it. There was no proof whatever before the jury of the correctness of the plaintiff's account." City of Logansport v. Crockett, 64 Ind. 319; Taylor v. Henry, 19 Mass. (2 Pick.) 397; Adams v. Mack, 3 N. H. 493.

[618] People v. Baldwin, 117 Cal. 244, 49 Pac. 186; Keehn v. McGillicuddy, 15 Ind. App. 580; Com. v. Sullivan, 165 Mass. 183; Auditor General v. Longyear, 110 Mich. 223, 68 N. W. 130; State v. Crawford County Sup'rs, 39 Wis. 596. Official records, where the authority appears or is implied by law, will be construed according to their intent and plain meaning and it will be assumed that the proceedings were legally had, especially in the absence of suggestions to the contrary.

Bartlett v. Eau Claire County, 112 Wis. 237, 88 N. W. 61. The record of the proceedings of a board of county supervisors as copied by the clerk cannot be attacked collaterally by the oral testimony of a member of the board. Com. v. Schubmehl, 3 Lack. Leg. N. 186. But see State v. Harris (Miss.) 18 So. 123.

[619] Pickton v. City of Fargo, 10 N. D. 469, 88 N. W. 90. A journal of the proceedings of the city council under Rev. Code 1899, § 2143, should show the number of votes cast, the calling of the yeas and nays and the names of the members voting with their vote in favor of or against the ordinance.

City of Corry v. Corry Chair Co., 18 Pa. Super. Ct. 271. If there is nothing in the municipal charter requiring the names of those voting for or against an ordinance, it is immaterial that they are omitted. Mills v. City of San Antonio (Tex. Civ. App.) 65 S. W. 1121. A ratification of the acts of a city council will not be presumed from the mere approval of the minutes of that meeting at a subsequent one. Wilmot v. Lathrop, 67 Vt. 671.

[620] United States v. Fillebrown, 7 Pet. (U. S.) 28. Under act of congress 1811, the proceedings of the board of navy hospital commissioners need not be in writing.

People v. Eureka Lake & Y. Canal Co., 48 Cal. 143. The failure of the chairman and clerk of a board of supervisors to sign the record of one of their proceedings will not invalidate a tax then levied. The signatures are for the purpose of identification. Trustees of Hazelgreen v. McNabb, 23 Ky. L. R. 811, 64 S. W. 431; Giddings v. Van Buren County Treasurer, 99 Mich. 221, 58 N. W. 64. Where the rec-

that the power and right of the body acting should be shown, and also all facts necessary to give jurisdiction.[621] Ordinarily they should be signed,[622] duly recorded and published in some particular manner as required by law,[623] although for some local administrative boards, the entry of the proceedings in public records kept for the purpose is sufficient.

§ 592. Right of access or inspection.

The right to inspect public records by one who may be affected by them usually obtains although it is quite customary for this to be granted by law.[624] The right, however, cannot be exercised in an unreasonable manner or at an unreasonable and untimely hour.[625] Public documents and records can only be examined un-

ord of a board of supervisors recites the adoption of a resolution, it will be presumed that it received the necessary majority. State v. Irvin, 126 N. C. 989; State v. Crawford County Sup'rs, 39 Wis. 596.

[621] Bullitt County v. Washer, 130 U. S. 142; Newaygo County Mfg. Co. v. Echtinaw, 81 Mich. 416, 45 N. W. 1010; Johnson v. Eureka County, 12 Nev. 28.

[622] San Diego County v. Seifert, 97 Cal. 594, 32 Pac. 644. Where the minutes of meetings by county supervisors are not signed by the chairman and clerk as required, oral evidence is admissible to show the handwriting of the entry, the contemporaneous character, the official custody from which the book was produced and the further fact that the board met and adjourned at the time stated.

People v. Eureka Lake & Y Canal Co., 48 Cal. 143; Beck v. Allen, 58 Miss. 143. The minutes of the proceedings of a board of supervisors to be valid need not be signed before adjournment; if approved and signed at the next meeting it is sufficient.

[623] Haislett v. County of Howard, 58 Iowa, 377.

[624] Whelan v. Superior Ct. of City & County of San Francisco, 114 Cal. 548, 46 Pac. 468; Stockman v. Brooks, 17 Colo. 248; State v. King, 154 Ind. 621; People v. Walker, 9 Mich. 328; Burton v. Tuite, 78 Mich. 363, 7 L. R. A. 73; Ferry v. Williams, 41 N. J. Law, 333; Neville v. Board of Health, 29 Abb. N. C. 59, 21 N. Y. Supp. 574; People v. Cornell, 47 Barb. (N. Y.) 329.

[625] People v. Walker, 9 Mich. 328. "While in the absence of any statutory provision to that effect, a corporator may at the common law, have a mandamus to compel the custos of corporate records and documents to allow him an inspection of them, yet to entitle himself to the aid of the court, he must show that he has made a proper demand upon the custos, at a proper time and place, and for a proper reason, and has been refused. I have examined all the cases to which we have been referred and can find none where the writ was granted to enable a cor-

der such rules and restrictions as will preserve them from loss or mutilation and also prevent any serious interruption of the duties

poration to gratify idle curiosity. The principle seems to be, and very properly, too, that the party asking the writ must have some interest at stake which renders the inspection necessary.

"No such case is made by this relator nor has he any remedy under the statute which provides that plank road companies shall keep a stock book which shall be open at the office of the corporation during business hours, for the inspection of all persons, for he makes no case under it. He asks for an inspection of all the books, records and papers of the company; which is a demand not within the statute; and he shows no demand made at the office of the company in business hours for inspection of its books nor does he give any excuse or reason why such demand was not or could not be made. Had he the statutory right to make the broad demand which was made in this case he has not made it under circumstances which entitle him to the remedy asked." People v. Cornell, 35 How. Pr. (N. Y.) 31.

State v. Williams, 110 Tenn. 549, 64 L. R. A. 418. The court in an elaborate decision citing many authorities said in part: "We pass now, to a statement of our conclusions upon the general question of law as to the right of a citizen and taxpayer of a city to make an examination of the books and papers of the city. In stating these conclusions we shall not discuss the authorities above referred to, or attempt to reconcile their conflicts. After considering all of these authorities and the whole subject involved, we shall state what we believe to be the sound principles applicable to the matter. In theory the right of examination is absolute, but in practice it is at last only a matter of discretion, because such application is likely at any time to be refused on the part of the custodian of the books and papers sought to be examined, and then the right must be enforced by mandamus, and this writ is not of absolute right, but merely of discretion, to be awarded only in a proper case; the facts claimed as authorizing its issuance to be judged of in every case by the court, and the writ to be awarded or withheld upon a consideration of all the circumstances presented. So, while the right is, in theory, absolute, yet it is in practice so limited by the remedy necessary for its enforcement as that it can be denominated only a 'qualified right.' The right to an examination for a special purpose, as for example, to obtain specific information to use in a litigation between the applicant and third parties, or between the applicant and the corporation, and the like cases, while not, in principle, standing upon higher grounds, yet is the more easily grantable, because it does not involve so much time, and so much inconvenience to the custodian of the books and papers, and so much interruption of business, as in case of a general examination. Yet it cannot be doubted, under a state of facts showing it to be important to the public interest that the general examination of the books of a municipality should be had, that the court should allow

of their custodians.[626] The purpose of the one exercising the privilege should not be that of idle curiosity alone.[627] The right, where it exists, is, it has been held, a substantial one and where public records have been willfully or wrongfully withheld from inspection, the officer in whose custody they are can be compelled by mandamus to permit the desired examination.[628]

such examination at the suit of one who is a citizen and taxpayer of the corporation. The right rests, not only on the ground that the books are public books, but also on the same principle that authorizes a taxpayer to enjoin the enforcement of illegal contracts entered into by the municipality, county or state, for the protection of the applicant and all other taxpayers from illegal burdens. And it is obvious that, in making and enforcing such application, the taxpayer acts, in a very real sense, not only for himself, but for all other taxpayers, and acts, therefore, in the capacity, as it were, of a trustee for all. It must be admitted also, that the exercise of such power, of prudently and carefully guarded, cannot be otherwise than salutary, because the knowledge that it can be exercised by a citizen and taxpayer, and may be exercised when the public good shall seem, on sound reasons, to demand it, cannot result otherwise than in producing an added sense of responsibility in those who administer the affairs of municipal corporations, and in inducing a greater carefulness in the discharge of the trusts imposed upon them by their fellow citizens under the sanctions of law. Yet it is equally true that such general examinations must necessarily to some extent interrupt the ordinary and usual course of business in public offices, and require of the officers in charge thereof some additional duties for the time being. And it follows from this, that such examinations should not be lightly granted, or permitted with unnecessary frequency; that the occasion should be grave and important; and that the person seeking the examination should be trustworthy and reliable, and at all times and at every stage subject to the supervision of the court, to the end that there may be no oppression practiced under the guise of doing service to the public, and that the safety of the books and records subjected to the examination shall be continually provided for. All of these matters fall within the principle that the granting of permission to make the examination rests in the sound discretion of the court, in the form of granting or withholding the writ of mandamus." See, also, note 64 L. R. A. 418, under the general subject of the right of a taxpayer to inspect the books of a municipality.

[626] Cormack v. Wolcott, 37 Kan. 394; People v. Cornell, 47 Barb. (N. Y.) 329; Payne v. Staunton, 55 W. Va. 202, 46 S. E. 927.

[627] Cormack v. Wolcott, 37 Kan. 391, 15 Pac. 245. Comp. Laws Kan. 1885, § 211, c. 25, does not give an individual the right to make copies of the records in the office of a recorder of deeds for the purpose of making a set of abstract books for private use.

[628] State v. King, 154 Ind. 621, 57 N. E. 535. "The various county of-

§ 593. Custody.

The custody and making of all public records, documents and files and the record of the proceedings of public bodies may be given either to some designated officer [629] or, in the absence of a special statutory provision or regulation, to that officer legally or naturally charged with the responsibility of a certain department or function of government [630] by whom they should be delivered to their successors in office [631] and kept at the legally established seat

ficials in a political sense are considered as the agents of the people in managing and conducting the business of the county. These officials are commonly denominated, and properly so, 'public servants,' and are directly responsible to the people who select them for the honest and faithful discharge of the duties and powers with which, under the law, they are invested. Under such conditions and circumstances, as they exist under the peculiar structure or genius of our government, it would certainly be a harsh interpretation of our laws, and one which would be, in our opinion, adverse to sound reason, to deny any taxpayer or citizen the right, subject to the reasonable rules and regulations previously mentioned, to inspect or examine the public records of his county in order to discover or ascertain whether the public officers had properly administered the funds of the county to which such taxpayer had been required to contribute. In fact there can be no sound reason advanced for depriving a citizen of this right, for it is evident that the exercise thereof, for the purpose in view in this case, will serve as a check upon dishonest public officials; and will in many respects conduce to the betterment of the public service." State v. Hoblitzelle, 85 Mo. 620; Barber v. West Jersey Title & G. Co., 53 N. J. Eq. 158; Com. v. Walton, 6 Pa. Dist. R. 287.

[629] Johnson v. Wakulla Co., 9 Fla. 690, 9 So. 690. A clerk of the board of county commissioners is required by law to keep a record of the proceedings of the board.

Allen v. Hopkins, 62 Kan. 175, 61 Pac. 750; State v. Patton, 62 Minn. 388, 64 N. W. 922. All of the official papers in a county supervisor's office including plats with their notes and calculations should be transmitted by the present incumbent to his successor in office.

Howze v. State, 59 Miss. 230. The records and public property in the treasurers office must, under Miss. code 1871, § 262, be delivered to his successor in office. And § 2890 makes it a misdemeanor for one failing to perform this duty.

[630] State v. Harwi, 36 Kan. 588. The county records must remain at the county seat. Phenix v. Clark, 2 Mich. 327; People v. State Treasurer, 24 Mich. 468. The custody of all public papers, records or documents belongs to the officer legally in charge of them by whom they are to be guarded. Town of Litchfield v. Parker, 64 N. H. 443, 14 Atl. 725; Conover v. City of New York, 25 Barb. (N. Y.) 513.

[631] Thompson v. Holt, 52 Ala. 491; State v. Patton, 62 Minn. 388, 64 N. W. 922; Howze v. State, 59 Miss.

of government.[632] However the right of custody may have been acquired, the custodian is legally charged with the responsibility of a safe care and keeping of public records and public property of a similar character.[633] Where he is wrongfully deprived of his rights in this respect he can maintain an action to recover possession of the records properly in his care,[634] and in proceedings to

230; Lincoln Land Co. v. Ackerman, 24 Neb. 46, 38 N. W. 25; Conover v. City of New York, 5 Abb. Pr. (N. Y.) 393.

[632] Shaw v. Hill, 67 Ill. 455; State v. County Judge, 13 Iowa, 138; Way v. Fox, 109 Iowa, 340, 80 N. W. 405; State v. Harwi, 36 Kan. 588; State v. McKinney, 5 Nev. 194; Caruthers v. Harnett, 67 Tex. 127.

[633] People v. State Treasurer, 24 Mich. 468. "There can be no doubt that when a person undertakes to hold in his official custody that which has been placed there under a claim that it should be lawfully deposited in his custody, he is bound to restore it on application of the proper party, if it does not belong to his custody. The public files and receptacles cannot be changed into private ones by any legal theories. Their custodian can never cease to be a public officer in regard to any of them. Having received them as an officer he is bound to keep them safely, until demanded by their owners and then he is equally bound to restore them. It is no defense to such a claim of restoration that the securities are not liable to be legally enforced. It is always possible that injury may be done to a person or municipality by being subjected to litigation and instruments which purport to be obligations, and are legally invalid may be compelled to be given up and canceled in all cases where any possible danger can be anticipated where there is no rule of equity to the contrary. In these cases of municipal bonds, the townships cannot be made to suffer for the legally wrongful action of their officers and they have a right to recall the unauthorized securities. The duty of the treasurer is not discretionary. It is their absolute right to demand and his absolute duty to surrender what is held in the files of the office in their wrong. The duty is unconditional and it is clear."

[634] Frisbie v. Fogg, 78 Ind. 269; State v. County Judge, 13 Iowa, 139; Way v. Fox, 109 Iowa, 340, 80 N. W. 105; State v. Dean, 49 Kan. 558, 31 Pac. 145; Phenix v. Clark, 2 Mich. 327; State v. Sherwood, 15 Minn, 221 (Gil. 172). A de facto officer is entitled to possession of the records and other books and papers pertaining to the office. State v. Patton, 62 Minn. 388; Flentge v. Priest, 53 Mo. 540; Conover's Case, 5 Abb. Pr. (N. Y.) 73; Devlin's Case, 5 Abb. Pr. (N. Y.) 281; Welch v. Cook, 7 How. Pr. (N. Y.) 282; In re Davis, 19 How. Pr. (N. Y.) 323; Conover v. Devlin, 24 Barb. (N. Y.) 587; In re Foley, 8 Misc. 196, 28 N. Y. Supp. 611; People v. Allen, 42 Barb. (N. Y.) 203; McGrory v. Henderson, 43 Hun (N. Y.) 438; In re Sells, 15 App. Div. 571, 44 N. Y. Supp. 570; In re Freeman, 23 Misc. 752, 53 N.

determine the title to public offices, the custody of public records is one of the objects sought to be secured and protected.[635] A personal liability may arise on the part of the custodian for a willful neglect of his duties. The character of the records kept by different public officers is a matter of common knowledge and their mutilation or destruction may, by statute, be made a crime or misdemeanor and punishable in the manner designated.[636]

§ 594. Amendment of public records.

The record of proceedings of legislative, administrative or judicial bodies, should show the facts as they actually occur upon a particular occasion, the conditions existing at a particular moment of time, with all that was said and done by those entitled to participate in such proceedings.[637] The purpose of the records, then, being to establish a true account of official action, it follows that where the rights of third parties have not intervened,[638] amendments may be made by officers having them in their care or charged with the ministerial or clerical duty of making them.[639]

Y. Supp. 171; In re Whipper, 32 S. C. 5, 10 S. E. 579; McMillan v. Bullock, 53 S. C. 161, 31 S. E. 860. Where an officer has been indicted for embezzlement, the appointee is entitled to the immediate possession of the books and records belonging to the office. Verner v. Seibels, 60 S. C. 572, 39 S. E. 274.

[635] Ex parte Scott, 47 Ala. 609; Thompson v. Holt, 52 Ala. 491; Hull v. Shasta County Sup. Ct. 63 Cal. 174; Desmond v. McCarthy, 17 Iowa, 525. The title to an office cannot be determined by an action of replevin for the books and records.

Eidolt v. Ter., 10 N. M. 141, 61 Pac. 105. The question of title to an office cannot be raised in a proceeding by one possessing a prima facie title to compel and deliver to himself the books, papers and records and other paper belongings to such office. In re Brenner, 67 App. Div. 375, 73 N. Y. Supp. 689. Code Civ. Pro. § 2471a providing for summary proceedings to compel the delivery of books, papers, etc., to a public officer is not intended to be a substitute for a writ of quo warranto.

[636] People v. Peck, 10 N. Y. Cr. Rep. 363; Whalley v. Tongue, 29 Or. 48; Zwietusch v. City of Milwaukee, 55 Wis. 369.

[637] Boston Turnpike Co. v. Town of Pomfret, 20 Conn. 590; Samis v. King, 40 Conn. 305; Chamberlain v. Inhabitants of Dover, 13 Me. 466; Welles v. Battelle, 11 Mass. 477; Vaughn v. School Dist. No. 31, 27 Or. 57, 39 Pac. 393.

[638] Ryder's Estate v. City of Alton, 175 Ill. 94, 51 N. E. 821; Jaquith v. Putney, 48 N. H. 138; Buehler's Heirs v. Buffington, 43 Pa. 278.

[639] City of Anniston v. Davis, 98 Ala. 629, 13 So. 331. The minutes of a council when properly corrected at a subsequent meeting can-

Such amendments may be made nunc pro tunc as will show the true condition of affairs if material matters through a misapprehension of duty, carelessness or ignorance have been omitted.[640] The amendments must be made, however, by the same officer or body through whose neglect or inadvertent act the mistake or omission occurred.[641]

§ 595. Municipal records as evidence.

Public records are admissible in evidence to show the facts therein cited if material when properly identified[642] and competent, which latter condition includes the character of the of-

not be collaterally impeached. Du Page County v. Martin, 39 Ill. App. 298; Allen v. Archer, 49 Me. 346; Inhabitants of Dresden v. Lincoln County Com'rs, 62 Me. 365; Sprague v. Bailey, 36 Mass. (19 Pick.) 436; Farmington River Water Power Co. v. Berkshire County Com'rs, 112 Mass. 206; Inhabitants of Gloucester v. Essex County Com'rs, 116 Mass. 579; Smith v, Messer, 17 N. H. 420; Bean v. Thompson, 19 N. H. 290; Leighton v. Ossipee School Dist., 66 N. H. 548, 31 Atl. 899; McClain v. McKisson, 15 Ohio Circ. R. 517. After the reading of the journal at a subsequent meeting and its approval by the council, the clerk has no further right to make amendments to the record as thus corrected.

[640] City of Logansport v. Crockett, 64 Ind. 319.

[641] Swamp Land Reclamation Dist. No. 407 v. Wilcox, (Cal.) 14 Pac. 843; Samis v. King, 40 Conn. 298. An amendment to the record of proceedings of the common council can only be made by the clerk at the time the original mistake was made. City of Covington v. Ludlow, 58 Ky. (1 Metc.) 295; Welles v. Battelle, 11 Mass. 477; Hartwell v. Inhabitants of Littleton, 30 Mass. (13 Pick.) 229; Judd v. Thompson, 125 Mass. 553. An attempted amendment by a clerk is inoperative that to the best of his "recollection the vote was passed by two-thirds the legal voters present and voting thereon." Foster v. Boston Park Com'rs, 131 Mass. 225; Bishop v. Cone, 3 N. H. 513; Low v. Pettengill, 12 N. H. 337; Cass v. Bellows, 31 N. H. 501; Pierce v. Richardson, 37 N. H. 306; Mott v. Reynolds, 27 Vt. 206. But see Gibson v. Bailey, 9 N. H. 168.

[642] South School Dist. v. Blakeslee, 13 Conn. 227; Ryder's Estate v. City of Alton, 175 Ill. 95, 51 N. E. 821. Official records when produced in court as such by the officer having them in charge can be attacked for fraud. Mosteller v. Mosteller, 40 Kan. 658, 20 Pac. 464; Lease v. Clark, 55 Kan. 621, 40 Pac. 1002; Thornton v. Campton, 18 N. H. 20. Books of account kept by the selectmen of the finances and expenses of a town are admissible in evidence.

Tompkins County Sup'rs v. Bristol, 15 Hun (N. Y.) 116. The county treasurer's report made and filed in accordance with statutory provisions admissible in evidence.

Pleasant Valley Coal Co. v Salt

ficer [643] and the manner in which made.[644] Parol evidence of facts not recited is inadmissible where the records themselves are offered and purport to contain all the evidence.[645] This rule will not apply where the records, as kept, are an abstract only of the proceedings of an official body; and in such a case, oral evidence is admissible to prove facts which occurred at a meeting of an official body and not otherwise reported or recorded.

Lake County Com'rs, 15 Utah, 97, 48 Pac. 1032. A court will take judicial notice of the records of public officials in passing upon the validity of their expenditures. Richardson v. Sheldon, 1 Pin. (Wis.) 625.

[643] Hutchinson v. Pratt, 11 Vt. 402. A record kept by a clerk pro tem of a town meeting is competent and, therefore, admissible in evidence although the clerk pro tem may not have been sworn. "We think it was competent for Chandler to keep the minutes of the proceedings and record the same with the consent of the actual clerk and that his neglect to take the oath does not vitiate or avoid enther his doings or those of the village. It must from necessity be in the power of any corporation, whether public or private, to appoint a person as clerk pro tem for the purpose of making the entries of what was done by them. Such an appointment supposes the office to be filled but as the duties required of such temporary officer are only ministerial, he is empowered, for the time being, to perform them for and in behalf of the regular officer. Where there is a vacancy in the office, as in the case of a town clerk, the legislature have provided for the performance of the duties by other persons.* * * The appointment of Chandler as clerk pro tem, was made in pursuance of authority obviously belonging to the corporation and conformable to the practice which has always prevailed in corporations of this nature, and it appears that ne entered upon the duties of the office. Can it be objected to his proceedings or his records that he was not duly sworn? We think not because it is not made a prerequisite to his entering upon the duties of the office."

[644] Williams v. School Dist. No. 1 in Lunenburg, 38 Mass. (21 Pick.) 75.

[645] Swamp Land Reclamation Dist. No. 407 v. Wilcox (Cal.) 14 Pac. 843; City of Logansport v. Crockett, 64 Ind. 319; City of Covington v. Ludlow, 58 Ky. (1 Metc.) 295; Taylor v. Henry, 19 Mass. (2 Pick.) 397; Halleck v. Inhabitants of Boylston, 117 Mass. 469; Weston v. Moody, 37 Fla. 473; Town of Lemont v. Singer & T. Stone Co., 98 Ill. 94. Oral evidence is admissible in facts contained in a lost record book. Jordan v. Osceola County, 59 Iowa, 388; Rock Creek Tp. v. Codding, 42 Kan. 649, 22 Pac. 741; Ragoss v. Cuming County, 36 Neb. 375, 54 N. W. 683; State v. Gloyd, 14 Wash. 5; Chicago, K. & W. R. Co. v. Stafford County Com'rs, 36 Kan. 121, 12 Pac. 593.

CHAPTER VIII.

PUBLIC OFFICE AND OFFICERS.

I. Commencement and Nature of Official Life.

II. Termination of Official Life.
(For Complete Analysis of this subdivision see p. 1532.)

III. Their Powers, Duties and Rights.
(For Complete Analysis of this Subdivision see p. 1560.)

I. Commencement and Nature of Official Life.

§ 596. In general.
597. Legislative control.
598. Definition of public office.
599. Office distinguished from employment.
600. Public office; how secured.
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602. Confirmatory action.
603. Appointments; manner of making.
604. Classes.
605. To fill vacancies.
606. Public offices secured through election.
607. Eligibility of candidates for public office.
608. Qualifications.
609. Physical.
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611. Condition of the candidate.
612. Act of candidate.
613. Right to change qualifications.
614. Limitations upon legislative power.
615. Removal of disqualification.
616. Acceptance.
617. Official oath.
618. Official bonds; nature.
619. Excessive or illegal bond.
620. Bond; execution.
621. Official bonds; their filing and approval.
622. Liability of sureties.
623. Liability on official bonds; the less strict rule.
624. Liability of the surety; the element of time considered.
625. New or additional duties.
626. Different offices or funds.
627. The right of action.
628. Parties.

§ 596. In general.

A public corporation is an artificial person and must, of necessity, act through natural persons serving as its agents. These are variously termed and perform the duties attending their respective offices whether legislative, administrative or judicial, the designation of an official in many cases indicating to a greater or less extent the character of his duties. The corporation having been created by the sovereign power, that power logically includes the lesser one of creating public officials,[1] also that of designating their duties, tenure of office and rights, including that of compensation.[2] The sovereign people in this country act primarily through a constitution and provide in this instrument for many public offices which are termed because of this fact, constitutional offices.[3] A constitution may also authorize the legislative branch of the government, under the proper restrictions, to create still other offices, generally subordinate ones, and to establish tenure of office, duties, the manner of selection and official rights including that of compensation.[4] We have, therefore, the sovereign

[1] Kavanaugh v. State, 11 Ala. 399; State v. Finn, 8 Mo. App. 341; State Revenue Agent v. Hill, 70 Miss. 106.

[2] Benford v. Gibson, 15 Ala. 521; Reynolds v. McAfee, 44 Ala. 237; Robinson v. White, 26 Ark. 139; Allen v. State, 32 Ark. 241; People v. Addison, 10 Cal. 1; People v. Squires, 14 Cal. 12; State v. Dews, R. M. Charlt. (Ga.) 397; State v. Hyde, 129 Ind. 296, 28 N. E. 186, 13 L. R. A. 79. In the creation of an office, it is not necessary that the legislature shall prescribe either the duties or the emoluments. State v. Champlin, 2 Bailey (S. C.) 220. The continuous recognition of an employment for many years with an appropriation for compensation will not constitute such employment an office.

[3] Kavanaugh v. State, 41 Ala. 399; Beebe v. Robinson, 52 Ala. 66; People v. Hunt, 41 Cal. 435; Patton v. Board of Health of San Francisco, 127 Cal. 388; Dunbar v. Canyon County, 6 Idaho, 725, 59 Pac. 536; Meller v. Logan County Com'rs, 4 Idaho, 44, 35 Pac. 712; Overshiner v. State, 156 Ind. 187, 59 N. E. 468, 51 L. R. A. 748; State v. Spaulding, 102 Iowa, 639; State v. Judge of Civil Dist. Ct., 50 La. Ann. 655, 23 So. 886; Com. v. Certain Intoxicating Liquors, 110 Mass. 172; State Revenue Agent v. Hill, 70 Miss. 106; State v. Woodbury, 17 Nev. 337; Warner v. People, 2 Denio (N. Y.) 272; People v. Draper, 15 N. Y. 532; State v. Stanley, 66 N. C. 59; State v. Bacon, 14 S. D. 284, 85 N. W. 225. A state constitution may provide the term of office, number and qualifications of members of a board with authority for holding over. Anderson v. Tyree, 12 Utah, 129, 42 Pac. 201.

[4] Board of Revenue v. Barber, 53 Ala. 589; State v. McDiarmid, 27 Ark. 176; Meek v. McClure, 49 Cal. 624; People v. Burns, 53 Cal. 660; People v. Mullender, 132 Cal. 217, 64 Pac. 299; Ford v. State Harbor

acting directly through the constitution and creating certain specified offices and indirectly through legislative bodies creating still others. Upon the manner of their origin in this respect will depend their mutual obligations, duties and rights in connection with the public whom they are to serve and whose servants they are.[5]

§ 597. Legislative control.

A public office is created by law and not by contract.[6] The rights and duties appertaining to it, therefore, do not partake of the nature of contract rights or duties and if the office with its

Com'rs, 81 Cal. 19. The power may be delegated by the legislature to a board in respect to the selection of their subordinate officials or employes.

El Dorado County v. Meiss, 100 Cal. 268; Quigg v. Evans, 121 Cal. 546; Parks v. Commissioners of Soldiers' & Sailors' Home, 22 Colo. 86, 43 Pac. 542; Walker v. City of Cincinnati, 21 Ohio St. 14. Discussing distinction between annexing an additional power or duty on an existing office and creating or filling a new one.

State v. Dillon, 42 Fla. 95, 28 So. 781; State v. Peelle, 124 Ind. 515, 24 N. E. 440, 8 L. R. A. 228. The office of the chief of the Indiana bureau of statistics is a state and not a legislative one. Wilson v. Clark, 63 Kan. 505, 65 Pac. 705; Page v. Hardin, 47 Ky. (8 B. Mon.) 648; Sweeney v. Coulter, 109 Ky. 295, 58 S. W. 784; Hope v. City of New Orleans, 106 La. 345, 30 So. 842. The legislature may authorize the creation of a board of civil service commissioners. Act No. 89, of 1900, providing one for the city of New Orleans held not repugnant to the constitution, arts 319, 320.

Rose v. Knox County Com'rs, 50 Me. 243; People v. Hurlbut, 24 Mich. 55; People v. Lothrop, 24 Mich. 235; Speed v. Common Council of Detroit, 100 Mich. 92, 58 N. W. 638; Common Council of Detroit v. Schmid, 128 Mich. 379, 87 N. W. 383; Ex parte Lucas, 160 Mo. 218, 61 S. W. 218. The legislation creating a board of commissioners for the regulation of barbers and authorizing the governor to appoint the members of the board, does not contravene Mo. Const., art. 14, § 9.

Gooch v. Town of Exeter, 70 N. H. 413, 48 Atl. 1100; Kokes v. State, 55 Neb. 691; Pacific Exp. Co. v. Cornell, 59 Neb. 364, 81 N. W. 377; Nebraska Tel. Co. v. Cornell, 59 Neb. 737, 82 N. W. 1, affirming on rehearing judgment in 58 Neb. 823, 80 N. W. 43; People v. Pinckney, 32 N. Y. 377; State v. Dunn, 73 N. C. 595; State v. Covington, 29 Ohio St. 102; State v. Baughman, 38 Ohio St. 455; In re Campbell's Registration, 197 Pa. 581, 47 Atl. 860; Lloyd v. Smith, 176 Pa. 213; State v. Tucker, 54 S. C. 251; State v. Bacon, 14 S. D. 394, 85 N. W. 605; Reals v. Smith, 8 Wyo. 159, 56 Pac. 690.

[5] Standeford v. Wingate, 63 Ky. (2 Dew.) 440; Farwell v. City of Rockland, 62 Me. 296.

[6] United States v. Hartwell, 73 U. S. (6 Wall.) 393. "An office is a public station, or employment, conferred by the appointment of government. The term embraces the ideas of tenure, duration, emolu-

duties, rights and emoluments has been created by a legislative body, that body can abolish or change these at its pleasure,[7] the reason being the nature of a public office. "Public offices are created for the purpose of effecting the ends for which govern-

ment, and duties. * * * A government office is different than a government contract. The latter from its nature is necessarily limited in its duration and specific in its objects. The terms agreed upon define the rights and obligations of both parties, and neither may depart from them without the assent of the other." Crenshaw v. United States, 134 U. S. 99; Taylor v. Beckham, 178 U. S. 548; United States v. Maurice, 2 Brock. 96, 102, 103, Fed. Cas. No. 15,747; Kavanaugh v. State, 41 Ala. 399; Beebe v. Robinson, 52 Ala. 66; Lane v. Kolb, 92 Ala. 636; Humphrey v. Sadler, 40 Ark. 100; Vincenheller v. Reagan, 69 Ark. 460, 64 S. W. 278; Ford v. State Harbor Com'rs, 81 Cal. 19; Hall v. Burks, 96 Ga. 622; Kreitz v. Behrensmeyer, 149 Ill. 496, 24 L. R. A. 59; People v. Kipley, 171 Ill. 44, 41 L. R. A. 775; State v. Hyde, 129 Ind. 296, 13 L. R. A. 79; Bryan v. Cattell, 15 Iowa, 538; Lynch v. Chase, 55 Kan. 367; Sinking Fund Com'rs v. George, 104 Ky. 260; Goud v. City of Portland, 96 Me. 125; Attorney General v. Jochim, 99 Mich. 358, 23 L. R. A. 699; Hennepin County Com'rs v. Jones, 18 Minn. 199 (Gil. 182); Kendall v. City of Canton, 53 Miss. 526; State Revenue Agent v. Hill, 70 Miss. 106; State v. Evans, 166 Mo. 347; Lloyd v. Silver Bow County, 11 Mont. 408; Douglas County v. Timme, 32 Neb. 272; State v. Trousdale, 16 Nev. 357; Kenny v. Hudspeth, 59 N. J. Law, 320; People v. Vilas, 36 N. Y. 459, 93 Am. Dec. 520; Nichols v. MacLean, 101 N. Y. 526; Koch v. City of New York, 152 N. Y. 72; State v. Hawkins, 44 Ohio St. 98; State v. Ware, 13 Or. 402; Kilgore v. Magee, 85 Pa. 401; Com. v. Weir, 165 Pa. 284; Jones v. Shaw, 15 Tex. 577; Foster v. Jones, 79 Va. 642, 52 Am. Rep. 637; State v. Douglas, 26 Wis. 428; Reals v. Smith, 8 Wyo. 159.

[7] Butler v. Pennsylvania, 10 How. (U. S.) 402; Beaman v. United States, 19 Ct. Cl. 5; Oldham v. City of Birmingham, 102 Ala. 357, 14 So. 793; Hawkins v. Roberts, 122 Ala. 130, 27 So. 327; Lovejoy v. Beeson, 121 Ala. 605; State v. Crow, 20 Ark. 209; People v. Haskell, 5 Cal. 357; People v. Squires, 14 Cal. 12; People v. Banvard, 27 Cal. 470; In re Bulger, 45 Cal. 553; People v. Davie, 114 Cal. 363; People v. Osborne, 7 Colo. 605; State v. Burris, 4 Pen. (Del.) 3, 49 Atl. 930; People v. Auditor of Public Accounts, 2 Ill. (1 Scam.) 537; People v. Cook County Com'rs, 176 Ill. 576, 52 N. E. 334; Walker v. People, 18 Ind. 264; Lawson v. Reno County Com'rs, 47 Kan. 271, 27 Pac. 998; Harvey v. Rush County Com'rs, 32 Kan. 159; Board of Councilmen of Frankfort v. Brawner, 100 Ky. 166, 37 S. W. 950, 38 S. W. 497. A municipal legislative body may abolish at any time the board of public works which it has established under a discretionary power conferred by statute.

Prince v. Skillin, 71 Me. 361, 5 L. R. A. 756; Davis v. State, 7 Md. 151; Taft v. Adams, 69 Mass. (3 Gray) 126; Attorney General v. Marr, 55 Mich. 445; Attorney General v. Bolger, 128 Mich. 355, 87 N. W. 366; Kendall v. City of Canton,

ment has been instituted, which are the common good, and not the profit, honor, or private interest of any one man, family, or class of men. In our form of government it is fundamental that public offices are a public trust and that the persons to be appointed shall be selected solely with a view to the public welfare."[8] The in-

53 Miss. 526; State v. Hermann, 11 Mo. App. 43; People v. Van Gaskin, 5 Mont. 352; Denver v. Hobart, 10 Nev. 28; People v. Woodruff, 32 N. Y. 355; Queens County v. Petry, 54 App. Div. 115, 66 N. Y. Supp. 447. Statutory powers of a board of supervisors may be taken away although such board is created by the constitution.

Phillips v. City of New York, 88 N. Y. 245; People v. Whitlock, 92 N. Y. 191; State v. Beardsley, (N. C.) 35 S. E. 241; Ter. v. Pyle, 1 Or. 149; Kilgore v. Magee, 85 Pa. 401; State v. McDaniel, 19 S. C. 114; Ex parte Cross, 84 Tenn. (16 Lea) 486. The legislature, however, cannot, by repealing a town charter, lessen the term of a justice of the peace elected before the passage of the repealing legislation. State v. Buchanan (Tenn. Ch. App.) 52 S. W. 480; City of Palestine v. West (Tex. Civ. App.) 37 S. W. 783; Mullen v. City of Tacoma, 16 Wash. 82, 47 Pac. 215; State v. Hundhausen, 26 Wis. 432. See, also, authorities cited in preceding note.

[8] Brown v. Russell, 166 Mass. 14, 32 L. R. A. 283; Beebe v. Robinson, 52 Ala. 66. An office is not to be regarded as property but a mere public trust created and existing for the benefit and advantage of the state and not for the personal advancement or profit of the officer. Bradford v. Justices of Inferior Ct., 33 Ga. 332; Opinion of Justices, 3 Me. (3 Greenl.) 481. In defining the term "office," the court said: "We apprehend that the term 'office' implies a delegation of a portion of the sovereign power to, and possession of it by the person filling the office;—and the exercise of such power within legal limits, constitutes the correct discharge of the duties of such office. The power thus delegated and possessed, may be a portion belonging sometimes to one of the three great departments, and sometimes to another; still it is a legal power, which may be rightfully exercised, and in its effects it will bind the rights of others, and be subject to revision and correction only according to the standing laws of the state." And further in the same opinion in distinguishing an office from an employment, "An employment merely has none of these distinguishing features. A public agent acts only on behalf of his principal, the public, whose sanction is generally considered as necessary to give the acts performed the authority and power of a public act or law. And if the act be such as not to require such subsequent sanction, still it is only a species of service performed under the public authority and for the public good, but not in the execution of any standing laws which are considered as the rules of action and guardians of rights."

Mechem, Pub. Off. § 4. "The most important characteristic which distinguishes an office from an employment or contract is that the creation and conferring of an office involves a delegation to the individual of some of the sovereign functions

cumbent of a public office created by the proper authorities does not have such an interest in the office or its emoluments that the creative body cannot, at its discretion, abolish or modify this at its pleasure, subject only to constitutional limitations.[9] Public offices are regarded as mere agencies of the government created for the benefit of the public; not for the benefit of the incumbent and neither they nor their emoluments are rights or privileges secured to citizens by either state or Federal constitutions.[10] And there

of government, to be exercised by him for the benefit of the public; that some portion of the sovereignty of the country, either legislative, executive or judicial, attaches, for the time being, to be exercised for the public benefit. Unless the powers conferred are of this nature, the individual is not a public officer." Citing the following cases: United States v. Germanie, 99 U. S. 508; United States v. Mouat, 124 U. S. 303; United States v. Smith, 124 U. S. 525; Miller v. Sacramento County Sup'rs, 25 Cal. 98; Bunn v. People, 45 Ill. 397; State v. Kirk, 44 Ind. 401, 15 Am. Rep. 239; Com. v. Swasey, 133 Mass. 538; Hill v. Boyland, 40 Miss. 618; People v. Nichols, 52 N. Y. 478, 11 Am. Rep. 734; Eliason v. Coleman, 86 N. C. 235; Doyle v. Aldermen of Raleigh, 89 N. C. 133; Walker v. City of Cincinnati, 21 Orio St. 14; United States v. Lockwood, 1 Pin. (Wis.) 359; Throop, Pub. Off. §§ 16, et seq.

[9] Crittenden County v. Crump, 25 Ark. 235; City of Augusta v. Sweeny, 44 Ga. 463; Decatur County Com'rs v. Cox, 65 Ga. 80; Kernion v. Hills, 1 La. Ann. 419; Chandler v. State, 5 Har. & J. (Md.) 284; State v. Davis, 44 Mo. 129. Offices created by legislation are not held by virtue of any vested interest or right in the incumbent and their tenure and duties are liable to such modification from time to time as the legislature may regard expedient and advisable.

Conner v. City of New York, 4 N. Y. Super. Ct. (2 Sandf.) 355, affirmed 5 N. Y. (1 Seld.) 285. Sandford, J., discusses at length the nature of public office and the rights of the officer and referring to an Alabama case (Wammack v. Holloway, 2 Ala. 31) characterizes the statements of the court in that case in respect to the nature of a public office as "rather a figure of speech than a judgment determining an office to be property. It was a strong mode of expressing the right which one elected to an office has to hold any enjoy it, as against all intruders and unfounded claims, which is as perfect a right, beyond a doubt, as the title of any individual to his property, real or personal. But the nature of that right, and its liability to control by legislative action, is quite a different thing."

[10] Ex parte Lambert, 52 Ala. 79; Hennepin County Com'rs v. Jones, 18 Minn. 199 (Gil. 182). "Public offices in this state are mere agencies of the government created for the benefit of the public; not for the benefit of the incumbent. Unless it is expressly forbidden by the constitution, their emoluments, when they are, as in this instance, prescribed by law, may be altered, increased, reduced and regulated

is nothing in the nature of a contract or a vested right in favor of a public official to prevent new legislation respecting either the powers, the duties or the rights of the office.[11] The only state maintaining the contrary doctrine is that of North Carolina where it is held that an office with a fixed term and specified emoluments is property, the right to which enures to the incumbent and of which he cannot be arbitrarily deprived.[12]

Restrictions on legislative power. It was suggested in a preceding paragraph that the creation of a public office by a state constitution or by legislative act leads to material differences in connection with its abolition or regulation. If this is what has been

by law. Indeed the office itself, emoluments and all, if created by law, as is the office in question, in this case, may be discontinued or abolished by law. * * * Now public offices in this state being mere agencies of the government, the incumbents having no property in the same as against the government and the emoluments thereof, in the absence of express constitutional inhibition, being subject to alteration, increase, reduction and regulation by law, neither the offices themselves nor their emoluments are rights or privileges secured to any citizen of the state."

[11] Dartmouth College v. Woodward, 4 Wheat. (U. S.) 518. Where Mr. Justice Story in his opinion said: "It is admitted that the state legislatures have power to enlarge, repeal and limit the authorities of public officials in their official capacity in all cases where the constitutions of the states respectively do not prohibit them; and this among others for the very reason that there is no express or implied contract that they shall always during their continuance in office exercise such authorities." Benford v. Gibson, 15 Ala. 521; Robinson v. White, 26 Ark. 139; Coffin v. State, 7 Ind. 157; Primm v. Carondelet, 23 Mo. 22; State v. Davis, 44 Mo. 129; Wilcox v. Rodman, 46 Mo. 322; Shelby v. Alcorn, 36 Miss. 273; Hyde v. State, 52 Miss. 665; Kendall v. City of Canton, 53 Miss. 526; People v. Van Gaskin, 5 Mont. 352; Marden v. City of Portsmouth, 59 N. H. 18; Love v. Jersey City, 40 N. J. Law, 456; Peal v. Newark 66 N. J. Law, 105, 48 Atl. 576; Alexander v. McKenzie, 2 S. C. (2 Rich.) 81; State v. Douglas, 26 Wis. 428. See, also, authorities cited under preceding section.

[12] Hoke v. Henderson, 15 N. C. (4 Dev.) 1; Cotton v. Ellis, 52 N. C. 545; King v. Hunter, 65 N. C. 603; State v. Gales, 77 N. C. 283. A public official, however, takes an office subject to the power of the legislature to make such subordinate changes as the public good may require.

McCall v. Webb, 125 N. C. 243; State v. Griffin, 125 N. C. 692. See, also, Wammack v. Holloway, 2 Ala. 31. Here the court said that the right to an office was "as much a species of property as any other thing capable of possession." State v. Owens, 63 Tex. 261, and Bastrop County v. Hearn, 70 Tex. 563.

termed a constitutional office, it is clear that a legislative body has no power to act or to interfere with either its existence, its duties or its rights;[13] this can only be effected by a change in the instrument creating it and prescribing its adjuncts.[14]

The legislature may also be restricted in its power to deal with public offices, even those created by the same legislative body through constitutional provisions prescribing the manner in which public offices may be created,[15] and designating official duties,[16] prohibiting the increase or decrease of emoluments during official life,[17] and fixing a method for removal from office.[18] In all of these, as well as many other respects, the legislature may be restrained and its action to be valid must be taken in accordance with such provisions.[19] Constitutional provisions relating to legislation generally must also be valid that acts concerning public offices or public officers in other respects valid shall be considered legal.[20]

[13] Morgan v. Vance, 67 Ky. (4 Bush) 325; Thomas v. Owens, 4 Md. 189; People v. Hurlbut, 24 Mich. 44; Fant v. Gibbs, 54 Miss. 396; Bridges v. Shallcross, 6 W. Va. 562. An act annexes to constitutional offices certain powers and duties and is not repugnant to that constitution.

[14] Benford v. Gibson, 15 Ala. 521; Kahn v. Sutro, 114 Cal. 316, 46 Pac. 87, 33 L. R. A. 620; Massenburg v. Bibb County Com'rs, 96 Ga. 614; Coffin v. State, 7 Ind. 157; Howard v. State, 10 Ind. 99; Lowe v. Com., 60 Ky. (3 Metc.) 237; Thomas v. Owens, 4 Md. 189; State v. Bernoudy, 40 Mo. 192; State v. Arrington, 18 Nev. 412; Devoy v. City of New York, 35 Barb. (N. Y.) 264; State v. Brewster, 44 Ohio St. 589, 9 N. E. 849.

[15] Black v. Trower, 79 Va. 123.

[16] Bunting v. Gales, 77 N. C. 283.

[17] Miller v. Kister, 68 Cal. 142; State v. Raine, 49 Ohio St. 580, 31 N. E. 741; Lloyd v. Silver Bow County, 11 Mont. 408, 28 Pac. 453.

[18] Lowe v. Com., 60 Ky. (3 Metc.) 237; State v. Wiltz, 11 La. Ann. 439; Uffert v. Voght, 65 N. J. Law, 621, 48 Atl. 574. A municipal council cannot by its action change the term of an office which has been placed by the legislature at the pleasure of the executive department.

[19] Beebe v. Robinson, 52 Ala. 66; Christy v. Sacramento County Sup'rs, 39 Cal. 3; Lyon v. Norris, 15 Ga. 480; Bryan v. Cattell, 15 Iowa, 538. In the absence of constitutional inhibition, any of the changes suggested above can be made by the legislature at pleasure.

Prince v. Skillin, 71 Me. 361; State v. Woodson, 41 Mo. 227; State v. McSpaden, 137 Mo. 628; Ter. v. Stubblefield, 5 Okl. 310; State v. Von Baumbach, 12 Wis. 310; State v. Dunn, 73 N. C. 595.

[20] Hall v. Burks, 96 Ga. 622. Special legislation. McGrath v. City of Chicago, 24 Ill. App. 19; Moreland v. Millen, 126 Mich. 381, 85 N. W. 882; State v. Herrmann, 75 Mo. 340; Dexheimer v. City of Orange, 60 N. J. Law, 111, 36 Atl.

§ 598. Definition of public office.

A public office has been defined as "an agency for the state, and the person whose duty it is to perform this agency is a public officer. This, we consider to be the true definition of a public officer in its original broad sense. The essence of it is, the duty of performing an agency, that is, of doing some act or acts, or series of acts for the state." [21] An office is a public employment or station conferred by the appointment or selection of the government and the phrase embraces the idea of tenure, duration, emolument and duties.[22] It is the duty of an office and its nature that makes a public officer and not the extent of his authority.[23] A public officer has also been defined as one "whose duties are in their nature public, that is, involving in their performance the exercise of some portion of the sovereign power, whether great or small, and in whose proper performance all citizens, irrespective of party, are interested, either as members of the entire body politic, or of some duly established division of it." [24]

Legislative, executive and judicial officers. In preceding paragraphs has been suggested the three-fold fundamental division of the government into the legislative, executive or administrative and judicial branches.

Legislative officers have been defined as "those whose duties relate mainly to the enactment of laws." Executive or administrative are "those whose duties are mainly to cause the laws to be

706; Hann v. Bedell, 67 N. J. Law, 148, 50 Atl. 364; People v. Blake, 49 Barb. (N. Y.) 9; People v. Porter, 90 N. Y. 68; State v. Cowles, 64 Ohio St. 162, 59 N. E. 895; Ladd v. Holmes, 40 Or. 167, 66 Pac. 714; State v. Maloney, 108 Tenn. 82; 65 S. W. 871; O'Connor v. City of Fon du Lac, 109 Wis. 253, 85 N. W. 327, 53 L. R. A. 831.

[21] State v. Stanley, 66 N. C. 59. This case holds that if a person is authorized to appoint to an office, this duty of itself constitutes him a public officer and that it is not necessary for one to be considered a public officer that he should be required to take an oath or be allowed a salary or fees.

[22] United States v. Hartwell, 73 U. S. (6 Wall.) 385; Hall v. Wisconsin, 103 U. S. 5; United States v. Maurice, 2 Brock. 96, Fed. Cas. No. 15,747; Hendricks v. State, 20 Tex. Civ. App. 178, 49 S. W. 705. Salary or fees are a mere incident of a public office.

[23] Leach v. Cassidy, 23 Ind. 449; Jones v. Shaw, 15 Tex. 577.

[24] United States v. Hartwell, 73 U. S. (6 Wall.) 385; Brown v. Russell, 166 Mass. 14, 32 L. R. A. 253; Attorney General v. Drohan, 169 Mass. 534; Opinion of the Justices, 3 Me. (3 Greenl.) 481; People v. Nostrand, 46 N. Y. 375; People v. Common Council of Brooklyn, 77 N. Y. 503.

executed." And judicial officers are "those whose duties are to decide controversies between individuals, and accusations made in the name of the public against persons charged with violations of the law."[25] The character of these duties and the manner of their performance will be as fully discussed in other paragraphs as the limits of this work will permit.

§ 599. Office distinguished from employment.

An employe of the government is protected in his contract of employment by constitutional provisions.[26] The relation which exists between him and the public corporation is a contract one.[27] It has been difficult at times to distinguish between an employe protected by contract rights whatever they may be and a public officer in respect to whom the sovereign or its properly delegated

[25] United States v. Fitzpatrick, 80 U. S. (13 Wall.) 568. Also known as the "Twenty per-cent" cases. "Civil offices are also usually divided into three classes—political, judicial and ministerial. Political offices are such as are not immediately connected with the administration of justice, or with the execution of the mandates of a superior, as the president or head of a department. Judicial offices are those which relate to the administration of justice, and which must be exercised by the persons appointed for that purpose and not by deputies. Ministerial offices are those which give the officer no power to judge of the matter to be done, and which require him to obey some superior, many of which are merely employments requiring neither a commission nor a warrant of appointment, as temporary clerks or messengers." Fitzpatrick v. United States, 7 Ct. Cl. 290; People v. Hays, 4 Cal. 127; People v. Ransom, 58 Cal. 558; Bishop v. City of Oakland, 58 Cal. 572; People v. Ridgley, 21 Ill. 65; State v. Taylor, 12 Ohio St. 130; O'Neil v. American Fire Ins. Co., 166 Pa. 72, 26 L. R. A. 715; State v. Womack, 4 Wash. 19; Bouvier, Law Dict., tit. "Officer."

[26] Vincenheller v. Reagan, 69 Ark. 460, 64 S. W. 278; White v. City of Alameda, 124 Cal. 95; State v. Hocker, 39 Fla. 477; People v. Kipley, 171 Ill. 44, 41 L. R. A. 775; Anne Arundel County Com'rs v. Duvall, 54 Md. 350; Attorney General v. Jochim, 99 Mich. 358, 41 Am. St. Rep. 606, 23 L. R. A. 699; Hill v. Boyland, 40 Miss. 618; State v. Valle, 41 Mo. 29; State v. Bus, 135 Mo. 325, 33 L. R. A. 616; Hardy v. City of Orange, 61 N. J. Law, 620; State v. Wilson, 29 Ohio St. 347; Com. v. Evans, 74 Pa. 124; Jones v. Hobbs, 63 Tenn. (4 Baxt.) 113; McCornick v. Thatcher, 8 Utah, 294, 17 L. R. A. 243; Shelby v. Alcorn, 36 Miss. 273, 72 Am. Dec. 169.

[27] Montgomery v. State, 107 Ala. 372; State v. Hocker, 39 Fla. 477; Bunn v. People, 45 Ill. 397; Goud v. City of Portland, 96 Me. 125; Butler v. Regents of University, 32 Wis. 124.

legislative agent may deal at their discretion.[28] A person who receives no certificate of appointment, who is not required to take an oath, has no term or tenure of office and neither discharges his duties nor exercises his powers depending directly on the authority of law but who serves upon the request written or oral of some public officer duly authorized, and responsible only to him, is usually regarded as an employe, although his duties may involve high professional skill and attain dignity and importance in connection with public affairs.[29] Since an office is associated with the ideas of tenure, duration, emolument and duties based upon some constitutional or statutory provision, the lack of these conditions or any of them make a particular service a mere employment and not an office.[30] In the notes will be found many cases deciding the question, based upon local conditions and local statutes.[31] In

[28] Castle v. Lawlor, 47 Conn. 340; Seiple v. Borough of Elizabeth, 27 N. J. Law (3 Dutch.) 407; In re Newport Charter, 14 R. I. 655.

[29] Olmstead v. City of New York, 42 N. Y. Super. Ct. (10 J. & S.) 481; State v. Jennings, 57 Ohio St. 415.

[30] United States v. Smith, 124 U. S. 525, 8 Sup. Ct. 595; Travelers' Ins. Co. v. Oswego Tp. (C. C. A.) 59 Fed. 58; Town of Salem v. McClintock, 16 Ind. App. 656, 46 N. E. 39; State v. Spaulding, 102 Iowa, 639, 72 N. W. 288. The treasurer of a state board of pharmacy elected by the members of that board who takes from them his tenure of office and his compensation is not a public officer but a mere employe of the commission. Since his position is not created nor authorized to be created by either the constitution or the statutes, neither do such authorities prescribe his duties nor delegate to him certain functions of government to be exercised by him for the benefit of the public. Poeple v. Coler, 33 App. Div. 617, 53 N. Y. Supp. 1090.

[31] *Positions considered as a public office:*

Aqueduct com'rs. People v. Civil Service, etc., Boards, 17 Abb. N. C. (N. Y.) 64. Aqueduct commissioners are local; not state officers and mere employes, therefore are subject to examination by the civil service board of the municipality.

Aldermen. Clarke v. City of Rochester, 24 Barb. (N. Y.) 446; In re Newport Charter, 14 R. I. 655.

Attendant. Moser v. City of New York, 21 Hun (N. Y.) 163. An "attendant" of the marine court of the city of New York holds an office under Laws 1870, c. 382, § 3, relative to increases in salaries of persons then in office or their successors. See, also, O'Brien v. City of New York, 84 Hun, 50, 32 N. Y. Supp. 34, where an attendant on the court of general sessions in New York city is held an officer of the court.

Board of local assessments. State v. Hocker, 39 Fla. 477.

Board of police com'rs. Gooch v. Town of Exeter, 70 N. H. 413, 48 Atl. 1100; Opinion to the Governor, 22 R. I. 654, 49 Atl. 36; Burch v. Hardwicke, 30 Grat. (Va.) 24. A municipal chief of police is

Colorado it has been held that every state official appointed or elected, whose duties are defined by statute, are in their nature

an officer of the state and not of the municipality in which he performs his duties.

Board of road com'rs. Doll v. State, 45 Ohio St. 445, 15 N. E. 293. A member of a board of public works is "an officer elected or appointed to an office of trust or profit in this state." Ohio Rev. St. § 6969. He cannot become interested directly or indirectly in any contract for the purchase of property or fire insurance for the use of a public corporation without committing a crime as provided in said section. Painter v. St. Clair, 98 Va. 85, 34 S. E. 989.

Building inspector. People v. Coler, 33 App. Div. 617, 53 N. Y. Supp. 1090.

City attorney. State v. Krez, 88 Wis. 135. The city attorney is a city officer within the constitution, art. 13, § 9, which provides that all city officials shall be elected by the electors of such cities or appointed by the authorities as the legislature may designate.

City com'rs. Sttae v. May, 106 Mo. 488, 17 S. W. 660.

City magistrates. Kelly v. Van Wyck, 35 Misc. 210, 71 N. Y. Supp. 814.

City jailer. State v. Canavan, 17 Nev. 422.

City justice of the peace. Hulaniski v. Ogden City, 20 Utah, 233, 57 Pac. 876.

Chief clerk of detective bureau. City of Chicago v. Luthardt, 191 Ill. 516.

Clerk. Vaughn v. English, 8 Cal. 39; MacDonald v. City of Newark, 55 N. J. Law, 267, 26 Atl. 82.

Clerk in department of state. Nance v. Stuart, 12 Colo. App. 125, 54 Pac. 867. A constitutional provision making salaries of public officials preferred claims against state funds includes all employes in all departments of the state government.

Clerk of courts. Dolan v. City of New York, 6 Hun (N. Y.) 506.

Clerk police court. People v. Tobey, 153 N. Y. 381.

Clerk police justice. People v. Tobey, 8 App. Div. 468, 40 N. Y. Supp. 577.

County assessors. State v. Arrington, 18 Nev. 412.

County collectors. Ex parte McCabe, 33 Ark. 396.

Collectors. Ford v. State Harbor Com'rs, 81 Cal. 19.

County superintendent of schools. O'Herrin v. Milwaukee County, 67 Wis. 142.

County treasurer. Riddle v. Bedford County, 7 Serg. & R. (Pa.) 386.

County judge. In re Compensation of County Judges, 18 Colo. 272, 32 Pac. 549, 19 L. R. A. 792.

Commissioners of appraisal. In re Gilroy, 11 App. Div. 65, 42 N. Y. Supp. 640.

County board education. State v. Thompson, 122 N. C. 493, 29 S. E. 720.

County fish and game wardens. State v. Halliday, 61 Ohio St. 171, 55 N. E. 175.

Deputy food com'r. State v. Cornell, 60 Neb. 276, 83 N. W. 72.

Deputy sheriff. State v. Bus, 135 Mo. 325, 36 S. W. 636, 33 L. R. A. 616.

Detectives. Brown v. Russell, 166 Mass. 14, 43 N. E. 1005, 32 L. R. A. 253.

Enrolling clerk house representa-

tives. State v. Gardner, 43 Ala. 234.

Fire com'rs. City of Savannah v. Grayson, 104 Ga. 105, 30 S. E. 693.

Fire marshal. People v. Scannel, 22 Misc. 298, 49 N. Y. Supp. 1096.

Harbor master. Goud v. City of Portland, 96 Me. 125, 51 Atl. 820.

Inspector weights and measures. State v. Lamantia, 33 La. Ann. 446.

Jury com'rs. In re Brenner, 67 App. Div. 375, 73 N. Y. Supp. 689, reversing 35 Misc. 212, 70 N. Y. Supp. 744.

Mayor or other executive official. Crovatt v. Mason, 101 Ga. 246, 28 S. E. 891.

Medical sup't. hospital for insane. State v. Wilson, 29 Ohio St. 347.

Policemen. Johnson v. State, 132 Ala. 43, 31 So. 493; Farrell v. City of Bridgeport, 45 Conn. 191; City of Jacksonville v. Allen, 25 Ill. App. 54; Everill v. Swan, 17 Utah, 514, 55 Pac. 68. Police officers are bound under the laws of the state to perform duties of a public nature and are to be regarded, therefore, as public or city officers, not as mere agents of a municipality although they may be appointed to office by such. Smith v. Bryan, 100 Va. 199, 40 S. E. 652.

Police judge. Todd v. Johnson, 99 Ky. 548, 36 S. W. 987, 33 L. R. A. 399.

Presidential electors. Montgomery v. State, 107 Ala. 372, 18 So. 157; People v. Henry, 62 Cal. 557.

Probate judge's clerk. Scruggs v. State, 111 Ala. 60, 20 So. 642.

Police surgeon. People v. Board of Police, 75 N. Y. 38.

Postmaster. Spence v. Harvey, 22 Cal. 336; Rodman v. Harcourt, 43 Ky. (4 B. Mon.) 224.

Physician in county hospital. People v. Harrington, 63 Cal. 257.

Reporter supreme court. Kerr v. Jones, 19 Ind. 351.

Representative. Morril v. Haines, 2 N. H. 246; Hill v. Boyland, 40 Miss. 619.

Sheriff. Peeling v. County of York, 113 Pa. 108.

State house com'rs. State v. Kennon, 7 Ohio St. 546.

State printer. Ellis v. State, 4 Ind. 1. The right to do the state printing is an office of profit and trust the sale of which is prohibited by principles of public policy.

State Sup't oil inspection. State v. Hyde, 129 Ind. 296, 28 N. E. 186, 13 L. R. A. 79.

State election com'r. Sweeney v. Coulter, 109 Ky. 295, 58 S. W. 784.

Steam boiler inspector. People v. Goodykoontz, 22 Colo. 507, 45 Pac. 414.

School dist. trustee. Ogden v. Raymond, 22 Conn. 379.

Street com'r. Bowden v. City of Rockland, 96 Me. 129.

Special tax com'rs. Kimble v. City of Peoria, 140 Ill. 157, 29 N. E. 723.

Street inspector. State v. Martin, 46 Conn. 479; Rogers v. City of Buffalo, 3 N. Y. Supp. 671. But see Meyers v. City of New York, 69 Hun, 291, 23 N. Y. Supp. 484, which holds that an inspector of a street grading is not a public officer, but a mere employe of the department of public works.

Supervisors. Bruner v. Madison County, 111 Ill. 11.

Supervisors waterworks. State v. Shannon, 133 Mo. 139, 33 S. W. 1137.

Suspension bridge com'rs. People v. Van Wyck, 27 Misc. 439, 59 N. Y. Supp. 134. Commissioners appointed to supervise the construction of a suspension bridge over

East River in New York City are municipal officers.

Trustees independent school dist. Kimbrough v. Barnett, 93 Tex. 301, 55 S. W. 120.

Village marshal. State v. Schram, 82 Minn. 420, 85 N. W. 155.

Not considered public officers:

Aldermen. State v. Kirk, 44 Ind. 401. Not a "lucrative office" within the meaning of Ind. Const. art. 2, § 9, which provides that no person shall hold more than one lucrative office at the same time.

Assistant sec'y of com'rs of docks. Jackson v. City of New York, 87 Hun, 296, 34 N. Y. Supp. 346.

Assistant postmaster. Coleman v. Frazier, 4 Rich. Law (S. C.) 146; Attorney Cohen v. Wright, 22 Cal. 293.

Architect. State v. Broome, 61 N. J. Law, 115, 38 Atl. 841; Colquitt v. Simpson, 72 Ga. 501.

Banking committee authorized by legislature. Attorney General v. Drohan, 169 Mass. 534.

Building inspectors. State v. Longfellow, 93 Mo. App. 364, 67 S. W. 665.

Capital com'rs. Ter. v. Scott, 3 Dak. 357.

Clerk in office of collector of customs. United States v. Smith, 124 U. S. 525, 8 Sup. Ct. 595.

City clerk. Mohan v. Jackson, 52 Ind. 599.

City notary. State v. Castell, 22 La. Ann. 15.

City surveyor. Wardlaw v. City of New York, 61 N. Y. Super. Ct. (29 J. & S.) 174, 19 N. Y. Supp. 6. A city surveyor of New York City whose position becomes vacant only by death, resignation or removal and who receives no salary, is not an officer within Laws 1882, § 55.

Commissioners. Conrey v. Copland, 4 La. Ann. 307.

Com'rs for location of new state house. Bunn v. People, 45 Ill. 397.

Com'rs to superintend construction of public buildings. McArthur v. Nelson, 81 Ky. 67.

County tax collector. Com. v. *Blackwell*, 97 Ky. 314, 30 S. W. 642. A tax collector is not a "district officer" within the meaning of constitution, § 234.

Deputy county clerk. Nelson v. Troy, 11 Wash. 435, 39 Pac. 974.

District school teacher. Seymour v. Over-River School Dist., 53 Conn. 509.

Electric light trimmer. State v. Anderson, 57 Ohio St. 429.

Engineer stationary engine. State v. Anderson, 57 Ohio St. 429.

Enrolling clerk, state legislature. State v. Gardner, 43 Ala. 234.

Firemen. State v. Jennings, 57 Ohio St. 415.

Grading com'rs. In re Fifth Ave., 91 Hun, 259, 36 N. Yupp. 141.

Health officer. Delano v. Goodwin, 48 N. H. 203.

Mayor. Britton v. Steber, 62 Mo. 370. The mayor of a city is not a "city officer" within the ceaning of Mo. Const.

Messenger. Smith v. City of New York, 67 Barb. (N. Y.) 223.

Police jurymen. State v. Montgomery, 25 La. Ann. 138.

Police officers. Burroughs v. Eastman, 93 Mich. 433, 53 N. W. 532; Id., 101 Mich. 419, 59 N. W. 817, 24 L. R. A. 859. Police officers not "city officials" within meaning of How. St. § 6576, as amended.

President city council. State v. Kiichli, 53 Minn. 147, 19 L. R. A. 779. The president of the council is not an "officer" of a city within the meaning of the city charter or of the state constitution.

Public printer. Brown v. Turner, 70 N. C. 93.

continuous, and relate to the administration of public affairs, is an officer of either of the three departments of government.[32]

Recorder Bangor municipal court. Morrison v. McDonald, 21 Me. 550. Not a judicial officer.

Sheriff. State v. Dillon, 90 Mo. 229, 2 S. W. 417. A sheriff is not a "state officer" within meaning of Mo. Const. art. 6, § 12, and the 5th section of the amendment adopted in 1884 giving the supreme court of Missouri jurisdiction in cases where "any state official is a party."

School board. Worcester County School Com'rs v. Goldsborough, 90 Md. 193.

School dist. trustees. People v. Bennett, 54 Barb. (N. Y.) 480. Trustees of school districts are not considered either county, city, town or village officers.

Special deputy sheriff. Kavanaugh v. State, 41 Ala. 399.

Supt. public instruction. City of Baltimore v. Lyman, 92 Md. 591, 48 Atl. 145, 52 L. R. A. 406.

Special road com'r. Alcona County v. White, 54 Mich. 503.

Supt. waterworks. Town of Salem v. McClintock, 16 Ind. App. 656, 46 N. E. 39; Cramer v. Water Com'rs of New Brunswick, 57 N. J. Law, 478, 31 Atl. 384.

Tax lister. Rowell v. Horton, 58 Vt. 1.

Treasurer commission of pharmacy. State v. Spaulding, 102 Iowa, 639.

Waterworks com'rs. David v. Portland Water Committee, 14 Or. 98.

Generally:

City of Anniston v. Davis, 98 Ala. 629; Bradford v. Justices of Inferior Ct., 33 Ga. 332. Where an individual has been appointed or elected to a position in a manner prescribed by law, has a designation or title given him and has the power to exercise functions concerning the public legally assigned to him, he must be regarded as a public officer. City of Savannah v. Grayson, 104 Ga. 105; State v. Curry, 134 Ind. 133; Griffin v. Town of Corydon, 19 Ky. L. R. 1872, 44 S. W. 629. The term "secretary" held synonymous with "clerk." Bouanchaud v. D'Hebert, 21 La. Ann. 138; Spencer v. Griffith, 74 Minn. 55; State v. Shannon, 133 Mo. 139; MacDonald v. City of Newark, 55 N. J. Law, 267; People v. Barker, 14 Misc. 360, 35 N. Y. Supp. 727. Defining the word "deputy" as used in Laws 1888, c. 119, § 1, as amended by Laws of 1892, c. 577 and c. 681, § 9.

Quintard v. City of New York, 51 App. Div. 233, 64 N. Y. Supp. 904. Construing Greater N. Y. charter, § 1536, providing a plan of transfer and apportionment of all "subordinates and employes." People v. Nixon, 158 N. Y. 221. Distinguishing between local and state officers. State v. Thompson, 122 N. C. 493; Com. v. Evans, 74 Pa. 124; Everill v. Swan, 17 Utah, 514, 55 Pac. 68; State v. Womack, 4 Wash. 19; Laramie County Com'rs v. Stone, 7 Wyo. 280, 39 L. R. A. 594. See, also, cases collected in 23 Am. & Eng. Enc. Law (2d ed.) p. 324; Throop, Pub. Off. §§ 12–15; Mechem, Pub. Off. §§ 27–62, inclusive.

[32] Parks v. Soldiers' & Sailors' Home Com'rs, 22 Colo. 86, 43 Pac. 542. "We shall not extend this opinion beyond the case presented, and for the purposes of this case

§ 600. Public office; how secured.

A public officer acting as he does as an agent of and for and on behalf of his principal, a public corporation, must necessarily, in order to have good title to his office, have secured his right to perform the duties appertaining to it in some manner prescribed by law [33] and either through an appointment or election.[34] An in-

it is sufficient to say that every officer of this state who holds his position by election or appointment and not by contract, and whose duties are defined by statute and are in their nature continuous, and relate to the administration of the affairs of the state government, and whose salary is paid out of the public funds, is a public officer of either the legislative, executive, or judicial department of the government."

[33] Thompson v. State, 21 Ala. 48; People v. Waite, 102 Cal. 251, 36 Pac. 518; Pinney v. Brown, 60 Conn. 164; White v. Screven County, 112 Ga. 802; Ward v. Cook, 78 Ill. App. 111. One cannot be city official either de facto or de jure without a legislative act creating such office.

People v. Blair, 82 Ill. App. 570; Kiley v. Forsee, 57 Mo. 390. An agent's authority may be implied from the recognition by the corporation of his acts; this rule applied to a deputy city engineer where the statute requiring a certificate of his appointment to be filed with the register had not been complied with. Poinier v. State, 44 N. J. Law, 433. An appointment under an unconstitutional act may be subsequently ratified. Dickinson v. Jersey City, 68 N. J. Law, 99, 52 Atl. 278; People v. Ransom, 56 Barb. (N. Y.) 514. A city corporation has such powers in respect to the appointment of charter officers as the charter affirmatively provides.

[34] Ames v. Port Huron Log Driving Co., 11 Mich. 139. "It is difficult to perceive by what process a public office can be obtained or exercised without either election or appointment. The powers of government are parceled out by the constitution, which certainly contemplates some official responsibility. Every officer not expressly exempted is required to take an oath of office as a preliminary to discharging his duties. It is absurd to suppose that any official power can exist in any person by his own assumption, or by the employment of some other private person; and still more so to recognize in such an assumption a power of depriving individuals of their property. Such claims are inconsistent with any idea of government whatever. And it is plain that the exercise of such a power is an act in its nature public and not private."

Kokes v. State, 55 Neb. 691, 76 N. W. 467. The population of a county cannot be ascertained by arbitrarily assuming that the number of voters is a certain proportion of the whole population in order to establish the right of such a county to a certain office because it contains a prescribed population.

Baker v. Hobgood, 126 N. C. 149, 35 S. E. 253. An appointment by a public school board made by one afterwards adjudged to be the de

dividual cannot assume an office and perform his duties except by authority of law without being considered an intruder.[35] The power of appointment will be considered first, and later the rights to a particular office of an individual derived from an election. The power to appoint may be found either in the constitution[36] or some statute.[37] Such provisions vary in their details; some

jure board is good as against the appointee of a number of persons claiming to be such board.

[35] Town of Plymouth v. Painter, 17 Conn. 585; Hooper v. Goodwin, 48 Me. 80; Tucker v. Aiken, 7 N. H. 113; People v. Station, 73 N. C. 546; Hamlin v. Kassafer, 15 Or. 456, 3 Am. St. Rep. 176; McCraw v. Williams, 33 Grat. (Va.) 510; Town of Plymouth v. Painter, 17 Conn, 585, 44 Am. Dec. 574.

[36] Ward v. Churchman, 3 Pen. (Del.) 361, 51 Atl. 49; Taylor v. Canyon County, 7 Idaho, 171, 61 Pac. 521; State v. Hyde, 121 Ind. 20, 22 N. E. 644; State v. Gorby, 122 Ind. 17; State v. Washburn, 167 Mo. 680, 67 S. W. 592. Holding unconstitutional act of June 19, 1899, creating a board of three election commissioners in cities over 100,000 inhabitants to be appointed by the governor. Brady v. West, 50 Miss. 68. An act creating a new county and conferring the power upon the governor to appoint a chancery clerk to continue in office until the next general election is constitutional under Miss. Const. art. 4, § 37, and art. 5, § 13. State v. Bacon, 6 Neb. 286; People v. Lathrop, 71 Hun, 202, 24 N. Y. Supp. 754. The power of appointing the keeper of a prison by the superintendent, agent and warden is subject to legislative control under Const. art. 5, § 4.

People v. Blair, 21 App. Div. 213, 47 N. Y. Supp. 495; MacDonald v. City of New York, 42 App. Div. 263, 59 N. Y. Supp. 16. Construing § 151 of Greater New York charter relative to the appointment by the comptroller of an auditor to receive and audit all claims against the city. In re Brenner, 35 Misc. 212, 70 N. Y. Supp. 744, affirming 67 App. Div. 375, 73 N. Y. Supp. 689; People v. Bledsoe, 68 N. C. 457; Taggart v. Com., 102 Pa. 354. City comptroller of the city of Philadelphia is a county officer under the control of the governor and not the city council.

State v. Sheldon, 8 S. D. 525, 67 N. Y. 613. Const. of S. D. art. 4, § 8 provides that "When an office shall, from any cause, become vacant and no mode is provided by the constitution or law for filling such vacancy, the governor shall have the power to fill such vacancy by appointment." Under this provision the governor is authorized to fill vacancies in the board of regents as affected by Laws 1890, c. 6, § 1.

[37] Johnson v. State, 132 Ala. 43, 31 So. 493; Harwood v. Perrin, (Ariz.) 60 Pac. 891; Higgins v. City of San Diego, 131 Cal. 294, 63 Pac. 470; Brophy v. Hyatt, 10 Colo. 223, 15 Pac. 399; City of Americus v. Perry, 114 Ga. 871, 40 S. E. 1004. A state general assembly can take from a municipal corporation its charter power respecting the police and their appointment.

Sheridan v. Colvin, 78 Ill. 237;

designate with explicitness the source of appointive authority and the manner of its exercise,[38] while others grant the authority in broad terms leaving the manner and the time of its exercise to usage and custom or the discretion of the individual in whom the appointive power is lodged.[39] Statutory authority must comply with constitutional provisions regarding special legislation and the passage of laws. A failure in this respect will render the legislation invalid.[40] The power to appoint when once granted by either

People v. Inglis, 161 Ill. 256; Adsit v. Osmun, 84 Mich. 420, 48 N. W. 31, 11 L. R. A. 534; State v. Griffen, 69 Minn. 311; State v. Ritt, 76 Minn. 531, 79 N. W. 535. Acts providing for the appointment of officers must comply with constitutional requirements as to special legislation. Laws 1899, c. 140, § 1, relative to the election and appointment of county assessors in counties with a designaed population held unconstitutional as being special legislation regulating the affairs of counties and the attempted classification of population being incomplete, arbitrary and evasive of constitutional provisions. Sales v. Barber Asphalt Pav. Co., 166 Mo. 671, 66 S. W. 979; Moores v. State, 54 Neb. 486, 74 N. W. 823; Foley v. City of Hoboken, 61 N. J. Law, 478; Lowthorp v. City of Trenton, 61 N. J. Law, 484; People v. Scheu, 167 N. Y. 292, affirming 60 App. Div. 592, 69 N. Y. Supp. 597; Cunningham v. Sprinkle, 124 N. C. 638, 33 S. E. 138; State v. Meares, 116 N. C. 582.

[38] Polk v. James, 68 Ga. 128; Weir v. State, 96 Ind. 311. Where the statutes provide that the county commissioners shall only elect a secretary after an election, the commissioners cannot elect another person secretary until after the expiration of the year. Eliason v. Coleman, 86 N. C. 235.

[39] State v. O'Leary, 64 Minn. 207, 66 N. W. 264. A prospective appointment to a vacancy made by one empowered to fill it when it arises is valid. State v. Irwin, 5 Nev. 111. An appointment to a new office to take effect at some future day, when the act creating the office goes into effect, is valid. Haight v. Love, 39 N. J. Law, 14; Whitney v. Van Buskirk, 40 N. J. Law, 463; Fagan v. City of New York, 84 N. Y. 348; People v. Hasbrouck, 11 Utah, 291, 39 Pac. 918; Smith v. Dyer, 1 Call (Va.) 562.

[40] Pittsburgh & S. Coal Co. v. Louisiana, 156 U. S. 590. Act La. 1888, No. 147, providing for the appointment of two coal gaugers does not violate act of congress Feb. 20, 1811, admitting the state of Louisana on an equal footing with the original states and providing that the Mississippi River and other navigable waters leading into it or the Gulf of Mexico shall be free highways.

Sabin v. Curtis, 3 Idaho, 662, 32 Pac. 1130; People v. Onahan, 170 Ill. 449; Morrison v. People, 196 Ill. 454. The Illinois civil service act does not violate that provision of the constitution placing the management of the affairs of Cook County in the board of commissioners.

Wilcox v. Paddock, 65 Mich. 23, 31 N. W. 609. An act which au-

the constitution or statutes of a state is not considered a grant of a right which becomes absolute or vested in its nature.[41] The same authority can in a like manner change or wholly take away any right which may have been granted.[42]

(a) Collateral attack on title to office. Whatever may be the manner in which one obtains his possession and color of title to an office, the presumption of law operates in favor of the validity of his title,[43] and the rule almost universally obtains that the subject of his right to the office and to perform his duties cannot be raised collaterally or in any proceedings except those brought directly to determine the question.[44]

(b) Estoppel. The principle also obtains that one who has exercised the functions of a public office is estopped to deny that he

thorizes the judge of probate to appoint a superintendent of the work of improvement on a local river with power to assess taxes upon lands benefited is unconstitutional as an infringement of local self-government.

City of St. Louis v. Dorr, 145 Mo. 466, 42 L. R. A. 686; State v. Stuht, 52 Neb. 209; State v. Ruhe, 24 Nev. 251, 52 Pac. 274. An act incorporating a city and naming the first municipal officers is not an infringement on the constitutional right of the state executive to make appointments.

Varney v. Kramer, 62 N. J. Law, 483, 41 Atl. 711; Meredith v. City of Perth Amboy, 60 N. J. Law, 134; Johnson v. Martin, 75 Tex. 33, 12 S. W. 321. An act authorizing the governor to appoint public weighers for designated cities as in his judgment may be deemed expedient, does not conflict with constitution, art. 3, § 56, prohibiting the legislature, except as otherwise provided, to pass any local or special law "regulating the affairs of counties, cities, towns, wards or school districts." Richmond Mayoralty Case, 19 Grat. (Va.) 673; Ice v. Marion County Ct., 40 W. Va. 118, 20 S. E. 809.

[41] Sansbury v. Middleton, 11 Md. 296.

[42] Kaufman v. Stone, 25 Ark. 336.

[43] Pueblo County Com'rs v. Gould, 6 Colo. App. 44, 39 Pac. 895; Delphi School Dist. v. Murray, 53 Cal. 29; Allen v. State, 21 Ga. 217; State v. Nield, 4 Kan. App. 626, 45 Pac. 623; Carter v. Sympson, 47 Ky. (8 B. Mon.) 155; Hutchings v. Van Bokkelen, 34 Me. 126; Callison v. Hedrick, 15 Grat. (Va.) 244.

[44] Peyton v. Brent, 3 Cranch, 424, Fed. Cas. No. 11,056; Satterlee v. City of San Francisco, 23 Cal. 314; Parish of St. Helena v. Burton, 35 La. Ann. 521; State v. Brooks, 39 La. Ann. 817; Fitchburg R. Co. v. Grand Junction R. & Depot Co., 83 Mass. (1 Allen) 552; Ballou v. O'Brien, 20 Mich, 304; Tower v. Welker, 93 Mich. 332, 53 N. W. 527; Van Dorn v. Mengedoht, 41 Neb 525, 59 N. W. 800; Bean v. Thompson, 19 N. H. 290; Parker v. Baker, 8 Paige (N. Y.) 428; Crosier v. Cornell Steam Boat Co., 27 Hun (N. Y.) 215; People v. Orleans County

was properly appointed or elected for the purpose of escaping liability,[45] and the rule includes as well the sureties on the official bond.[46]

§ 601. Power to appoint.

The power to appoint or select subordinate officers or employes is regarded in its fundamental nature as an executive or administrative act,[47] and is usually vested in an administrative or executive official or body [48] or is exercised in some cases by an executive

Ct., 28 Hun (N. Y.) 14; Lopez v. State, 42 Tex. 298; McGregor v. Balch, 14 Vt. 428.

[45] People v. Jenkins, 17 Cal. 500; Boone County v. Jones, 54 Iowa, 699, 7 N. W. 155; Taylor v. State, 51 Miss. 79; Kelly v. State, 25 Ohio St. 567; State v. Sellers, 7 Rich. Law (S. C.) 368.

[46] People v. Huson, 78 Cal. 154, 20 Pac. 369; Lucas v. Shepherd, 16 Ind. 368; City of Paducah v. Cully, 72 Ky. (9 Bush) 323; Jones v. Gallatin County, 78 Ky. 491; School Directors of Lafayette v. Judice, 39 La. Ann. 896; State v. Powell, 40 La. Ann. 234, 4 So. 46; Horn v. Whittier, 6 N. H. 88; Kelly v. State, 25 Ohio St. 567; King v. Ireland, 68 Tex. 682, 5 S. W. 499. See, also, Shelby v. Alcorn, 36 Miss. 273.

[47] Ackley's Case, 4 Abb. Pr. (N. Y.) 35; Dillon v. Whatcom County, 12 Wash. 391, 41 Pac. 174. The power of appointing deputy county officers is discretionary with the board of county commissioners.

[48] Oregon v. Jennings, 119 U. S. 74; Conger v. Gilmer, 32 Cal. 75; In re Bulger, 45 Cal. 553; People v. Reid, 11 Colo. 138; Morgan v. City of Denver, 14 Colo. App. 147, 59 Pac. 619. Under the charter of Denver, the city treasurer is not the head of the department but of a bureau and hence has no authority to appoint or remove his subordinate officers or employes except the deputy. This power rests solely in the common council.

In re Inman, 8 Idaho, 398, 69 Pac. 120. An act creating a state board of medical examiners to be appointed by the governor without the concurrence of the state senate does not violate that provision of the Idaho constitution which forbids any person charged with the exercise of powers properly delegated to either one of the three departments, viz., the legislative, executive or judicial, from exercising powers belonging to others.

Keating v. Stack, 116 Ill. 191; Overshiner v. State, 156 Ind. 187; Davis v. State, 7 Md. 151; Smith v. Thursby, 28 Md. 244; Opinion of Justices, 138 Mass. 601; Rittenhouse v. Bigelow, 38 Neb. 543, 57 N. W. 387; Redell v. Moores, 63 Neb. 219, 88 N. W. 243, 55 L. R. A. 740; Denver v. Hobart, 10 Nev. 28; Hartshorn v. Schoff, 51 N. H. 316; Bownes v. Meehan, 45 N. J. Law, 189. A retiring board of county freeholders cannot fill an office not becoming vacant during their own term of office.

Adams v. Haines, 48 N. J. Law, 25. The board of choosen freeholders of a county may appoint such officers for the management of the

officer concurrently with a legislative or administrative body,[49] although the existence of the power of appointment is not conclusive that the one to whom it is given is an executive or an administrative officer.[50] The principle stated above does not prevent legislative or judicial officers or bodies from selecting their subordinate officers and employes;[51] although the objection has been raised at times to the exercise of such a power that it is a substantial encroachment upon the prerogatives and powers of other departments.[52] The objection has not been sustained because the courts have held that every judicial or legislative body has the inherent power to avail itself of such implied powers or agencies as may be necessary to enable it to properly perform, without fear of outside compulsion, the functions and the duties which devolve

poor house as to them may seem necessary. They may abolish the office or change the incumbent. Bakely v. Nowrey, 68 N. J. Law, 95, 52 Atl. 289. Where the power of appointment is attached to an executive office it can be legally exercised up to the very moment of the expiration of the term.

Palmer v. Foley, 44 How. Pr. (N. Y.) 308; Sturgis v. Spofford, 45 N. Y. 446; People v. Leavy, 47 App. Div. 97, 62 N. Y. Supp. 161, affirming 28 Misc. 246, 59 N. Y. Supp. 408; People v. Board of Fire Com'rs, 73 N. Y. 437; People v. Comstock, 78 N. Y. 356; Griggs v. Weston County Com'rs, 5 Wyo. 274, 40 Pac. 304.

[49] In re Marshalship for the Southern & Middle Districts of Alabama, 20 Fed. 379; Somerville v. Wood, 129 Ala. 369, 30 So. 280; People v. Bissell, 49 Cal. 407; State v. Rareshide, 32 La. Ann. 934; Taylor v. Hebden, 24 Md. 202; Merrill v. School Com'rs, 70 Md. 269, 16 Atl. 723, 2 L. R. A. 844; Calvert County Com'rs v. Hellen, 72 Md. 603, 20 Atl. 130, 11 L. R. A. 224; Hooper v. Creager, 84 Md. 195, 35 L. R. A. 202; Clarke v. City of Trenton, 49 N. J. Law, 349, 8 Atl. 509; People v. Tremain, 9 Hun (N. Y.) 573; People v. Kneissel, 58 How. Pr. (N. Y.) 404; Kip v. City of Buffalo, 123 N. Y. 152, 25 N. E. 165, 9 L. R. A. 493; State v. Tate, 68 N. C. 546; Brumby v. Boyd, 28 Tex. Civ. App. 164, 66 S. W. 874.

[50] People v. Freeman, 80 Cal. 233; People v. Hoffman, 116 Ill. 587; State v. Peelle, 124 Ind. 515, 8 L. R. A. 228; City of Baltimore v. State, 15 Md. 376; Kimball v. Alcorn, 45 Miss. 151; Ex parte Lucas, 160 Mo. 218; State v. Swift, 11 Nev. 128; In re Brenner, 35 Misc. 212, 70 N. Y. Supp. 744; State v. George, 22 Or. 142, 16 L. R. A. 737; Eddy v. Kincaid, 28 Or. 537.

[51] Horan v. Lane, 53 N. J. Law, 275, 21 Atl. 302; Gouldey v. Atlantic City, 63 N. J. Law, 537, 42 Atl. 852; O'Rourke v. City of Newark, 66 N. J. Law, 109, 48 Atl. 578; People v. McDonald, 69 N. Y. 362. The legislative appointment of commissioners authorized to widen a designated highway, sustained. Willis v. Angell, 19 R. I. 617, 35 Atl. 677.

[52] Doyle v. Aldermen of Raleigh, 89 N. C. 133; Shaw v. Jones, 4 Ohio N. P. 372.

upon it under the three-fold assignment of sovereign duties and powers.[53] The power of appointment may depend also upon some sudden exigency or emergency such as the unexpected failure of a public official to perform the duties of his office.[54] To entitle one under these circumstances to legally perform the duties of the office, the act of appointment should specify the existence of the conditions which authorizes the exercise of the appointive power.[55] Where the power of appointment is vested in a designated board or number of public officers, ordinarily the concurrent action as a board of a majority is sufficient for a legal appointment,[56] al-

[53] State v. Westfall, 85 Minn. 437, 89 N. W. 175, 57 L. R. A. 297. "Judicial power includes the authority to appoint all necessary subordinate officers and assistants essential to the conducting of judicial business. The examiners provided for by this act are subordinate officers or assistants of the courts, to aid them in the discharge of the judicial duties imposed upon them by the act. It was, therefore, competent and proper for the legislature to provide for their appointment by the courts, as much so as would be a statute authorizing them to appoint a stenographer or a receiver in insolvency."

[54] State v. Lovell, 70 Miss. 309, 12 So. 341; State v. Mayhew, 21 Mont. 93, 52 Pac. 981. The power to fill legislative appointment county offices temporarily is an implied power accompanying the express grant of the legislative power to create new counties. King v. Duryea, 45 N. J. Law, 258; People v. Hall, 104 N. Y. 170, 10 N. E. 135; Pippin v. State, 34 Tenn. (2 Sneed) 43.

[55] Pippin v. State, 34 Tenn. (2 Sneed) 43.

[56] Benson v. People, 10 Colo. App. 175, 50 Pac. 212. Where the law authorizes the majority of a board consisting of ten members to fill vacancies, the election of a member at a meeting where five members are present is void. State v. West, 62 Neb. 461, 87 N. W. 176. "The only question involved in the controversy is as to the proper appointing power when a vacancy occurs by resignation in a board of supervisors in a county under township organization. It appears from the information that a vacancy occurred in the board of supervisors of Cuming county on account of the resignation of the number from the third supervisor district of said county. After this vacancy occurred, the county clerk, the county treasurer and the county judge attempted to fill the vacancy by the appointment of Owen Kane, who immediately filed his bond, subscribed to the oath of office and demanded the office. The remaining members of the board of supervisors refused to recognize the appointment so made, and proceeded to appoint the respondent, Frank West, who immediately qualified and entered upon the discharge of his duties under the appointment made by the members of the board. * * * Section 7 of this act (township organization) provides: 'The county commissioners of any such county having adopted township organization shall each be assigned to

though some authorities maintain that their unanimous action is necessary.[57] A substantial compliance with the provisions of the appointing law is generally all that is necessary on the part of such a board to validate action by them in appointing subordinate officials.[58]

§ 602. Confirmatory action.

The appointing power when once granted may consist of the right to make an appointment or selection without securing directly or indirectly the approval of some designated body.[59] The assent, however, of some confirmatory legislative body may be required by law.[60] Under the United States government the presi-

the supervisor district in which he may reside, or if two reside in one district then the one residing nearest the center of such district shall be the supervisor of such district and the other shall be the supervisor for the district nearest to his residence and the three shall forthwith appoint four supervisors to fill the vacancies in the other four supervisor districts, and the newly appointed supervisors shall duly qualify and file their oath of office and bond with the county judge within ten days after such appointment. Any vacancy shall be filled by appointment by the remaining supervisors.' We think that a fair construction of this section makes the concluding sentence confer the authority on the remaining members of the board to fill any vacancies that may occur in the board."

[57] Keyser v. Upshur, 92 Md. 726, 48 Atl. 399, 404.

[58] Bath County v. Daugherty, 24 Ky. L. R. 350, 68 S. W. 436; State v. Seavey, 22 Neb. 454. "An act providing that 'in each city there shall be a board of fire and police to consist of the mayor and four electors to be appointed by the governor not more than two of whom shall be of the same political party,' is directory merely and an appointment made irrespective of the political qualifications is legal." State v. Bennett, 22 Neb. 470, 35 N. W. 235; Bohan v. Weehawken Tp., 65 N. J. Law, 490, 47 Atl. 446; People v. Mills, 32 Hun (N. Y.) 459.

[59] People v. Perry, 79 Cal. 105, 21 Pac. 423; Gilboy v. City of Detroit, 115 Mich. 121; Attorney General v. McCabe, 172 Mass. 417; States Prison v. Day, 124 N. C. 362, 32 S. E. 748, 46 L. R. A. 295; Burch v. Hardwicke, 23 Grat. (Va.) 51.

[60] People v. Fitch, 1 Cal. 519; People v. Mizner, 7 Cal. 519; People v. Addison, 10 Cal. 1; People v. Freese, 76 Cal. 633, 18 Pac. 812; Wetherbee v. Cazneau, 20 Cal. 503; People v. Bissell, 49 Cal. 408. Action by a confirmatory board is necessary to the validity of the appointment. People v. Tyrrell, 87 Cal. 475; Monash v. Rhodes, 27 Colo. 235, 60 Pac. 569, affirming 11 Colo. App. 404, 53 Pac. 236; State v. Churchman, 3 Pen. (Del.) 361, 51 Atl. 49; State v. Murphy, 32 Fla. 138; In re Inman, 8 Idaho, 398, 69 Pac. 120; Calvert County Com'rs v. Helen, 72 Md. 603, 20 Atl. 130; Com. v. Ginn, 23 Ky. L. R. 521, 63 S. W. 467;

dent has, through the Federal constitution, the right to make designated appointments to office but these appointments or selections must be confirmed by the United States senate.[61] The greater number of instances of a delegation of the appointing power by the people grant to designated officials the right to make the prescribed appointments or selections of subordinate officials and employes without securing the consent directly or otherwise of a confirming body.[62] Where action by a confirmatory board is

Shepherd v. Haralson, 16 La. Ann. 134; Hooper v. New, 85 Md. 565, 37 Atl. 424; Hooper v. Creoger, 84 Md. 195, 35 L. R. A. 202; Lynch v. Raymond, 45 Miss. 151; State v. Page, 20 Mont. 238, 50 Pac. 719; Hoell v. City Council of Camden, 68 N. J. Law, 226, 52 Atl. 213. It is the duty of a confirmatory board to act in good faith upon pending nominations.

Fryer v. Norton, 67 N. J. Law, 537, 52 Atl. 476; State v. Manson, 105 Tenn. 232, 58 S. W. 319. The appointment by the governor of insane hospital trustees for an unexpired term is independent of any control by the legislature, under Tenn. Code, §§ 2585, 2586. Brumby v. Boyd, 28 Tex. Civ. App. 164, 66 S. W. 874. See, also, cases cited under § 601, ante.

[61] U. S. Const. art. 1, § 2, par. 2. In re Marshalship for the Southern and Middle Districts of Alabama, 20 Fed. 379. Where the senate of the United States rejects the nomination of a person for an office made by the president, this action is conclusive. Matter of Farrow, 3 Fed. 112; Gould v. United States, 19 Ct. Cl. 593.

[62] People v. Hammond, 66 Cal. 654; Union Depot & R. Co. v. Smith, 16 Colo. 369; Matter of Executive Communication, 25 Fla. 426; Taylor v. Stevenson, 2 Idaho, 180; Rowley v. People, 53 Ill. App. 298; State v. Allen, 21 Ind. 516. The commission of an executive possessing the appointive power is the only legal evidence of the right of an incumbent to the office.

Stingley v. Nichols, Shepard & Co., 131 Ind. 214, 30 N. E. 34. Where a county board of supervisors is authorized to appoint a deputy surveyor whenever his services are needed, the necessity for such an appointment cannot be questioned in a collateral proceeding. State v. Hyde, 121 Ind. 20; Carson v. State, 145 Ind. 348; Berry v. McCollough, 94 Ky. 247; Walsh v. Knickerbocker, 18 La. Ann. 180; Burton v. Kennebec County, 44 Me. 388; Ash v. McVey, 85 Md. 119; Russell v. Wellington, 157 Mass. 100; Tower v. Welker, 93 Mich. 332, 53 N. W. 527. The city clerk has the power to appoint a deputy to act during his absence.

Speed v. Common Council of Detroit, 97 Mich. 198, 56 N. W. 570. Where the power to appoint an officer is vested in the mayor, upon his making and filing an appointment, it is then beyond his recall. Attorney General v. Corliss, 98 Mich, 372; State v. Lovell, 70 Miss. 309; Ter. v. Rodgers, 1 Mont. 252; State v. Weston, 4 Neb. 234; People v. Angle, 47 Hun (N. Y.) 183; People v. Murray, 70 N. Y. 521; People v. Andrews, 104 N. Y. 570; People v. Bledsoe, 68 N. C. 457;

necessary, it is customary, however, to give executive officials the power to appoint officers to fill vacancies caused by death, resignation or removal after the adjournment of the confirmatory board; such appointments hold good until their confirmation or its failure at the next meeting of the confirming board.[63]

§ 603. Appointments; manner of making.

An appointment to public office should be made in writing,[64] although in some cases action has been valid not made in this manner.[65] The weight of authority and the better reason calls, however, for the existence of title to office in some form more definite and more permanent than memory. A public officer exercises for the sovereign certain functions of government and transacts the business of the government committed to his charge. In this the rights of the government and the people are affected and it is highly important, if not absolutely necessary, to the safety and peace of society, that the rights of such an officer to perform these duties and functions should be evidenced in a substantial manner.[66] The authority authorizing an appointment

Briggs v. McBride, 17 Or. 640, 5 L. R. A. 115; Com. v. Oellers, 140 Pa. 457; State v. Sheldon, 8 S. D. 525; State v. Manson, 105 Tenn. 232; In re Fourth Judicial Dist., 4 Wyo. 133.

[63] In re Marshalship of the Southern and Middle Districts of Alabama, 20 Fed. 379; Matter of Farrow, 3 Fed. 112; Gould v. United States, 19 Ct. Cl. 593; People v. Cazneau, 20 Cal. 503; People v. Forquer, 1 Ill. 104; State v. Rareshide, 32 La. Ann. 934; State v. Jones, 116 N. C. 570, 21 S. E. 787; Com. v. Waller, 145 Pa. 235.

[64] Conger v. Gilmer, 32 Cal. 75; State v. Crawford, 28 Fla. 441, 14 L. R. A. 253; State v. Allen, 21 Ind. 516; Justices of Jefferson County v. Clark, 17 Ky. (1 T. B. Mon.) 82; Phelon v. Inhabitants of Granville, 140 Mass. 386; State v. Meder, 22 Nev. 264, 38 Pac. 668; People v. Willard, 44 Hun (N. Y.) 580; People v. Keller, 30 Misc. 52, 61 N. Y. Supp. 746; People v. Fitzsimmons, 68 N. Y. 514; People v. Murray, 70 N. Y. 521; Jeter v. State, 1 McCord (S. C.) 233. A commission is evidence only of an officers appointment. State v. Barber, 4 Wyo. 409, 34 Pac. 1028, 27 L. R. A. 45.

[65] Carter v. Sympson, 47 Ky. (8 B. Mon.) 155. A public officer acting and recognized as such will be presumed to have been legally appointed until the contrary appears. Hoke v. Field, 73 Ky. (10 Bush) 144.

[66] People v. Murray, 70 N. Y. 521. "It would be unfortunate if the title to office of one upon whose official acts public interests and private rights hinged, did or could be made to depend upon the verbal declarations and statements of the person having the power to make the ap-

may prescribe the precise manner in which it shall be made [67] by requiring a yea and nay vote of the appointing body,[68] the con-

poinment, to be proved by parol and liable to be forgotten, misunderstood or misrepresented, subject to all the contingencies and infirmities which are incident to verbal evidence, or evidence by parol, so pregnant of mischief and misfortune as to have led to the enactment of the statute of frauds. It will not be presumed that the legislature, while making void, contracts involving trifling pecuniary interests unless evidenced by some writing, intended that important civil offices should be conferred without a commission or any writing, but simply by a verbal statement of an individual in any form which by the bystanders should be understood as expressing a present intent to make the appointment; and a liberal interpretation will be given to the statutes bearing upon the subject if necessary to avoid any such conclusion. * * *

"The constitution and the laws of the state create or provide for the creation of all offices, and prescribe the mode of election or appointment, the terms and duration of office, as well as regulate the duties and emoluments. Offices in certain cases, may be for a term of years, during the pleasure of the appointing power, or during good behavior; but whatever may be the term or tenure of office, the appointment must be in conformity with the statutes of the state. An appointment in the general sense of the term may be by deed or in writing without seal or verbal, depending upon the subject-matter of the appointment and the terms of the authority under which it is made. But an appointment to office by the person or persons having authority therefor, as distinguished from an election, can only be made verbally, and without writing when permitted by the terms of the statute conferring the power. Affecting the public, and not merely private rights, and being done under the authority of the sovereign power and not under individual authority, it should be authenticated in a way that the public may know when and in what manner the duty has been performed."

[67] Lane v. Kolb, 92 Ala. 636; Allen v. State, 32 Ark. 241; Com. v. Mann, 5 Watts & S. (Pa.) 418.

[68] Keyser v. Upshur, 92 Md. 726, 48 Atl. 399. "Section 741 requiring all appointments to and removals from the police force to be by yea and nay vote of the commissioners was substantially complied with. These appointments were unanimously made. This means that each commissioner voted for them. When it is stated on the record of their proceedings that the members of the board have unanimously done an act, it is asserted that each united in doing that act, and this is equivalent to saying that each voted aye. It would be a most rigid refinement to hold that a declaration that all the members of the board voted to appoint these officers was not the same thing as a statement that every member had concurred in doing so. If every member did concur then these appointments were made by the affirmative vote of every member, and thus the record discloses in plain language susceptible of but one

current action of a majority of two legislative bodies,[69] or some other indispensable act,[70] the performance of which is necessary to secure good title to the office. The time of appointment may also be specified by a statutory provision and the power to appoint is lost if action is not taken within the time thus designated by law.[71]

§ 604. Classes.

Appointments to office as made are usually of two classes—what may be termed original appointments and appointments to fill vacancies. The president of the United States has at his disposal more original appointments than any other executive or administrative officer.[72] The possession of the authority to make original appointments or selections of subordinate officials and employes leads to an unnecessary concentration of power in the hands of high executive officers and it should be the present policy and tendency to limit the power rather than to extend it. The reason for this is a strong argument against municipal or governmental ownership of private or quasi public enterprises or industries. The right to directly select local public officers by those who are to sustain governmental relations with them is a necessary conclusion from our belief in the theory of local self-government.[73] In many cases the power of the legislature has been

meaning that all the commissioners voted aye upon the appointment of these officers." People v. Keller, 30 Misc. 52, 61 N. Y. Supp. 746.

[69] Attorney General v. McCabe, 172 Mass. 417, 52 N. E. 717; Saunders v. City of Lawrence, 141 Mass. 380.

[70] Braman v. City of New London, 74 Conn. 695, 51 Atl. 1082. The appointment of a health officer by incorporated cities and burroughs under Pub. Acts 1895, c. 145, must be made upon the nomination of the mayor. City of Huntington v. Cast, 149 Ind. 255, 48 N. E. 1025; Robinson v. City of Detroit, 107 Mich. 168, 65 N. W. 10.

[71] People v. Inglis, 161 Ill. 256, 43 N. E. 1103. An appointment to take effect in the future is valid. Todd v. Johnson, 99 Ky. 548, 33 L. R. A. 399; State v. Hostetter, 137 Mo. 636, 38 L. R. A. 208; State v. Irwin, 5 Nev. 111. An appointment to a new office to take effect at a future day when the act creating the office goes into effect is valid. State v. Sheldon, 8 S. D. 525; State v. Henderson, 4 Wyo. 535, 22 L. R. A. 751. But see People v. Blanding, 63 Cal. 333. An appointment made on the day upon which a term of office expires is not invalid because the power to appoint was given "at" the expiration of a designated official term.

[72] Mechem, Pub. Off. § 122.

[73] City of Evansville v. State, 118 Ind. 426, 4 L. R. A. 93; State v.

seriously questioned to provide even temporarily for the filling of public offices by appointment rather than by election.[74]

Denny, 118 Ind. 449, 4 L. R. A. 65; People v. Hurlbut, 24 Mich. 44. "The doctrine that within any general grant of legislative power by the constitution there can be found authority thus to take from the people the management of their local concerns, and the choice, directly or indirectly, of their local officers, if practically asserted, would be somewhat startling to our people, and would be likely to lead hereafter to a more careful scrutiny of the charters of government framed by them, lest sometime, by an inadvertent use of words, they might be found to have conferred upon some agency of their own, the legal authority to take away their liberties altogether. If we look into the several state constitutions to see what verbal restrictions have heretofore been placed upon legislative authority in this regard, we shall find them very few and simple. We have taken great pains to surround the life, liberty, and property of the individual with guaranties, but we have not, as a general thing, guarded local government with similar protections. We must assume either an intention that the legislative control should be constant and absolute or, on the other hand, that there are certain fundamental principles in our general framework of government, which are within the contemplation of the people when they agree upon the written charter, subject to which the delegations of authority to the several departments of government have been made. That this last is the case, appears to me too plain for serious controversy. The implied restrictions upon the power of the legislature, as regards local government, though their limits may not be so plainly defined as express provisions might have made them, are nevertheless equally imperative in character, and whenever we find ourselves clearly within them, we have no alternative but to bow to their authority. The constiution has been framed with these restrictions in view, and we should fall into the grossest absurdities if we undertook to construe that instrument on a critical examination of the terms employed, while shutting our eyes to all other considerations." The right of the legislature to make permanent appointments of local officers was considered and Mr. Justice Cooley says in the opinion of the court withholding such a right: "Such are the historical facts regarding local government in America. Our traditions, practice and expectations have all been in one direction. And when we go beyond the general view to inquire into the details of authority, we find that it has included the power to choose in some form the persons who are to administer the local regulations. Instances to the contrary, except where the power to be administered was properly a state power, have been purely exceptional." People v. Common Council of Detroit, 28 Mich. 228; People v. Common Council of Detroit, 29 Mich. 110.

[74] State v. Mayhew, 21 Mont. 93, 52 Pac. 981. An act, however, is valid which establishes a new county and names the persons who are to act as public officials until their successors are duly elected

§ 605. To fill vacancies.

The power to appoint public officials is exercised frequently in connection with vacancies in public offices. A public official is vested with some portion of sovereign powers to be exercised for the benefit of the people. The existence of the office presupposes the existence of official duties and, therefore, the necessity, at all times, for some competent and qualified person to perform these duties.[75] If through removal,[76] change of residence,[77] death,[78] resignation [79] or other condition,[80] a vacancy arise in an office, it

and qualified. "Did the legislative assembly have the power to appoint or name provisionally the county officers of the county, including county commissioners, in and by the act creating Ravalli County? It is and must be conceded that the legislative assembly has the power to create new counties. 'The creation of counties is an act of the sovereign power of the state, and is not based on the particular solicitation, consent or concurrent action of the people who inhabit them. As a general rule, the power of the legislature in the division of the state into counties is absolute, and it may alter, modify or destroy them, as the public good may require.' * * * While our constitution provides that county commissioners shall be elected or appointed otherwise than by the legislature, it does not mean that the legislature may not appoint them provisionally, when new counties are created, as an incident to their creation, and for the purpose of putting them in motion."

[75] Peck v. Barrien County Sup'rs, 102 Mich. 346, 60 N. W. 985. Members of a board of supervisors appointed to fill vacancies have the same right as the members duly elected to take part in all proceedings legally coming before the board for their action. Attorney General v. Varney, 68 N. H. 64, 40 Atl. 394. Under Gen. Laws, c. 45, 12, aldermen of a city can select one of their number to act as chairman who "shall have all the powers and perform all the duties of the mayor, until a mayor shall be elected and qualified to fill the vacancy."

State v. Hopkins, 10 Ohio St. 509; In re Johnson County Com'rs (Wyo.) 32 Pac. 850. Construing Wyo. Const. art. 4 § 7, which provides that "when any office from any cause becomes vacant, and no mode is provided by the Constitution or law for filling such vacancy, the governor shall have the power to fill the same by appointment."

[76] Stokes v. Kirkpatrick, 58 Ky. (1 Metc.) 134; City of Somerset v. Somerset Banking Co., 109 Ky. 549, 60 S. W. 5. Where the statutes provide that three-fourths of the members of a city council of the fourth class voting affirmatively may expel for good cause one of their members, such action by less than this number will not create a vacancy.

State v. Schumaker, 27 La. Ann. 332. The power to remove subordinates cannot be arbitrarily exercised for the purpose of creating a vacancy to which another person is to be appointed. Gage v. Dudley, 64 N. H. 437, 13 Atl. 865; Went-

worth v. Town of Farmington, 49 N. H. 119. See Coogan v. State, 1 S. C. (1 Rich.) 468, construing S. C. Sp. St. 1868, p. 4, which gives to the city council of Charleston the power to declare certain municipal offices vacant.

Honey v. Graham, 39 Tex. 1. The governor has no power to adjudge the office of a state treasurer forfeited; this belongs alone to the judiciary and the right of a trial by jury exists in every such case. Tex. Const. art. 1, § 16, provides a manner in which one who has been elected to perform the duties of an office by the people can be deprived of his rights in this respect. But see State v. Kearns, 47 Ohio St. 566, 25 N. E. 1027.

[77] Smith v. State, 24 Ind. 101. Whether a removal constitutes a vacancy will depend upon statutory provisions. Curry v. Stewart, 71 Ky. (8 Bush) 560; Barre v. Inhabitants of Greenwich, 18 Mass. (1 Pick.) 129; Ross v. Barber, 86 Mich. 380, 49 N. W. 35. Under Bay City charter, the change of ward limits in such a manner as to place an alderman without the ward which he represents is sufficient to constitute a vacancy. People v. Glass, 19 App. Div. 454, 46 N. Y. Supp. 572. But see State v. Milwaukee County Sup'rs, 21 Wis. 443. A member of a board of county supervisors cannot lose his office by an apportionment of law changing the boundaries of assembly districts in such a manner as to place him outside the district from which he is elected; the law requiring county supervisors to be residents within the districts which they represent.

[78] Hedley v. Franklin County Com'rs, 4 Blackf. (Ind.) 116; State v. Hopkins, 10 Ohio St. 509; In re Supreme Ct. Vacancy, 4 S. D. 532, 57 N. W. 495, construing Const. art. 5, § 37; Gold v. Fite, 61 Tenn. (2 Baxt.) 237.

[79] Biddle v. Willard, 10 Ind. 62. Where a resignation has been announced as taking effect at some future day no vacancy exists until this designated time. Stubbs v. Lee, 64 Me. 195. The acceptance of a commission as deputy sheriff vacates an office as trial justice; the two being incompatible.

New Jersey R. & Transp. Co. v. City of Newark, 27 N. J. Law, (3 Dutch.) 185; Canniff v. City of New York, 4 E. D. Smith (N. Y.) 430; In re Corliss, 11 R. I. 638. One who is ineligible under the Constitution to hold office cannot by resignation create a vacancy to be filled under a statute providing for filling vacancies. Only a person who has been lawfully elected can create a vacancy by resigning. State v. Washburn, 17 Wis. 658. A refusal to qualify by one elected to the office of county judge creates a vacancy and an appointment may be made immediately.

[80] People v. Rodgers, 118 Cal. 393, 50 Pac. 668, reversing 46 Pac. 740. Contested election. People v. Brite, 55 Cal. 79. Vacancy created by a change of residence.

People v. Taylor, 57 Cal. 620. A vacancy occurs upon the refusal or failure of a person elected to file his official oath or bond within the time prescribed. People v. Shorb, 100 Cal. 537. Where one in violation of the law absents himself from the state for more than sixty days or for any period without the consent of the board authorized to give this, such absence ipso facto creates a vacancy in the office and the appointing board may fill such vacancy.

In re office of Attorney General,

14 Fla. 277. Neglect to take the oath of office prescribed creates a vacancy. In re Executive Communication, 25 Fla. 426, 5 So. 613. The failure of a person elected to give a bond and qualify as required by Florida Const. art. 8, § 7, creates a vacancy which the governor may fill by appointment.

Jones v. Collier, 65 Ga. 553. Embezzlement of public funds will create a vacancy in an office after a judgment to this effect by the ordinary which may be filled by appointment in the manner prescribed by law.

People v. Hanifan, 96 Ill. 420. The acceptance of an office incompatible with that of alderman is equivalent to its abandonment and a vacancy is thereby created.

Osborne v. State, 128 Ind. 129, 27 N. E. 345. Where an officer becomes a defaulter, his office becomes vacant without a judicial examination.

Kimberlin v. State, 130 Ind. 120, 29 N. E. 773, 14 L. R. A. 858; State v. Craig, 132 Ind. 54, 31 N. E. 352, 16 L. R. A. 688. The removal of a councilman to another ward from that from which he was elected to his office does not of itself create a vacancy under a statutory provision that the council under such circumstances "shall have power to declare his office vacant, and order a special election to fill the vacancy."

Bowen v. Long, 19 Ky. L. R. 1881, 44 S. W. 647. The adjudication in a proper proceeding that an officer is a lunatic creates without notice to him a vacancy in his office.

State v. Graham, 26 La. Ann. 568. "The absence of the governor from the state for a few hours, or a few days, creates no vacancy in the office, and does not authorize the assumption of the duties, perogatives and emoluments thereof by the lieutenant governor during such absence. It must be, under a proper construction of article 53 of the Constitution, such an inability to discharge the duties of the office, as well as such absence from the state as would affect injuriously public interests."

Kriseler v. LeValley, 122 Mich. 576, 81 N. W. 580. The failure to give the bond required by law does not create a vacancy in an office until action by a village council as prescribed by Comp. Laws 1897, § 2710.

State v. Baird, 47 Mo. 301. The sickness of a county officer for fifty days of such a character as to prevent him from attending to his official duties will not create a vacancy in his office.

State v. White, 20 Neb. 37; State v. Lansing, 46 Neb. 514, 35 L. R. A. 124. Although Neb. Const. art. 3, § 20, specifies certain acts or conditions which result in a vacancy, this does not preclude the legislature from further providing that vacancies may result from other causes.

Richards v. McMillin, 36 Neb. 352, 54 N. W. 566. A declaration by a county board that an office is vacant because an officer elected is ineligible does not of itself create a vacancy. The incumbent of the office may qualify as prescribed by law and hold over until a successor is elected and properly qualified.

People v. Hall, 104 N. Y. 170; State v. Buttz, 9 S. C. (9 Rich.) 156. One vacates an office by accepting another incompatible therewith.

Wenner v. Smith, 4 Utah, 238, 9 Pac. 293. The election of one ineligible creates a vacancy which can

is necessary that the power exist in some individual or body to fill it temporarily [81] or as usual until the next general election [82]

be filled by the governor in the manner provided by act of Congress Aug. 7, 1882, c. 433 (22 Stat. 313). State v. City of Ballard, 10 Wash. 4, 38 Pac. 761. The town council may declare the office of a councilman vacant only by reason of his absence from three consecutive meetings of the council without its permission. A designation of these acts implies the exclusion of all others.

State v. Shank, 36 W. Va. 223, 14 S. E. 1001. The failure to give a new or additional bond when required will not of itself render an office vacant. Omro Sup'rs v. Kaime, 39 Wis. 468.

[81] Sheen v. Hughes, 4 Ariz. 337, 40 Pac. 679. An appointment under Rev. St. par. 3116, vests the appointee with all the rights and powers and makes him subject to all liabilities, duties and obligations of the officer whose vacancy he fills and entitles him to hold the office during the unexpired portion of the term of office.

People v. Campbell, 2 Cal. 135; People v. Langdon, 8 Cal. 1. In re Advisory Opinion to Governor, 31 Fla. 1, 12 So. 114, 18 L. R. A. 594. Where a vacancy has been caused by suspension of an official incumbent, an appointment cannot be for a longer period than the remainder of the term of the suspended officer.

State v. Day, 14 Fla. 9; Carson v. State, 145 Ind. 348, 44 N. E. 360. One appointed to fill a vacancy has a right to hold such office for the unexpired term. Hoke v. Richie, 100 Ky. 66, 37 S. W. 266, 38 S. W. 132. An appointee to fill a vacancy holds for the unexpired portion of the term; not for the full term of the office.

State v. Dubuc, 9 La. Ann. 237; Opinion of the Justices, 64 Me. 596. One elected to fill a vacancy in a public office holds the same only for the remainder of the term. Moreland v. Millen, 126 Mich. 381, 85 N. W. 882; Brady v. Howe, 50 Miss. 607; O'Leary v. Adler, 51 Miss. 28. A vacancy cannot be created by establishing an office which has never had an incumbent and then considering the mere filling of the office as a vacancy which has happened. Brady v. Howe, 50 Miss. 607; State v. Kuhl, 51 N. J. Law, 191, 17 Atl. 102; In re Board of Health, 64 Hun, 634, 19 N. Y. Supp. 131; State v. McKee, 65 N. C. 257. An appointment to fill a vacancy includes only the unoccupied term of the previous incumbent. Com. v. King, 85 Pa. 103.

[82] Falconer v. Robinson, 46 Ala. 340; State v. Gamble, 13 Fla. 9. Where a constitutional provision vests in the governor the power to fill a vacancy by granting a commission "which shall expire at the next election," this is not a grant of the power to fill the office for the unexpired term; it is the duty of the authorities, although the constitution does not fix the precise time for the "next election," to see that the time of this election is not indefinately postponed at the expense of the rights of the people. State v. Hyde, 121 Ind. 20, 22 N. E. 644; State v. Peelle, 121 Ind. 495, 22 N. E. 654; Dyer v. Bagwell, 54 Iowa, 487; Todd v. Johnson, 18 Ky. L. R. 354, 36 S. W. 987; Neely v. Mc-

or until a special election [83] can be called in the manner provided by law for the election of an official incumbent. Vacancies in offices may occur either where the incumbent secures his position through appointment or by an election. A vacancy has been defined as that condition which "exists when there is no person lawfully authorized to assume and exercise at present the duties of the office." [84] The power to appoint and fill vacancies, however arising, may proceed from other constitutional or statutory provisions and must be exercised in the manner and by the authority designated.[85] In considering the subject of a vacancy, the idea

Collum, 21 Ky. L. R. 823, 53 S. W. 37; State v. Garrett, 29 La. Ann. 637; Munroe v. Wells, 83 Md. 505; Edison v. Manly, 66 Mich. 329; Attorney General v. Trombly, 89 Mich. 50, 50 N. W. 744; State v. Benedict, 15 Minn. 198 (Gil. 153); State v. O'Leary, 64 Minn. 207; State v. Johns, 3 Or. 533; Com. v. Callen, 101 Pa. 375; People v. Hardy, 8 Utah, 68, 29 Pac. 1118.

[83] People v. Ward, 107 Cal. 236, 40 Pac. 538; Sam v. State, 31 Miss. 480; Reeves v. Ferguson, 31 N. J. Law, 107; People v. Trustees of Whitestone, 71 Hun, 188, 24 N. Y. Supp. 532.

[84] Stocking v. State, 7 Ind. 326; State v. Askew, 48 Ark. 89; People v. Whitnam, 10 Cal. 38; Quigg v. Evans, 121 Cal. 546; People v. Osborne, 7 Colo. 605; Gormley v. Taylor, 44 Ga. 76; State v. Harrison, 113 Ind. 434; State v. Hostetter, 137 Mo. 636, 38 L. R. A. 208; State v. Irwin, 5 Nev. 112; Johnston v. Wilson, 2 N. H. 202. A vacancy cannot occur until the death, removal or resignation of the incumbent. Davis v. Davis, 57 N. J. Law, 80; Cline v. Greenwood, 10 Or. 230; Walsh v. Com., 89 Pa. 419. A vacancy in county offices occurs within Pa. Const. art. 4, § 8, when a new county is created. In re Supreme Court Vacancy, 4 S. D. 532; In re Johnson County Com'rs (Wyo.) 32 Pac. 850. A vacancy exists within the meaning of the constitution when a new office is created. Mechem, Pub. Off. § 126.

[85] Payne v. Rittman, 66 Ark. 201, 49 S. W. 814; Montgomery v. Little, 69 Ark. 63 S. W. 993; People v. Campbell, 2 Cal. 135; People v. Martin, 12 Cal. 409. A county judge is not a county official and a vacancy is to be filled by the governor of the state; not by the board of county supervisors.

People v. Parker, 37 Cal. 639; Gormley v. Taylor, 44 Ga. 76; Reed v. Baker, 31 Ind. 425; Manor v. State, 149 Ind. 310, 49 N. E. 160; Heim v. State, 145 Ind. 605, 44 N. E. 638; State v. Leovy, 21 La. Ann. 538; State v. City of New Orleans, 51 La. Am. 99, 24 So. 620. Construing 1896 charter of New Orleans with reference to the filling of vacancies. Ijams v. Duvall, 85 Md. 252, 36 Atl. 819, 36 L. R. A. 127. Construing Const. art. 4, § 40.

Hooper v. New, 85 Md. 565, 37 Atl. 424; Hooper v. Farnen, 85 Md. 587, 37 Atl. 430, construing Baltimore City Code 1893, art. 1, § 46, and Code Pub. Local Laws, art. 4, § 31; Kroh v. Smoot, 62 Md. 172; Sappington v. Slade, 91 Md. 640, 48 Atl. 64, construing Const. art. 2 § 11, and Act 1896, c. 202, § 4, re-

underlying the creation of public office must be remembered. If there is some person qualified and competent to perform the duties of an office and who is legally authorized to perform these duties, no vacancy can exist.[86] This principle applies in many cases to public officials who are empowered to perform the duties of their office whether secured by election or by appointment until their successors are duly elected or appointed, and have qualified.[87] Under such provisions they are competent to perform the duties pertaining to their official position and no vacancy can, therefore, exist,[88] the legal significance being that an appoint-

lating to vacancies. Peck v. Berrien County Sup'rs, 102 Mich. 346, 60 N. W. 985. An appointment to a vacancy is not void when made for the remainder of the term or until the successor is elected and duly qualified. Grondin v. Logan, 88 Mich. 247, 50 N. W. 130, construing How. St. Mich. § 745, relating to the filling of a vacancy in the township board in case of temporary disability of one of the older justices of the peace.

State v. Hostetter, 137 Mo. 636, 39 S. W. 270, 38 L. R. A. 208; In re City of Rensselaer, 31 Misc. 512, 64 N. Y. Supp. 704; State v. Harris, 1 N. D. 190, 45 N. W. 1101.

[86] People v. Tilton, 37 Cal. 614. "The evident intention of the provisions of the constitution of California regulating the power of the governor to appoint officers to fill vacancies is to restrict the appointing power to the veriest limits. The decision is that the governor shall appoint only where there is no party authorized by law to discharge the duties of the office. When there is a party expressly authorized by law to discharge the duties temporarily, until the power upon which the duty of election or appointment is devolved can regularly act, there is no action for calling into exercise this extraordinary power vested in the governor to make a merely temporary appointment." People v. Rodgers, 118 Cal. 393, 46 Pac. 740, 50 Pac. 668; People v. Bissell, 49 Cal. 408; People v. Callaghan, 83 Ill. 128; State v. Ralls County Court, 45 Mo. 58.

[87] Tillson v. Ford, 53 Cal. 701; Londoner v. People, 15 Colo. 557, 26 Pac. 135, 33 Pac. 1005; State v. Fowler, 66 Conn. 294, 32 Atl. 162; State v. Harrison, 113 Ind. 434, 16 N. E. 348; Koerner v. State, 148 Ind. 158, 47 N. E. 323. Where a public officer has properly qualified and performs the duties of his office, the fact that he fails to give a bond, as required by law upon his re-election will not create a vacancy, since he is authorized by law to act until his successor is duly elected and qualified. Berry v. McCollough, 94 Ky. 247, 22 S. W. 78; Long v. Bowen, 94 Ky. 540, 23 S. W. 343; Dust v. Oakman, 126 Mich. 717, 86 N. W. 151; Kilburn v. Conlan, 56 N. J. Law, 349; State v. Compson, 34 Or. 25, 54 Pac. 349; State v. Gardner, 3 S. D. 553, 54 N. W. 606.

[88] People v. Tilton, 37 Cal. 614; State v. McMullen, 46 Ind. 307; State v. Linkhauer, 142 Ind. 94; Elliott v. Burke, 113 Ky. 479; Lawrence v. Hanley, 84 Mich. 399, 47 N. W. 753; State v. Marr, 65 Minn.

ment made for the purpose of filling a vacancy claimed to exist under such circumstances is void.[89]

§ 606. Public offices secured through election.

The greater number of public officials secure their title to office through an election held as authorized by constitutional or statutory provisions.[90] As suggested in a preceding section,[91] our form of government favors this method of securing public office rather than that of an appointment since the power to appoint to public office, it is thought and has been held, concentrates the administrative powers of government to an undesirable extent in the hands of a single individual. Where provision is made for the election of public officers, executive officers have no power under general laws of the state to fill vacancies by appointment.[92] The time and the manner of election if prescribed by the source of authority suggested above must follow this strictly and one held in any other manner or at another time is void.[93] The authority for such an election, if statutory, must, to be legal, com-

243, 68 N. W. 8; Kilburn v. Conlan, 56 N. J. Law, 349, 29 Atl. 162; Tappan v. Gray, 9 Paige (N. Y.) 507; People v. Randall, 12 Misc. 619, 34 N. Y. Supp. 450.

[89] People v. Hammond, 66 Cal. 654; People v. Edwards, 93 Cal. 153, 28 Pac. 831, following People v. Hammond, 66 Cal. 654.

State v. Harrison, 113 Ind. 434, 16 N. E. 384. The power as given by law to an executive to fill vacancies by appointment does not confer the power of conclusively determining whether such vacancies exist.

State v. Bankston, 23 La. Ann. 375; State v. McNeeley, 24 La. Ann. 19. An appointment by the governor upon the erroneous supposition that an office was vacated will confer no title in the office of the person who receives the appointment under such misapprehension. Hill v. Slade, 91 Md. 640, 48 Atl. 64; People v. Henderson (Wyo.) 35 Pac. 517.

[90] Speed v. Crawford, 60 Ky. (3 Metc.) 207; State v. Sims, 18 S. C. 460.

[91] See § 604, ante.

[92] State v. Burbridge, 24 Fla. 112; City of Monroe v. Hoffman, 29 La. Ann. 651; Groome v. Gwinn, 43 Md. 572.

[93] Lane v. Kolb, 92 Ala. 636, 9 So. 873; State v. May, 49 Ala. 376; Rittman v. Payne, 68 Ark. 338, 58 S. W. 350; Brooks v. Melony, 15 Cal. 58; People v. Mathewson, 47 Cal. 442; People v. Col, 132 Cal. 334, 64 Pac. 477; Crowley v. Freud, 132 Cal. 440, 64 Pac. 696; Sipe v. People, 26 Colo. 127, 56 Pac. 571; Mallett v. Plumb, 60 Conn. 352, 22 Atl. 772. Connecticut Gen. St. § 48, which provides that "the person first named in the plurality of the ballots cast for them or any of them shall be first selectmen" refers to

ply with the constitutional provisions determining the validity of legislation and if, under these provisions, election laws are held unconstitutional, this will render an election, held under them, void and the incumbent will have no further right or title to the office.[94] The rule, however, usually obtains that until such de-

the person receiving the highest number of votes, not that one whose name appears first on the ballot among the list of candidates.

State v. Anderson, 26 Fla. 240, 8 So. 1; Collins v. Russell, 107 Ga. 423, 33 S. E. 444; Cunningham v. George, 2 Idaho, 1196, 31 Pac. 809. County commissioners although representing districts must be elected by the vote of the whole county and not by that of the district.

People v. Williams, 145 Ill. 573, 24 L. R. A. 492; Gass v. State, 34 Ind. 425. Courts recognize and apply the rule that statutes regulating the mere mode of conducting elections are directory and that immaterial departures from the prescribed mode will not invalidate an election. State v. Winter, 148 Ind. 177, 47 N. E. 642; Florer v. State, 133 Ind. 453; State v. McFarland, 149 Ind. 266, 39 L. R. A. 282; State v. Finger, 46 Iowa, 25. Where the limits of a town acting under a special charter are coextensive with those of a township, the assessor is an official of the township and not of the town and should be elected at the general township election.

Winn v. Board of Park Com'rs, 12 Ky. L. R. 339, 14 S. W. 421; Com. v. Donovan, 170 Mass. 228, 49 N. E. 104; White v. Manistee County Sup'rs, 105 Mich. 608, 63 N. W. 653; Michigan Const. art. 11, § 1, which provides for the election of constables in organized townships does not apply to cities. Ostrander v. Gratiot County Sup'rs, 111 Mich. 64, 69 N. W. 91; State v. Wilder, 75 Minn. 547, 78 N. W. 83; State v. Fiala, 47 Mo. 310; State v. McMillan, 108 Mo. 153; State v. Woodbury, 17 Nev. 337, 30 Pac. 1006; State v. Sadler, 25 Nev. 131, 58 Pac. 284, 59 Pac. 546, 63 Pac. 128. A councilman of the city of Reno must be chosen by the electors of his ward only; State v. Withers, 121 N. C. 376, 28 S. E. 522.

Eddy v. Kincaid, 28 Or. 537, 41 Pac. 655. The Australian ballot Law of 1891 does not repeal Hill's Ann. Laws, § 4003, which provides for the election of railway commissioners by the state legislature. Stone v. Reynolds, 7 Okl. 397, 54 Pac. 555. The legislature is authorized to confer the right to hold elections and to elect county officers; an election is void without this authority. Young v. Crawford, 153 Pa. 34, 25 Atl. 617; State v. Gardner, 3 S. D. 553, 54 N. W. 606; State v. Allen (Tenn. Ch. App.) 57 S. W. 182; State v. Goldstucker, 40 Wis. 124; Bush v. State, 100 Wis. 549, 76 N. W. 606, construing Wisconsin Laws 1897, c. 70, § 1; In re Moore, 4 Wyo. 98, 31 Pac. 980, defining the term "general election" as used in Const. art. 6, § 17, and Sess. Laws 1890–91, p. 115; Id., p. 236, §§ 1, 4.

[94] Jackson County Com'rs v. State, 147 Ind. 476; Sherman v. City of Des Moines, 100 Iowa, 88, 69 N. W. 410; Berry v. McCollough, 94 Ky. 247, 22 S. W. 78, construing Const. § 152; Johnson v. Wilson, 95 Ky. 415, 25 S. W. 1057, considering Const. 1891 § 167; Shelley v. Mc-

termination one elected is to be considered an officer de facto with all the rights and liabilities accompanying such a status both with respect to the public generally, himself and the public corpora-

Cullough, 97 Ky. 164, 30 S. W. 193, construing Const. § 152; City of Lexington v. Wilson, 97 Ky. 707, 31 S. W. 471; Sweeney v. Coulter, 109 Ky. 295, 58 S. W. 784, holding Kentucky Election Law of March 11, 1898, constitutional.

Pratt v. Breckinridge, 112 Ky. 1, 65 S. W. 136, 66 S. W. 405. Appointment to office being an executive power to be legally exercised by the legislature only where the duties of the office pertain to the legislative department, Kentucky Election Law, March 11, 1898, in so far as it provides for the appointment and election of commissioners by the legislature is an invasion of the powers of the executive and, therefore, unconstitutional in this respect. Spencer v. Griffith, 74 Minn. 55, 76 N. W. 1018; State v. McKee, 69 Mo. 504; State v. Mayhew, 21 Mont. 93, 52 Pac. 981; State v. Dickinson, 26 Mont. 391, 68 Pac. 468; State v. Westcott, 34 Neb. 84, 51 N. W. 599; State v. Welsh, 62 Neb. 721, 87 N. W. 529. County supervisors are to be elected at large; not by the voters of the separate supervisor districts.

Brown v. Boden, 51 N. J. Law, 114, 16 Atl. 58; Crookall v. Matthews, 61 N. J. Law, 349, 39 Atl. 659; Boorum v. Connelly, 66 N. J. Law, 197, 48 Atl. 955. New Jersey Act of Feb. 28, 1901, relative to the election of municipal officers is not unconstitutional as being special and local or regulating the internal affairs of cities in contravention of constitution, art. 4, § 7, par. 11, which prohibits the passage of private local or special laws regulating the internal affairs of towns and counties. Cities are regarded as a distinct class and not included within either towns or counties.

Wanser v. Hoos, 60 N. J. Law, 482, 38 Atl. 449. Laws 1897, p. 43, relative to the election of municipal officers in cities of the first class which shall consist of those having a population of 100,000 is repugnant to Const. art. 4, § 7, par. 11, since population is not the proper basis for classification for the purpose of the act. People v. Sturges, 21 Misc. 605, 47 N. Y. Supp. 999. An act is not unconstitutional which provides for the election of the president of the village by the trustees instead of an appointment by them as prescribed by Statute, art. 10, § 2.

In re Noble, 34 App. Div. 55, 54 N. Y. Supp. 42; People v. Sutphin, 53 App. Div. 613, 66 N. Y. Supp. 49. Construing New York Laws 1873, c. 84, relative to the village of Brockport and holding it not repugnant to Constitution, art. 3, § 16. Kelly v. Van Wyck, 35 Misc. 210, 71 N. Y. Supp. 814; People v. Westchester County Sup'rs, 139 N. Y. 524, 34 N. E. 1106; Rathbone v. Wirth, 150 N. Y. 459, 45 N. E. 15, 34 L. R. A. 408. N. Y. Laws 1896, c. 427, as amending Laws 1870, c. 77, and other acts relative to the police department of the city of Albany not in conflict with Constitution, art. 10, § 2, which provides that "all city, town, and village officers whose election or appointment is not provided for by the constitution, shall be elected by the electors of such cities, towns and vil-

tion.[95] Elective offices cannot be made appointive except in the manner creating the basis of the original authority,[96] but it has been held that where a constitution declares an office elective, the legislature may extend its term provided that the term as thus extended does not exceed the time limited by the constitution.[97]

§ 607. Eligibility of candidates for public office.

The holding of public office is a special grant or mark of favor by the sovereign. It is not an inherent, a vested or a natural right and the people acting in constitutional convention or

lages, or some division thereof, or appointed by such authorities thereof, as the legislature shall designate for that purpose." People v. Mosher, 163 N. Y. 32, 57 N. E. 88; People v. Scheu, 167 N. Y. 292, 60 N. E. 650, affirming 60 App. Div. 592, 69 N. Y. Supp. 597; State v. Meares, 116 N. C. 582, 21 S. E. 973; State v. Kearns, 47 Ohio St. 566, 25 N. E. 1027; State v. Simon, 20 Or. 365, 26 Pac. 170; State v. McAlister, 88 Tex. 284, 31 S. W. 187, 28 L. R. A. 523; Reals v. Smith, 8 Wyo. 159, 56 Pac. 690. Laws 1899, c. 65, § 5, is not a local or special law.

[95] Gould v. United States, 19 Ct. Cl. 593; Delphi School Dist. v. Murray, 53 Cal. 29; Pueblo County Com'rs v. Gould, 6 Colo. App. 44, 39 Pac. 895; State v. Nield, 4 Kan. App. 626, 45 Pac. 623; State v. Rost, 47 La. Ann. 53; City of Vicksburg v. Lombard, 51 Miss. 111; Perkins v. Perkins, 24 N. J. Law, (4 Zab.) 409; Haines v. Camden County Chosen Freeholders, 47 N. J. Law, 454; Brinkerhoff v. Jersey City, 64 N. J. Law, 225, 46 Atl. 170; McCoy v. Curtice, 9 Wend. (N. Y.) 17; Conover v. Devlin, 15 How. Pr. (N. Y.) 470; People v. White, 24 Wend. (N. Y.) 520; In re Board of Health of Lansinburgh, 43 App. Div. 236, 60 N. Y. Supp. 27; In re Kendall, 85 N. Y. 302; State v. Goodwin, 69 Tex. 55, 5 S. W. 678; Hendricks v. Huffmeyer (Tex. Civ. App.) 27 S. W. 777; Williams v. Clayton, 6 Utah, 86, 21 Pac. 398; State v. Superior Ct. of Snohomish County, 17 Wash. 12, 48 Pac. 741. Where an incumbent has duly qualified and is in possession, under a certificate of election properly issued and regular on its face, he is entitled to exercise the duties of his office without interference until his legal right can be adjudicated and a court of equity has jurisdiction to protect this right.

[96] Warner v. People, 2 Denio (N. Y.) 272; Ridley v. Sherbrook, 43 Tenn. (3 Cold.) 569.

[97] Christy v. Sacramento County Sup'rs, 39 Cal. 3. But see People v. Foley, 148 N. Y. 677, 43 N. E. 171. "The legislature has the power to prescribe the time and manner of holding town meetings for the election of town officers and the transaction of town business. It may designate a single day for that purpose or provide, as it did in this case, for the election of officers on one day and the transaction of the other general business of the town on the following day. The act of 1858 did not change the day for

through the state legislature can prescribe such qualifications as they may deem desirable or expedient and which must be possessed by those desiring to become public officials and perform public duties.[98] It is not for candidates for public offices to question the expediency or the reasonableness of such provisions. The qualifications required have as their reason the securing of com-

holding the annual town meeting which was fixed by the board of supervisors under general laws, but it virtually gave to the electors of the town two days to transact the business usually transacted in one in most of the towns of the state. * * * That the legislature had the power to so enact cannot be doubted."

[98] Jeffries v. Harrington, 11 Colo. 191, 17 Pac. 505. The word "office" as used in Colorado Constitution, art. 7, § 6, does not include a deputy clerkship of a county court and women may hold such deputy clerkships. In re Advisory Opinion to the Governor, 31 Fla. 1, 18 L. R. A. 594; Hinze v. People, 92 Ill. 406; State v. Watkins, 21 La. Ann. 631; Hudspeth v. Garrigues, 21 La. Ann. 684; State v. Moores, 52 Neb. 770, 73 N. W. 299; Bramhall v. City of Bayonne, 35 N. J. Law, 476; Conklin v. Cunningham, 7 N. M. 445; Fox v. Mohawk & H. R. Humane Soc., 25 App. Div. 26, 48 N. Y. Supp. 625. A corporation cannot take an oath of office and does not possess moral qualities; it is, therefore, not eligible to public office.

Ter. v. Stubblefield, 5 Okl. 310, 48 Pac. 112; State v. Stevens, 29 Or. 464; State v. Crawford, 17 R. I. 292, 21 Atl. 546; Ex parte Charles, 48 S. C. 279; Seay v. Hunt, 55 Tex. 545. The legislature may authorize a city council to determine primarily one's eligibility to the office of mayor of the city. This decision is not subject to revision in proceedings by quo warranto. State v. Von Baumbach, 12 Wis. 311.

Throop, Pub. Off. § 72. "Similarly each state has regulated for itself, and according to its own ideas of public policy, the general qualifications for holding office, or the qualifications for holding particular offices, under the authority of the state. Certain general principles are common to all, and these are styled by a learned writer 'the common political law' of this country. We quote a few sentences from his work, in this connection: 'The same descriptions of persons, namely minors, idiots, and lunatics, women, and aliens, who have already been mentioned as excluded from the right of suffrage by the common political law, are also prohibited and for the same reasons, from being elected to any political office whatever. * * * It may also be laid down as a general principle, founded in the nature of representative government, which presupposes the electors, except in particular instances, to elect from among themselves, that no person can be elected to any office who is not himself possessed of the requisite qualifications for an elector; and * * * whatever other and different qualifications or disqualifications may be specified, every person who is voted for * * * must, at all events, possess the qualifications, and be free

petent persons, both mentally and physically, to perform the public or governmental duties which may be assigned to them. At the best, officials ordinarily are none too competent to honestly and properly perform their public duties. A high standard of excellence should, at least, be required. The establishment of specific qualifications for the holding of a specific office will in no ways affect the right of a succeeding legislature or of a sovereign body to add to, alter or change them. No vested right can be acquired by any individual to public office or the privilege of holding it through the possession of the qualifications prescribed by statute at any precise moment of time.[99]

§ 608. Qualifications.

Since the right to hold a public office is, under our political system, not a natural inherent or vested one, the uniform legislative policy has prescribed, as stated in a preceding section, qualifications for public office which naturally, in their character, relate or depend upon the physical or mental condition of prospective candidates, conditions based upon residence, citizenship or other similar requirements or those depending upon some act of the candidate for office either in respect to his personal or his public life. These requirements may not only apply to the eligibility of a public officer at the time of election or appointment to office but they may also be extended to the existence of a like condition during the entire term for which the official is elected or appointed and if an incumbent of office becomes ineligible at any time during his term, steps may be taken to have the office declared vacant.[100]

from the disqualifications which attach to the character of an elector.' "

[99] Hall v. Hostetter, 56 Ky. (17 B. Mon.) 785; State v. Woodson, 41 Mo. 227; State v. Dunn, 73 N. C. 595; Ter. v. Stubblefield, 5 Okl. 310. See, also, §§ 597 and 598, ante.

[100] Kean v. Rizer, 90 Md. 507, 45 Atl. 468. "The question in this case involves a construction of certain sections of the city charter of Cumberland, Md. By the act of 1898, c. 158, it is provided that each and every member of the city council shall be the bona fide owner in his own right of property to the amount of $500 and assessed for the same on the books of the city at the time of his election and for the next year prior thereto, the taxes on which shall not be in arrears. And the act further provides that the mayor and each member of the city council shall, during the whole term for which they are elected, be possessed of all the qualifications rendering them eligi-

§ 609. Physical.

The fitness to perform the duties of certain offices may depend upon the physical strength of the incumbent, and since women [101]

ble to be elected, and if any one of them during the time for which he was elected shall fail to retain all the qualifications necessary to render him eligible to election, he shall forfeit such office and such forfeiture shall be declared by the said city council and the vacancy caused thereby shall be immediately filled as herein provided. * * * On the 25th of October, 1899, the appellant, a tax-paying citizen and a legal voter, in the city of Cumberland, filed a petition in the circuit court for Allegheny county, wherein it is alleged that the appellee, Edwin F. Rizer, was on the 16th day of May, 1898, at a municipal election held in the city of Cumberland, elected to the office of city councilman for the term of two years; that, subsequently, he was sworn in, and has acted and continues still to act in that capacity; that the appellee is not a bona fide owner in his own right of property to the amount in value of $500 and was not at the time of his election, nor for the year next prior thereto, and does not possess and retain the said qualifications that would render him eligible to be elected and retain the office of city councilman, and so has not at any time been duly and legally qualified to occupy the office and discharge its duties. * * * It is well settled law that the election of a disqualified person is a nullity—the election is a failure and a new election must be held. * * * It it quite certain, then, that if the appellee, Edwin F. Rizer, did not possess at the time of his election, as alleged, the qualifications prescribed by the charter for the office of city councilman of Cumberland, he was never legally elected thereto."

[101] Jeffries v. Harrington, 11 Colo. 191, 17 Pac. 505. A woman may hold a deputy clerkship of a county court. Schuchardt v. People, 99 Ill. 501. A woman may be master in chancery. Huff v. Cook, 44 Iowa, 639. A right to hold an elective office may be conferred upon a woman even by a retrospective statute. Wright v. Noell, 16 Kan. 601; Harbour-Pitt Shoe Co. v. Dixon, 22 Ky. L. R. 1169, 60 S. W. 186. The office of notary public is created by statute and not by the constitution; a married woman is, therefore, eligible.

Atchison v. Lucas, 83 Ky. 451. A woman is not eligible to the office of jailor. Wilson v. Genessee Circuit Judge, 87 Mich. 493, 49 N. W. 869. A woman may be appointed deputy county clerk. State v. Gorton, 33 Minn. 345. Eligible for office of county superintendent. Rupp v. Rust, 4 Ohio Cir. Ct. R. 329. See, also, Washington Laws 1889-90, p. 564; Warwick v. State, 25 Ohio St. 22; State v. Hostetter, 137 Mo. 636, 39 S. W. 270, 38 L. R. A. 208. Where the court holds that no restrictive intent is shown by the use of the word "his" as used in the Constitution, art. 8, § 12, declaring who is eligible to office, a woman is, therefore, eligible to the office of clerk of county court. See, also, Wisconsin Statutes, Laws 1891, c. 34, p. 27; c. 119, p. 141, which allow married women to act as court commissioners or receivers since

or minors [102] of both sexes are usually regarded as inferior in this respect to males of full age, by constitutional provisions or legislative enactment in some states these have been debarred from holding the particular offices specified and to which the qualifications may apply. The question of whether women shall vote or hold office is one of local public policy merely. It is not to be compared with the same question in respect to aliens; the inclinations, interests and duties of the latter are presumptively with the nation of which they are citizens and otherwise antagonistic. The present tendency is to remove the disabilities and restrictions imposed upon women in respect to their holding office and the rule almost universally obtains in the United States of their right to vote on questions connected with public education and to hold office in connection with the public school system.[103]

§ 610. Mental.

To properly perform the duties of many offices special educational or professional attainments are necessary and special qualifications based upon these conditions are usually required of those desiring to fill the offices where such qualifications are regarded as expedient and necessary.[104] Age may also affect the mental

their admission to the bar is authorized. But see Opinion of Justices, 115 Mass. 602. Member of school committee. State v. McSpaden, 137 Mo. 628. Not eligible for office of school director. State v. Stevens, 29 Or. 464. A woman is ineligible to the office of county superintendent of public schools.

[102] State v. Bradley, 48 Conn. 548; In re Golding's Petition, 57 N. H. 146; People v. Dean, 3 Wend. (N. Y.) 438; Green v. Burke, 23 Wend. (N. Y.) 490; McConnell v. Kennedy, 29 S. C. 180. See, also, In re Golding's Petition, 57 N. H. 146; Lynch v. Livingston, 6 N. Y. (2 Seld.) 422; Lambert v. People, 76 N. Y. 220. But see United States v. Bixby, 10 Biss. 520, 9 Fed. 78.

[103] Huff v. Cook, 44 Iowa, 639; Wright v. Noell, 16 Kan. 601; Koontz v. Kurtzman, 12 Wash. 59. But see State v. Stevens, 29 Or. 464, 44 Pac. 898. Laws 1893, p. 62, unconstitutional in so far as it makes women eligible to the office of county superintendent of schools. Const. art. 6, § 8, and art. 2, § 2, provide that only electors who must be male citizens are eligible to county offices.

[104] State v. City Council of Wilmington, 3 Har. (Del.) 294; State v. Blanchard, 6 La. Ann. 515; People v. May, 3 Mich. 598; State v. Starkey, 49 Minn. 503, 52 N. W. 24. The provision that a building inspector shall be "a practical architect and engineer" is mandatory and the election is void of one not possessing such qualifications. State v. Gylstrom, 77 Minn. 355, 79 N. W. 1038; Stearns v. Tew, 6 Misc. 404,

capacity of candidates. This is especially true of all those offices which require for the proper performance of their duties, the exercise of that judgment and discretion which usually accompany age and experience.[105] Since youth may be regarded as a disqualification, so, on the other hand, extreme old age may be considered as having dulled the mental faculties to such an extent as to incapacitate those having reached a certain age from performing the duties of particular offices.[106]

§ 611. Condition of the candidate.

It was said by Judge Dixon of Wisconsin that "it is an acknowledged principle, which lies at the very foundation, and the enforcement of which needs neither the aid of statutory nor constitutional enactments or restrictions, that the government is instituted by the citizens for their liberty and protection, and that it is to be administered and its powers and functions exercised

27 N. Y. Supp. 26; People v. City of Buffalo, 18 Misc. 533, 42 N. Y. Supp. 545. But see State v. Nichols, 83 Minn. 3, 85 N. W. 727, which holds that a qualified voter is eligible to the office of city attorney although he has not been duly admitted as an attorney at law; the city charter providing that all qualified voters shall be eligible to any municipal office.

It is interesting to note that in Maryland, Delaware, Kentucky and Tennessee no minister or preacher of any religious denomination can be a member of the state legislature. In Kentucky they are not eligible for the office of governor and in Delaware they cannot hold any civil office. See Stimson, Am. St. Law, § 223, subd. 1. See, also, Bacon's Abr. tit. "Offices and Officers" (I), where it is said: "If an office, either of the grant of the king or subject, which concerns the administration, proceeding or execution of justice, or the king's revenue, or the commonwealth, or the interest, benefit or safety of the subject, or the like; if these or any of them be granted to a man that is unexpert, and hath no skill and science to exercise or execute the same, the grant is merely void, and the party disabled by law, and incapable to take the same, pro commodo regis et populi; for only men of skill, knowledge, and ability to exercise the same, are capable to serve the king and his people."

[105] United States v. Bixby, 9 Fed. 78. U. S. Const. art. 2, § 1, subd. 5. No one is eligible to the office of president of the United States who shall not have attained the age of 35 years. State v. Gastinel, 20 La. Ann. 115; In re Golding's Petition, 57 N. H. 146; McConnell v. Kennedy, 29 S. C. 180.

[106] Keniston v. State, 63 N. H. 37, 56 Am. Rep. 486. See, also, People v. French, 52 Hun (N. Y.) 464; People v. Carr, 100 N. Y. 236; People v. Duane, 121 N. Y. 367.

only by them and through their agency."[107] This principle has acted so universally that all of the states require as one of the first qualifications for the proper performance of public duties that one of citizenship.[108] In further maintaining the principle of local self-government, the condition of residence[109] within the

[107] State v. Smith, 14 Wis. 497.

[108] Scott v. Strobach, 49 Ala. 477; Walther v. Rabolt, 30 Cal. 186; Drew v. Rogers (Cal.) 34 Pac. 1081; McCarthy v. Froelke, 63 Ind. 507. One necessarily need not be a citizen of the United States if he is a voter under the state constitution where a "voter" is declared eligible to an office. State v. Kilroy, 86 Ind. 118. The terms "inhabitant" and "citizen" are not synonymous; one need not necessarily be a citizen of the county where an inhabitant is eligible under the statutes to hold office.

State v. Van Beek, 87 Iowa, 569, 54 N. W. 525, 19 L. R. A. 622; State v. Fowler, 41 La. Ann. 380, 6 So. 602. One who has declared his intention to become a citizen of the United States is a citizen of the state and qualified to hold office. State v. Abbott, 41 La. Ann. 1096, 6 So. 805; Justices Opinion, 70 Me. 560. A person not a citizen of the United States may be a selectman of the town so that his official acts will bind it. Taylor v. Sullivan, 45 Minn. 309, 11 L. R. A. 272; State v. Streukens, 60 Minn. 325, 62 N. W. 259; State v. Boyd, 31 Neb. 682, 48 N. W. 739, 51 N. W. 602; State v. Smith, 14 Wis. 497; State v. Murray, 28 Wis. 96.

If a person has filed his declaration of intention to become a citizen, this is usually sufficient. See State v. Fowler, 41 La. Ann. 380, 6 So. 602; State v. Abbott, 41 La. Ann. 1096, 6 So. 805; Taylor v. Sullivan, 45 Minn. 309, 11 L. R. A. 272, and State v. Streukens, 60 Minn. 325, 62 N. W. 259; In re Conway, 17 Wis. 526.

[109] Wheat v. Smith, 50 Ark. 266, 7 S. W. 161. One does not lose his domicile as to disqualify him from holding office by residing abroad as consul for the United States. People v. Brite, 55 Cal. 79; Wristlen v. Donlan, 79 Cal. 472, 21 Pac. 868; Bergevin v. Curtz, 127 Cal. 86, 59 Pac. 312; Jain v. Bossen, 27 Colo. 423, 62 Pac. 194; State v. George, 23 Fla. 585, 3 So. 81; Jones v. Mills, 11 Ill. App. 350; Laimbeer v. People, 48 Ill. 490; State v. Allen, 21 Ind. 516; Yonkey v. State, 27 Ind. 237; State v. Kilroy, 86 Ind. 118; Police Com'rs v. City of Louisville, 66 Ky. (3 Bush) 598; Barker v. Southern Const. Co., 20 Ky. L. R. 796, 47 S. W. 608; Gibson v. Wood, 20 Ky. L. R. 1547, 49 S. W. 768. A charter provision required a residence in the city for three years as a qualification for office; under this provision, one who has resided for three years in territory annexed to the city becomes immediately eligible to office. State v. Blanchard, 6 La. Ann. 515; Stow v. Common Council of Grand Rapids, 79 Mich. 595, 44 N. W. 1047; Auditor General v. Longyear, 110 Mich. 223, 68 N. W. 130. Deputy township treasurers may, however, be appointed who do not reside in the township. Safford v. Board of Health, 110 Mich. 81, 33 L. R. A. 300; State v. Holman, 58 Minn. 219; State v. Banta, 71 Mo. App. 32; Dowty v. Pittwood, 23 Mont. 113, 57 Pac. 727; State v.

limits of the corporation as to which the public office exists is almost universally required and the lack of this qualification is sufficient to debar one from holding certain prescribed offices. In some instances, the ownership of real property is a necessary qualification for eligibility to office; the principle which is a sound one being that the ownership of property, real or personal, will make one more conservative in his official acts as affecting the public welfare and that he will, in all respects, exercise the duties of his office more carefully, efficiently and honestly since he will be personally affected in his property interests by any neglect, extravagance or misfeasance in office.[110] In a succeeding section [111] will be considered the various acts required in properly qualifying, as it is termed, for office; the formal acceptance, the taking of a prescribed oath and the furnishing of an official bond; a failure to qualify by performing those acts which may be required by statute is sufficient to create a condition through which a candidate for office duly elected may be prevented from assuming and exercising the duties appertaining thereto.[112]

McMillen, 23 Neb. 385, 36 N. W. 587; People v. Platt, 50 Hun, 454, 3 N. Y. Supp. 367; People v. Merick, 61 Hun, 396, 16 N. Y. Supp. 246; People v. Hull, 64 Hun, 638, 19 N. Y. Supp. 536; Fahey v. Johnstone, 21 App. Div. 154, 47 N. Y. Supp. 402; Jones v. Jones, 12 Pa. 356; State v. McGeary, 69 Vt. 461, 38 Atl. 165, 44 L. R. A. 446; Kempster v. City of Milwaukee, 97 Wis. 343, 72 N. W. 743. But see Salamanca Tp. v. Wilson, 109 U. S. 627, which holds that where there is nothing in either the constitution or laws of the state which require a township treasurer to be a resident of the township when elected or qualified, the fact that he moves across the line into a joining township cannot create a vacancy in his office. See, also, Steusoff v. State, 80 Tex. 428, 15 S. W. 1100, 12 L. R. A. 364.

110 Darrow v. People, 8 Colo. 417; Crovatt v. Mason, 101 Ga. 246; People v. Hamilton, 24 Ill. App. 609; Pettit v. Yewell, 24 Ky. L. R. 565, 68 S. W. 1075; Spear v. Robinson, 29 Me. 531; Vanneman v. Pusey, 93 Md. 686, 49 Atl. 659; Davis v. School Dist. No. 1, 81 Mich. 214; State v. Macklin, 41 Mo. App. 335; State v. Williams, 99 Mo. 291, 12 S. W. 905; Wynn v. State, 67 Miss. 312; Roane v. Matthews, 75 Miss. 94, 21 So. 665; Mayer v. Sweeney, 22 Mont. 103, 55 Pac. 913; State v. Ruhe, 24 Nev. 251, 52 Pac. 274; State v. McAllister, 38 W. Va. 485, 24 L. R. A. 343; Kempster v. City of Milwaukee, 97 Wis. 343.

111 See §§ 617 et seq., post.

112 Pearson v. Wilson, 57 Miss. 848. The requirement to qualify within a prescribed time does not, where an election is contested, apply until the termination of the contest. Johnson v. Mann, 77 Va. 265; Vaughan v. Johnson, 77 Va. 300; Carr v. Wilson, 32 W. Va. 419, 9 S. E. 31, 3 L. R. A. 64.

§ 612. Act of candidate.

The duties required of public officers are many and vary with the nature of each office. Some collect and disburse the public moneys, others enact laws, others construe them and still others perform administrative and executive duties. In order to secure the proper performance of these duties respectively, the law may require as qualifications that highest excellency and ability which is necessary. This principle applied eliminates as candidates for office, controlling and handling public moneys, those persons who have been defaulters, embezzlers or have committed other crimes or misdemeanors, the nature of which would incapacitate them from honestly, efficiently and safely performing these duties.[113]

[113] Taylor v. The Governor, 1 Ark. 21; Trustees of Town of Gillett v. People, 13 Colo. App. 553, 59 Pac. 72, construing § 9 of the corrupt practices act, Laws 1891, p. 168. Cawley v. People, 95 Ill. 249; Shuck v. State, 136 Ind. 63, 35 N. E. 993; Carrothers v. Russell, 53 Iowa, 346; State v. Watkins, 21 La. Ann. 631; Hudspeth v. Garrigues, 21 La. Ann. 684; State v. Reid, 45 La. Ann. 162, 12 So. 189; State v. Dart, 57 Minn. 261. The eligibility of a person for office during the remainder of a term is involved in removal proceedings which may be prosecuted for the purpose of determining that eligibility. The removal of a county treasurer was sought in this case for misfeasance in office. On the question above the courts say: "But we are of the opinion that he was not eligible for reappointment while under suspension, or during the pendency of the proceedings. The removal proceedings cannot be nullified or reversed in that manner. Such removal proceedings are not merely for the purpose of ousting the person holding the office; they include a charge that he has forfeited his qualification for the office for the remainder of the term. They are brought to declare a forfeiture of a civil right, his eligibility, his qualification to hold that office for the rest of that term. The proceeding is not brought for his removal from a day or a week or a month of his term, but from the whole of the remainder of his term, and the final order of removal is not made for his removal from a day or a week or a month of his term, but from the whole of the remainder of his term. Nothing less is involved in the proceedings. Whether the voters at the polls should condone the offense by which he forfeited his office it is not necessary here to decide. We are of the opinion that the county commissioners could not do so."

State v. Dart, 57 Minn. 261, 59 N. W. 190; State v. Bersch, 83 Mo. App. 657. The offense of selling lottery tickets cannot be classed with misfeasance in office or bribery and does not, therefore, disqualify a delegate to the municipal assembly.

Hoskins v. Brantley, 57 Miss. 814; State v. Moores, 52 Neb. 770, 73 N. W. 299. Construing Constitution, art. 14, § 2, which provides "that any person who is in default as collector and custodian of public

The act of dueling has been held to evidence such lack of a fine sense of honor and good morals as to incapacitate those who may have participated in a duel or the sending of a challenge from holding certain prescribed offices.[114]

It is a sound proposition without doubt that the duties of a public office should be performed by those who have always been in sympathy with the government, its traditions and policies, and laws prohibiting those who have engaged in an open or overt act against the government are unquestionably constitutional and the condition of continuous allegiance may be a necessary qualification for office.[115]

money or property shall not be eligible to any office of trust or profit under the Constitution or Laws of this state" and holding the office of mayor of a city of the metropolitan class an office of "trust or profit." State v. Moores, 56 Neb. 1, 76 N. W. 530; Attorney General v. Marston, 66 N. H. 485, 22 Atl. 560, 13 L. R. A. 67; People v. French, 102 N. Y. 583.

Com. v. Walter, 83 Pa. 105. It is not necessary that a person shall be convicted of an offense before proceedings can be begun for his removal from office. The word "qualify" as used in the Constitution, is used in its ordinary or proper signification.

Pucket v. Bean, 58 Tenn. (11 Heisk.) 600; State v. Humphreys, 74 Tex. 466, 12 S. W. 99, 5 L. R. A. 217. Where one promises in case of his election to an office to serve for less compensation than the lawful fees, it does not disqualify him from holding such office under Constitution Tex., art. 16, § 1, 5, which prohibit the offering of inducements to procure votes. State v. Common Council of Watertown, 9 Wis. 254. The reappointment of an officer with knowledge of his previous misconduct is a condonation of such so far as it fixes the right to hold office. But see People v. Goddard, 8 Colo. 432. The Colorado Constitution does not in terms disqualify persons from holding office because of a resort to corrupt means to obtain it. See, also, Dassey v. Sanders, 17 Ky. L. R. 972, 33 S. W. 193.

[114] Matter of Dorsey, 7 Port. (Ala.) 294; Anderson v. State, 72 Ala. 187; State v. Buchman, 18 Fla. 267; Morgan v. Vance, 67 Ky. (4 Bush) 325; Barker v. People, 3 Cow. (N. Y.) 686; Royall v. Thomas, 28 Grat. (Va.) 130.

[115] Payne v. City of San Francisco, 3 Cal. 122; Matter of Office of Attorney General, 14 Fla. 277; People v. Taylor, 57 Cal. 620; Matter of Executive Communication, 12 Fla. 651; People v. Perkins, 85 Cal. 509, 26 Pac. 245; State v. Van Beek, 87 Iowa, 569, 54 N. W. 525, 19 L. R. A. 622. The existence of a contest is a legal excuse for not qualifying within the time prescribed by law. State v. Watkins, 21 La. Ann. 631; Hudspeth v. Garrigues, 21 La. Ann. 684; State v. Matheny, 7 Kan. 327; State v. Barnes, 51 Kan. 688, 33 Pac. 621; Privett v. Stevens, 25 Kan. 275. One who has served in the rebel army but not voluntarily is eligible to hold the office of sheriff. People

A person may be also disqualified from holding or becoming a candidate for a particular office because of the fact that he is now holding a certain designated one. This rule or principle proceeds upon the theory that one cannot, because of physical limitations, efficiently perform the duties of more than one public office.[116] The interests and duties of two offices may also be so diverse and incompatible that no one should be permitted to hold them both;[117] it being assumed that the duties of one would be neg-

v. Miller, 16 Mich. 56; State v. Cosgrove, 34 Neb. 386, 51 N. W. 974; Cordiell v. Frizell, 1 Nev. 130; People v. Watts, 73 Hun, 404, 26 N. Y. Supp. 280. The failure to take an oath required by law does not of itself vacate an office.

Worthy v. Barrett, 63 N. C. 199; State v. Kraft, 18 Or. 550, 20 Or. 28, 23 Pac. 663. The existence of a contest extends the time for qualification. Branham v. Long, 78 Va. 352; State v. Ruff, 4 Wash. 234, 29 Pac. 999, 16 L. R. A. 140; Attorney General v. Elderkin, 5 Wis. 300; State v. Knight, 82 Wis. 151, 50 N. W. 1012, 51 N. W. 1137. But see Ross v. Williamson, 44 Ga. 501. The failure to give a bond and take the oath required by law and within the time required must be the fault or failure of the officer. The fact of the failure alone is not sufficient to vacate the office.

[116] Howard v. Shoemaker, 35 Ind. 111; Horton v. Watson, 23 Kan. 229, construing Kansas Const. art. 9, § 3, which provides that no person shall hold the office of county treasurer for more than two consecutive terms.

State v. Montgomery, 25 La. Ann. 138. The constitutional prohibition against a person holding more than one office does not prevent a constitutional officer from holding a municipal office. State v. Plymell, 46 Kan. 294; Taylor v. Com., 26 Ky. (3 J. J. Marsh.) 407; Rodman v. Harcourt, 43 Ky. (4 B. Mon.) 224; Justices of Spencer County Court v. Harcourt, 43 Ky. (4 B. Mon.) 499; Bouanchaud v. D'Hebert, 21 La. Ann. 138; State v. Arata, 32 La. Ann. 193; State v. Sutton, 63 Minn. 147, 65 N. W. 262, 30 L. R. A. 630; Brady v. West, 50 Miss. 68; State v. Draper, 45 Mo. 355; State v. Weston, 4 Neb. 234. The office of secretary of state and adjutant general can be held by the same person at the same time as such condition does not conflict with Nebraska Constitution providing that the secretary of state shall not receive to his own use "any fees, costs, perquisites of office or other compensation."

State v. Sadler, 25 Nev. 131; State v. Parkhurst, 9 N. J. Law (4 Halst.) 427; State v. Brown, 5 R. I. 1; In re Corliss, 11 R. I. 638; Calloway v. Sturm, 48 Tenn. (1 Heisk.) 764; Carr v. Wilson, 32 W. Va. 419, 9 S. E. 31, 3 L. R. A. 64. A person though ineligible for re-election as governor of the state by reason of a constitutional provision limiting the term of office to four years and making one ineligible to re-election can continue to discharge the duties of his office after the expiration of his term under art 4, § 6.

[117] Preston v. United States, 37 Fed. 417. The offices of crier and

lected or improperly performed because of the interest or nature of the other. Still another reason sustaining this rule is to be found in the proposition that it is not desirable nor expedient to place upon one individual, or set of individuals, the burden of

messenger of the United States District Court are not incompatible and one person may perform the duties and receive the salaries of both. See, also, United States v. Saunders, 120 U. S. 126; State Bank v. Curran, 10 Ark. 142. The office of sheriff and justice of the peace cannot be held by the same person at the same time. Vogel v. State, 107 Ind. 374. A judicial officer under the Indiana Constitution is not eligible to a political office the term of which begins before the expiration of the judicial term.

Abrey v. Gray, 58 Kan. 148, 48 Pac. 577. The office of city clerk and clerk of the District Court can be held by the same person in the absence of constitutional or statutory inhibition. Rodman v. Harcourt, 43 Ky. (4 B. Mon.) 224; Justices of Spencer County Court v. Harcourt, 43 Ky. (4 B. Mon.) 499; Hoglan v. Carpenter, 67 Ky. (4 Bush) 89. Postmaster and judge of county court are incompatible offices. Stubbs v. Lea, 64 Me. 195; Justices Opinion, 68 Me. 594; Horthway v. Sheridan, 111 Mich. 18, 69 N. W. 82. Acceptance by a person of an office incompatible with one then held ipso facto vacates the latter. Attorney General v. Common Council of Detroit, 112 Mich. 145, 70 N. W. 450, 37 L. R. A. 211. The office of mayor and governor are incompatible. Kenney v. Goergen, 36 Minn. 190, 31 N. W. 210. The office of clerk of the district court and court commissioner are incompatible. State v. Bus, 135 Mo. 315, 36 S. W. 636, 33 L. R. A. 616; State v. Valle, 41 Mo. 29; State v. Draper, 45 Mo. 355; Andover v. Carr, 55 N. H. 452. The office of selectmen and officers of the section committee are not incompatible and may be held by the same person at the same time.

State v. Sadler, 25 Nev. 131, 58 Pac. 284, 59 Pac. 546, 63 Pac. 128. A state senator and a paymaster in the army are incompatible offices and one accepting an appointment of the latter and entering upon the duties ipso facto vacates his seat as state senator. Oliver v. City of Jersey City, 63 N. J. Law, 96, 42 Atl. 782. The position of colonel in the United States army considered an office. People v. Lahr, 71 Hun, 271, 24 N. Y. Supp. 1020; People v. Duane, 121 N. Y. 367. Retired army officer. People v. Purdy, 154 N. Y. 439, 48 N. E. 821. School trustees and town supervisor incompatible offices. State v. Mason, 61 Ohio St. 513, 56 N. E. 468. A member of the general assembly vacates his place by accepting an appointment to a Federal judgeship.

State v. Mason, 61 Ohio St. 62. A clerk of the United States pension agency having no duties defined by law nor discretion to act independently of the direction of the pension agent is not ineligible to membership in the general assembly as "holding an office under the authority of the United States." Ohio Const. art. 2, § 4. O'Connor v. City of Fond du Lac, 101 Wis. 83. But see Dust v. Oakman, 126 Mich. 717, 86 N. W. 151. See, also, Santa Ana Water Co. v. Town of San Buena-

performing the duties of too many public offices when there are so many others properly qualified and competent to administer the duties with equal ability and efficiency.[118] Statutory or constitutional provisions may also disqualify members of legislative bodies from holding any civil office which shall have been created or the emoluments of which have been increased during their incumbency in the legislative office.[119] One may also be rendered ineligible to office by reason of the fact that it has already been held by him for a designated time.[120]

§ 613. Right to change qualifications.

As suggested in a preceding section, the right to hold office if possessed by reason of the possession of the required qualifications does not become a vested one and the people acting in constitutional convention or through the legislature, if the office is a legislative one, can at any time change or add to such qualifications.[121] It is unquestioned in the United States that with respect to the public offices established by the different states and the Federal government, each one of these sovereignties is supreme with respect to the creation and regulation of such offices and the fixing of qualifications thereto and that neither a state nor the

ventura, 65 Fed. 323, which holds that the incumbency of two offices does not ipso facto create a vacancy in either of them where neither the general statutes nor a particular charter makes such condition a ground for such result. Vogel v. State, 107 Ind. 380; Keating v. Covington, 18 Ky. L. R. 245, 35 S. W. 1026; State v. Newhouse, 29 La. Ann. 824; State v. Thompson, 20 N. J. Law (Spencer) 689; People v. Norstrand, 46 N. Y. 375; Davenport v. City of New York, 67 N. Y. 456; State v. Hoyt, 2 Or. 246; Adam v. Mengel (Pa.) 8 Atl. 606; State v. Buttz, 9 S. C. 156, and State v. Brinkerhoff, 66 Tex. 45.

[118] United States v. Harsha, 172 U. S. 567.

[119] People v. Curtis, 1 Idaho, 753; State v. Valle, 41 Mo. 29; State v. Hoyt, 2 Or. 246; State v. George, 22 Or. 142, 29 Pac. 356, 16 L. R. A. 737, following David v. Portland Water Committee, 14 Or. 98, 12 Pac. 174. Not an office within the meaning of such provision in the Oregon Constitution as noted in the text. State v. Boyd, 21 Wis. 208. But a member of the legislature may hold an office, the emoluments of which were increased during the legislative term but after his election to the other office.

[120] State v. Bogard, 128 Ind. 480, 27 N. E. 1113; State v. Linkhauer, 142 Ind. 94, 41 N. E. 325; Davis v. Patten, 41 Kan. 480, 21 Pac. 677; Koontz v. Kurtzman, 12 Wash. 59, 40 Pac. 622.

[121] Thomas v. Owens, 4 Md. 189; State v. McSpaden, 137 Mo. 628; State v. Dunn, 73 N. C. 595.

Federal government can with respect to the other pass legislation or adopt constitutional provisions which will alter, add to, or defeat the legislation of that other sovereignty with respect to their own local matters so far as they have not been limited by the provisions of the Federal constitution.[122] In a preceding section [123] it was stated that in all of the states, many offices are provided for by the constitution of the state and are, therefore, termed constitutional offices while the establishment and regulation of still others is left by the constitution to the legislature and the latter are termed legislative offices. The principle clearly applies as was then suggested that a constitutional office is beyond the regulation or control of the legislature.[124] Where, however, no constitutional prohibition intervenes, the legislature may create or fix the qualifications of an office and may add to them or change them at pleasure.[125]

[122] De Turk v. Com., 129 Pa. 151, 18 Atl. 757, 5 L. R. A. 853. The state cannot declare vacant a Federal office.

[123] See § 596.

[124] Com. v. Willis, 19 Ky. L. R. 962, 42 S. W. 1118. A city council has no power to add to the qualifications of city attorney as prescribed by the city charter. State v. Holman, 58 Minn. 219. Where the constitution prescribes the qualifications for eligibility to office it is not in the power of the legislature to add any additional qualifications or impose any limits upon the terms of eligibility fixed by the constitution. See, also, the following cases: Rison v. Farr, 24 Ark. 161; Quinn v. State, 35 Ind. 485; Morris v. Powell, 125 Ind. 281, 9 L. R. A. 326; Kinneen v. Wells, 144 Mass. 497; St. Joseph & D. C. R. Co. v. Buchanan County Ct., 39 Mo. 485; People v. Schiellein, 95 N. Y. 124; People v. Canaday, 73 N. C. 198; Black v. Trower, 79 Va. 123; State v. Baker, 38 Wis. 71; State v. Williams, 5 Wis. 308, and State v. Tuttle, 53 Wis. 45; People v. Clute, 50 N. Y. 451.

State v. Wilson, 121 N. C. 425, 28 S. E. 554. Laws 1891, c. 320, § 1, are not unconstitutional as requiring a qualification for office in addition to those prescribed in the constitution. The chapter provides that railroad commissioners shall not be interested in any railroad. This the court holds is not intended to restrain the rights of the individual but to secure the faithful and efficient performance of public duties.

[125] Robinson v. White, 26 Ark. 139; Jeffries v. Rowe, 63 Ind. 592; Buckner v. Gordon, 81 Ky. 665; Jordan v. Bailey, 37 Minn. 174.

State v. Holman, 58 Minn. 219.

"The legislature in the absence of express constitutional restrictions possesses absolute freedom to create or abolish offices at pleasure and to attach to them such restrictions as it chooses; it may prescribe the qualifications of the incumbents and may make the office elective or appointive in such a manner as it

§ 614. Limitations upon legislative power.

The limitations, however, are found either as expressly made or inherently existing that neither political [126] nor religious opinions or beliefs [127] can be made a test of the right to hold office except as a particular board of public officers may, by law, be required to consist of the members of the two leading political bodies.[128] Nor can arbitrary, unreasonable exclusions from office be made or qualifications prescribed which do not operate with uniformity.[129]

§ 615. Removal of disqualification.

An interesting question arises in connection with the removal of a disqualification attached to a person in respect to holding office. At what time does the eligibility or lack of it attach to a candidate for office and destroy or affect the right of holding it. Do statutory provisions, general in their terms as to time apply to the condition of the candidate at the time of his nomination under a primary law or his election or at the time when he should qualify and enter upon the duties of his office. In respect to these questions there are two leading lines of decisions; one holding that the question of eligibility refers to the condition of the candidate at the time of his nomination for office under a primary system or his election to the office and that if, at this time, a person is ineligible to become an incumbent of a specified office, the removal of his disqualifications or disabilities will not thereafter render him eligible to enter upon and perform the duties of the office.[130] The other line of cases hold directly to the con-

sees fit." People v. Clute, 50 N. Y. 451; Waldraven v. City of Memphis, 44 Tenn. (4 Cold.) 431.

[126] Scott v. Strobach, 49 Ala. 477; City of Evansville v. State, 118 Ind. 426, 4 L. R. A. 93; Com. v. Jones, 73 Ky. (10 Bush) 744; City of Baltimore v. State, 15 Md. 376. But see Rogers v. City of Buffalo, 123 N. Y. 173, 9 L. R. A. 579. A law is not unconstitutional which provides that no more than a certain proportion of a board of commissioners can be taken from one party. See, also, State v. Wilmington City Council, 3 Har. (Del.) 294, relative to the exclusion of clergymen from holding a "civil office in this state."

[127] State v. Wilmington City Council, 3 Har. (Del.) 294.

[128] Rogers v. Common Council of Buffalo, 123 N. Y. 173, 9 L. R. A. 579. But see Rathbone v. Wirth, 150 N. Y. 459, 45 N. E. 15, 34 L. R. A. 408.

[129] White v. Clements, 39 Ga. 232. Colored persons not ineligible to hold office. Smith v. Moody, 26 Ind. 299; City of Baltimore v. State, 15 Md. 376.

[130] Searcy v. Grow, 15 Cal. 118; Taylor v. Sullivan, 45 Minn. 309, 47

trary and decide that if at any time before it is necessary for a person duly elected or appointed to qualify and enter upon the performance of the duties of an office, he removes disabilities or disqualifications, he then becomes a fit legal and proper incumbent of the office.[131]

§ 616. Acceptance.

It was a common-law duty resting upon those selected either by election or appointment to perform the duties of a public office to accept the honor and the responsibility. There is, however, at the present time, no principle of law which, independent of statutory provisions, requires one to sacrifice themselves for the good of the public if the holding of office is regarded in this light.[132]

N. W. 802, 11 L. R. A. 272. "The whole article (referring to Const. art. 7), relates to the elective franchise. It declares the disability of certain classes, including persons of foreign birth who have not declared their intention to become citizens of the United States, to vote at any election. That declared disability certainly relates to the time when an election takes place. Closely associated with this is the provision in question, which in legal effect declares that the persons thus disqualified to vote shall not be 'eligible to any office' elective by the people. Neither the proper signification of the language, nor the context, justifies the conclusion that at this point there is an abrupt transition in the subject from elections to the holding of office. * * *"

In State v. Murray, 28 Wis. 96, it was considered to be a fundamental principle of popular government, even in the absence of any constitutional or statutory restriction, that one who is not a qualified elector cannot legally hold an elective office. According to the opinion of Ryan, C. J., in the later case of State v. Trumpf, 50 Wis. 103, this proposition should in principle be more broadly stated, and only such persons as are themselves electors at the time of the election should be deemed to be eligible to office." State v. Sutton, 63 Minn. 147, 65 N. W. 262, 30 L. R. A. 630; State v. Berkeley, 140 Mo. 184, 41 S. W. 732; State v. Page, 140 Mo. 501, 41 S. W. 963; State v. McMillen, 23 Neb. 385; State v. Clarke, 3 Nev. 566.

[131] Smith v. Moore, 90 Ind. 294; Vogel v. State, 107 Ind. 374; Brown v. Goben, 122 Ind. 113, 23 N. E. 519, following Smith v. Moore, 90 Ind. 294; Shuck v. State, 136 Ind. 63; State v. Van Beek, 87 Iowa, 569, 54 N. W. 525; Privett v. Bickford, 26 Kan. 52, 40 Am. Rep. 301; Demaree v. Scates, 50 Kan. 275, 20 L. R. A. 97. The word "eligible" as used in the Gen. St. 1889, par. 1622, does not mean "eligible to be elected" but eligible or legally qualified to hold the office after the election; that is, at the commencement of the term of office. Attorney General v. Marston, 66 N. H. 485, 22 Atl. 560, 13 L. R. A. 670; Kirkpatrick v. Brownfield, 97 Ky. 558, 31 S. W. 137, 29 L. R. A. 703.

[132] Edwards v. United States, 103

Statutory provisions may exist and must be complied with under the penalties prescribed.[133] Where an office is accepted, this act may be either formally done or informally and in the latter case it will be evidenced by acts of the candidate in entering upon the duties of his office or in doing other things which the law will consider as equivalent to an acceptance.[134]

§ 617. Official oath.

One qualification for the office and also one of the criterions adopted by courts in distinguishing between a public office and an employment is the requirement that the incumbent shall take and file the oath prescribed by law[135] which includes, usually, an

U. S. 471; Hinze v. People, 92 Ill. 406. "No man can be compelled to give his time and labor, any more than his tangible property, to the public without compensation; and, since there is no mode by which policemen appointed by the commissioners can be compensated, it follows that no one, even after accepting their appointment, can be compelled to perform any police duties. People v. White, 54 Barb. (N. Y.) 622; State v. McEntyre, 25 N. C. (3 Ired.) 171; Township of Hartford v. Bennett, 10 Ohio St. 441.

[133] People v. Williams, 145 Ill. 573, 33 N. E. 849, 24 L. R. A. 492. The demand of a fine for failure to accept an office to which one has been elected will not relieve the person from the duty of serving. Black v. Trower, 79 Va. 123; State v. Von Baumbach, 12 Wis. 310.

[134] People v. Whitman, 10 Cal. 38; Justices of Jefferson County v. Clark, 17 Ky. (1 T. B. Mon.) 82; People v. Wilson, 72 N. C. 155.

[135] Thomas v. Owens, 4 Md. 189; Bennett v. Treat, 41 Me. 226; Jump v. Spence, 28 Md. 1; Com. v. Sullivan, 165 Mass. 183; Doherty v. Buchanan, 173 Mass. 338; State v. McAdoo, 36 Mo. 452. The rule applies to a candidate for office under Missouri Const. Blake v. Sturtevant, 12 N. H. 567; Scammon v. Scammon, 28 N. H. 419. The "taking of an oath of office" imports the taking of the oath prescribed by law. Mason v. Thomas, 36 N. H. 302. A town record stating that the selectmen chosen "to take the oath of office prescribed by law" is sufficient proof of this fact.

Duffy v. State, 60 Neb. 812, 84 N. W. 264. A failure to take a constitutional oath of office within the time required because of a mistake in good faith as to the proper official oath to be taken will not of itself forfeit the office where, after the mistake is discovered, the person elected takes the proper oath and files it with the designated officer. Fisher v. Allen, 8 N. J. Law (3 Halst.) 301; Hoagland v. Culvert, 20 N. J. Law (Spencer) 387; Armstrong v. Whitehead, 67 N. J. Law, 405, 51 Atl. 472; In re Board of Health of Lansinburgh, 43 App. Div. 236, 60 N. Y. Supp. 27; In re Kendall, 85 N. Y. 302. The failure of commissioners appointed to act with reference to local improvements in the city of New York, to take the proper oath of office before

expression of allegiance to the government and the further pledge that the office-holder will perform the duties of his office honestly, efficiently, to the best of his ability, and according to law.[136] Where the taking of an oath is contrary to the religious belief of candidates, who in other respects are eligible, the provision is usually made for an affirmation which legally serves the same purpose.[137] The form of the oath if prescribed by statute is the one which should be administered [138] although courts usually hold that unimportant informalities or irregularities either in the form of the oath prescribed [139] or the manner or time of administering it [140] will not invalidate the title of the incumbent to his office.

entering upon the performance of official duties with respect to their official actions will not invalidate them. They are at least officers de facto and in the absence of fraud their acts are binding upon the public as well as the city.

In re Bradley, 141 N. Y. 527, 36 N. E. 598; Colvert v. Whittington, 33 N. C. (11 Ired.) 278; State v. Cansler, 75 N. C. 442. It is no defense to an indictment for misdemeanor in the exercise of official duties that the required oath of office was never taken. See, also, State v. Long, 76 N. C. 254; Wilcox v. Hemming, 58 Wis. 144.

[136] Forristal v. People, 3 Ill. App. 470; Greene v. Lunt, 58 Me. 518; Frans v. Young, 30 Neb. 360; Johnston v. Wilson, 2 N. H. 202; Bentley v. Phelps, 27 Barb. (N. Y.) 524.

[137] Glidden v. Towle, 31 N. H. 147.

[138] Bradley v. Clark, 133 Cal. 196, 65 Pac. 395; Smith v. Cronkhite, 8 Ind. 134; Harwood v. Marshall, 9 Md. 84. The presumption of law is that the proper oath was administered. Kearney v. Andrews, 10 N. J. Eq. (2 Stockt.) 70; People v. Palen, 74 Hun, 289, 26 N. Y. Supp. 225; People v. Watts, 73 Hun (N. Y.) 404; In re Cambria Street, 75 Pa. 357.

[139] Perkins v. Perkins, 24 N. J. Law (4 Zab.) 409; Hayter v. Benner, 52 N. J. Law, 359, 52 Atl. 351. The statutory form of oath is the one to be administered. In re Taylor, 25 Abb. N. C. 143, 11 N. Y. Supp. 189. Where the provisions of a statute are directory as to time in respect to the oath, it may lawfuly be taken within a reasonable time.

[140] Otterbourg v. United States, 5 Ct. Cl. 430. The oath must be administered by one having authority. Gurnee v. City of Chicago, 40 Ill. 165; Farwell v. Adams, 112 Ill. 57. The existence of a contest will extend the time in which an officer can qualify by taking and filing a required oath. State v. Wadhams, 64 Minn. 318; In re Taylor, 25 Abb. N. C. 143, 11 N. Y. Supp. 189; State v. Colvig, 15 Or. 57, 13 Pac. 639. The failure of a district attorney to file his certificate of election with his oath of office endorsed thereon only prevents him from entering upon the duties of his office: it does not operate as a forfeiture. State v. Kraft, 16 Or. 550, 23 Pac. 663. Where the failure to take an oath is due to the refusal of a police judge to administer it, an office cannot be declared vacant or forfeited.

If the taking of an oath is not prescribed by statute, none is required, and the mere fact that one is omitted, if the other distinguishing characteristics of a public office exist, will not alone make this an employment and not a public office.[141]

§ 618. Official bonds; nature.

Public officials to whom are entrusted and delegated the performance of duties and acts which affect not only the public corporation which they represent as an entity but also the public composing it and further create private rights between third parties by reason of such acts are usually required to give an official bond. This requirement is especially made applicable to public officials collecting and disbursing public moneys and entrusted with the care of public property.[142] Such a bond is required and

[141] People v. Perry, 79 Cal. 105, 21 Pac. 423; Com. v. Cushing, 99 Mass. 592; Frans v. Young, 30 Neb. 360, 46 N. W. 528; Glidden v. Towle, 31 N. H. 147; Brock v. Bruce, 58 Vt. 261, 2 Atl. 598.

[142] Ex parte Buckley, 53 Ala. 42; Ex parte Plowman, 53 Ala. 440; Oliver v. Martin, 36 Ark. 134; Middleton v. State, 120 Ind. 166, 22 N. E. 123; Neosho County Com'rs v. Leahy, 24 Kan. 54. Additional bonds may be required from time to time as made necessary by an increase in the amount of moneys handled. Gilbert v. Board of Education, 45 Kan. 31, 25 Pac. 226; Glass v. Hutchinson, 55 Kan. 162, 40 Pac. 287; Ketler v. Thompson, 76 Ky. (3 Bush) 287; City of Detroit v. Weber, 26 Mich. 284; People v. St. Clair County Sup'rs, 30 Mich. 388. Additional sureties can be required. Town of Gloster v. Harrell, 77 Miss. 793, 23 So. 520, 27 So. 609; Hyde v. State, 52 Miss. 665. It is within the constitutional power of a legislature to require a new bond in a larger amount and to have the sureties justify in respect to their sufficiency in a different manner from that prescribed by the statute at the time of the election and qualification of the official. Stoner v. Keith County, 48 Neb. 279, 67 N. W. 311; Mead Tp. v. Couse, 156 Pa. 311, 27 Atl. 26. Roadmasters must give bonds as tax collectors of township roads and levees. Milwaukee County Sup'rs v. Pabst, 70 Wis. 352, 35 N. W. 337, construing P. & L. Laws Wis. 1871, c. 400, § 3. But in the absence of a statutory or constitutional requirement, a bond is not necessary or ordinarily required. State v. Comson, 34 Or. 25; Quimby v. Wood, 19 R. I. 571. See, also, Throop, Pub. Off. § 170. "Many officers are also required by statute to furnish official bonds, with sureties; those who receive public money are almost invariably required so to do, for the safety of the public; and those whose powers and duties involve the receipt of money or property for the benefit of individuals; the seizure and disposition of the property, or the arrest or detention of the persons, of individuals; or otherwise bring

given not only to protect public funds and the community from loss by reason of a failure on the part of a public officer to faithfully discharge the duties of its office in respect to the public moneys, but it is also required and given in many cases on the broader principle of a protection to the whole world from injury resulting from an abuse of official position or negligence in performing official duties.[143]

Whether a statute requiring the giving of an official bond is mandatory or merely directory in its provisions will depend upon the language of the act immediately under consideration,[144] but the general principle or rule will apply that such provisions in cases of doubt are to be construed as mandatory in their character in respect to the giving of the bond but directory as to the time and that an individual is not properly qualified to perform the duties of an office until legal requirements in respect to the bond have been complied with.[145] Usually the failure to give a

them into conflict with the rights of individuals; are generally required to furnish official bonds, for the safety of those interested in or injured by the exercise of such powers and duties. The bond thus given affords merely a cumulative security for the due performance of the duties of the officer; for he is liable to an appropriate action for any failure to perform the same, without reference to his bond, and of course without joining his sureties."

[143] National Bank of Redemption v. Rutledge, 84 Fed. 400; Somerville v. Wood, 129 Ala. 369, 30 So. 280; Ex parte Buckley, 53 Ala. 42; People v. Smith, 123 Cal. 297, 55 Pac. 765; State v. Hughes, 19 Ind. App. 266, 49 N. E. 393. Before one can recover under § 5528, Horner's Rev. St. 1897, there must be shown both a breach of the official duty and resulting damages to the relator. State v. Peck, 58 Me. 123; James v. State, 49 Miss. 420; Jefferson County Com'rs v. Lineberger, 3 Mont. 231; Hardenbergh v. Van Keuren, 16 Hun (N. Y.) 17; People v. Tobey, 8 App. Div. 468, 40 N. Y. Supp. 577; Bray v. Barnard, 109 N. C. 44, 13 S. E. 729; McMulin v. Ellis (Tex.) 48 S. W. 217; Town of Stowe v. Luce, 27 Vt. 605. But see State v. Stout, 26 Ind. App. 446, 59 N. E. 1091.

[144] Sprowl v. Lawrence, 33 Ala. 674; State v. Ely, 43 Ala. 568; Ross v. Williamson, 44 Ga. 501; State v. Porter, 7 Ind. 204.

[145] Jackson v. Simonton, 4 Cranch, 255, Fed. Cas. No. 7,147; State v. Ely, 43 Ala. 568; Beebe v. Robinson, 52 Ala. 66; Thompson v. Holt, 52 Ala. 491; Pace v. People, 47 Ill. 321; Hollingsworth v. State, 111 Ind. 289, 12 N. E. 490; Albaugh v. State, 145 Ind. 356, 44 N. E. 355; Morgan v. Vance, 67 Ky. (4 Bush) 323; Trustees of Campbellsville v. Borders, 10 Ky. L. R. 162, 8 S. W. 446; State v. Peck, 30 La. Ann. 280; Rounds v. Mansfield, 38 Me. 586; Rounds v. City of Bangor, 46 Me. 541; State v. Ring, 29 Minn. 78;

bond within the time prescribed by law does not ipso facto vacate an office.[146]

§ 619. Excessive or illegal bond.

Where an official bond as given is excessive in its terms as tested by legal requirements or when its obligations require the performance of acts which are not authorized by law, it is usually held not binding either upon the principal or sureties of the bond in so far as such excess or illegal provisions appear.[147] If separable and where it is the purpose of a court that such condition shall exist, the illegal or excessive obligations are separated or severed from those which are capable of enforcement and the latter enforced.[148]

State v. County Court of Texas County, 44 Mo. 230; Andrews v. State, 69 Miss. 740, 13 So. 853; Holt County v. Scott, 53 Neb. 176, 73 N. W. 681; McRoberts v. Winant, 15 Abb. Prac. N. S. (N. Y.) 210; People v. McKinney, 52 N. Y. 377; State v. Tool, 4 Ohio St. 553; Howell v. Com., 97 Pa. 332; Briggs v. Hopkins, 16 R. I. 83, 13 Atl. 109. Construing Pub. St. R. I., c. 37, § 20; Ex parte Charles, 48 S. C. 279, 26 S. E. 605.

[146] Sprowl v. Lawrence, 33 Ala. 674; State v. Falconer, 44 Ala. 696; Cawley v. People, 95 Ill. 249; City of Chicago v. Gage, 95 Ill. 593; State v. Porter, 7 Ind. 204; Knox County Com'rs v. Johnson, 124 Ind. 145, 24 N. E. 148, 7 L. R. A. 684; Horneman v. Harlan, 47 Kan. 413, 28 Pac. 177; Cronin v. Gundy, 16 Hun (N. Y.) 520; People v. Watts, 73 Hun, 404, 26 N. Y. Supp. 280; Com. v. Stambaugh, 164 Pa. 437. See, also, City of Chicago v. Gage, 95 Ill. 593, 35 Am. Rep. 182.

Archer v. State, 74 Md. 443, 22 Atl. 8; State v. Lansing, 46 Neb. 514, 64 N. W. 1104, 35 L. R. A. 124. Section 716 Compiled St. 1895, is self-executing and no office becomes vacant ipso facto by the failure to file a bond as required by law. State v. Buchanan, 65 Vt. 445, 27 Atl. 166. It is sufficient that an official bond be delivered to the town clerk as the custodian of the permanent funds and records of the town. But see Gage v. City of Chicago, 2 Ill. App. 332; State v. Hadley, 27 Ind. 496; State v. Beard, 34 La. Ann. 273.

[147] United States v. Tingey, 5 Pet. (U. S.) 115; United States v. Humason, 6 Sawy. 199, Fed. Cas. No. 15,421; City of Tuskaloosa v. Lacy, 3 Ala. 618; State v. Heisey, 56 Iowa, 404; Inhabitants of Nottingham Tp. v. Giles, 2 N. J. Law (1 Pen.) 120; State v. Bateman, 102 N. C. 52, 8 S. E. 882; State v. Smith, 48 Ohio St. 211, 26 N. E. 1069; Logan County Com'rs v. Harvey, 6 Okl. 629, 52 Pac. 402; McCaraher v. Com., 5 Watts. & S. (Pa.) 21. But see State v. Taylor, 10 S. D. 182, 72 N. W. 407.

[148] Moses v. United States, 166 U. S. 571; State v. Rhoades, 6 Nev. 352; Courser v. Powers, 34 Vt. 517; State v. McGuire, 46 W. Va. 328, 33 S. E. 313.

Defective or informal bond. Official bonds when not conformable with the statute which requires them may be good at common law though under these circumstances they are capable of enforcement only according to the rules of the common law. They may be good as common-law obligations and enforceable only as such.[149] Where the defect, insufficiency or informality is so great as to create a serious question of the legal sufficiency of the bond, it still will be capable of enforcement in its obligations as against the principal, although the sureties may be released under the rules of law to be stated later in that section discussing the different theories upon which the liability of a surety of an official bond is based.[150]

§ 620. Bond; execution.

The questions concerning the execution and the delivery of an official bond are usually considered from the position of either the principal or the surety. The form may be prescribed by law but the bonds as executed vary. The rules applying in these cases

[149] United States v. Hodson, 77 U. S. (10 Wall.) 395; Farrar v. United States, 5 Pet. (U. S.) 374; Tevis v. Randall, 6 Cal. 632; People v. Stacy, 74 Cal. 373; Clay County v. Simonsen, 1 Dak. 403, 46 N. W. 592; City of Brunswick v. Harvey, 114 Ga. 733, 40 S. E. 754; Smith v. Taylor, 56 Ga. 292; De Kalb County Com'rs of Roads & Revenues v. Mason, 104 Ga. 35; State v. Barnes, 51 Kan. 688, 33 Pac. 621. The failure of sureties to justify is not sufficient to invalidate a bond or work a forfeiture of the office.

Delker v. City of Owensboro, 22 Ky. 1777, 61 S. W. 362; Fournier v. Cyr, 64 Me. 33. A bond is not necessarily invalid because it contains an erroneous date. Meeker County Com'rs v. Butler, 25 Minn. 363; Swift County Com'rs v. Knudson, 71 Minn. 461; Matthews v. Lee, 25 Miss. 417; Boykin v. State, 50 Miss. 375; McLeod v. State, 69 Miss. 221; State v. Sappington, 67 Mo. 529; Id., 68 Mo. 454; Jefferson County Com'rs v. Lineberger, 3 Mont. 231; City of Butte v. Cohen, 9 Mont. 435, 24 Pac. 206; Stewart v. Carter, 4 Neb. 564; Perkins County v. Miller, 55 Neb. 141; Clark v. Douglas, 58 Neb. 571, 79 N. W. 158; Sooy v. State, 38 N. J. Law, 324; O'Hanlon v. Scott, 89 Hun, 44, 35 N. Y. Supp. 31; Alleghany County Sup'rs v. Van Campen, 3 Wend. (N. Y.) 48; Chambers v. Witherspoon, 10 N. C. 42; Branch v. Elliott, 14 N. C. 86; State v. McAlpin, 26 N. C. 140; State v. Baird, 118 N. C. 854; State v. Sutton, 120 N. C. 298, 26 S. E. 920; Edmiston v. Concho County, 21 Tex. Civ. App. 339, 51 S. W. 353; Coe v. Nash, 91 Tex. 113. But see Hecht v. Coale, 93 Md. 692, 49 Atl. 660.

[150] Burk v. Galveston County, 76 Tex. 267, 13 S. W. 455. The liability of sureties will be determined according to the terms and legal

have been stated in the preceding section.[151] The execution and delivery involves the elements of time,[152] manner[153] and approval.[154] It is not usually necessary that the sureties of a bond should reside within the district for which the official is to perform his duties although they should live within the jurisdiction of the state which includes as a component part the local or sub-

effect of the bond they signed; not the representations made at the time it was executed as to the character of their liability.

[151] See § 619; Ex parte Plowman, 53 Ala. 440; Harwood v. Marshall, 9 Md. 83.

[152] Sprowl v. Lawrence, 33 Ala. 674; Hyne v. Osborn, 62 Mich. 235; State v. Cooper, 53 Miss. 615; Foley v. Holtry, 41 Neb. 563; State v. Lansing, 46 Neb. 514, 35 L. R. A. 124; McKee v. Wild, 52 Neb. 9; State v. Paxton, 65 Neb. 110, 90 N. W. 983.

[153] Pima County v. Snyder (Ariz.) 44 Pac. 297; State v. Minton, 49 Iowa, 591; Yeakle v. Winters, 60 Ind. 554; Basham v. Com., 76 Ky. (13 Bush) 36. The signature of an agent to an official bond is binding. Wilson v. Linville, 14 Ky. 150, 19 S. W. 739. An official bond executed by the sheriff before the county judge alone is sufficient. Combs v. Breathitt County, 18 Ky. L. R. 809, 38 S. W. 138, 39 S. W. 33. The presumption of law is in favor of the proper execution and approval of an official bond. Schuff v. Pflanz, 99 Ky. 97; Hecht v. Coale, 93 Md. 692, 49 Atl. 660; Redwood County Com'rs v. Tower, 28 Minn. 45; State v. Chick, 146 Mo. 645, 48 S. W. 829. Where the defense in an action on an official bond is non est factum and an inspection of the bond shows that the penalty has been changed, the burden of proof is on the plaintiff to show that the alteration was made before the bond was signed.

Perkins County v. Miller, 55 Neb. 147, 75 N. W. 577; Lowe v. City of Guthrie, 4 Okl. 287; Baker City v. Murphy, 30 Or. 405, 35 L. R. A. 88; Quimby v. Wood, 19 R. I. 571; Custer County v. Albien, 7 S. D. 482, 64 N. W. 533. An official bond is not invalid because it runs not to the county but to the county commissioners and their successors in office.

Rader v. Davis, 73 Tenn. 536; McFarlane v. Howell, 16 Tex. Civ. App. 246, 43 S. W. 315; Washington County Sup'rs v. Dunn, 27 Grat. (Va.) 608; Town of Rutland v. Paige, 24 Vt. 181. The neglect of the sureties on an official bond to affix their seals will not, if this was their intention, make the instrument invalid. Town of Tumwater v. Hardt, 28 Wash. 684, 69 Pac. 378; Town of Platteville v. Hooper, 63 Wis. 381.

[154] See the following section. Mendocino County v. Morris, 32 Cal. 145. The liability of sureties does not depend upon the approval of a bond by the proper officials. Com. v. Ginn, 23 Ky. L. R. 521, 63 S. W. 467; People v. Johr, 22 Mich. 461. The failure to approve will not release the sureties. State v. Paxton, 65 Neb. 110, 90 N. W. 983. The approval of an official bond is not necessary to its validity as against the

ordinate public corporation.[155] If a bond is properly executed at a time later than that required by statute, its validity will not be affected by this fact, for the failure to give a bond affects generally only the right of an individual to legally perform the duties of an office; when signed, if the official enters upon the performance of the duties of his office, it then becomes a valid obligation.[156]

§ 621. Official bonds; their filing and approval.

In many cases the additional requirement is to be found that not only should an official bond be executed and delivered or filed[157] in a prescribed manner and within a specified time, but that it must further be approved by some designated official or

sureties. Omro Sup'rs v. Kaime, 39 Wis. 468. The failure of an approving board to formerly approve a bond does not relieve the principal nor his sureties from their liability. The approval of an official bond not being made for the benefit of the sureties, in their interest or for their protection, it is not necessary in an action for an alleged default in the condition of such bond to allege its approval.

Sprowl v. Lawrence, 33 Ala. 674; State v. Fredericks, 8 Iowa, 553; Moore v. State, 9 Mo. 334; Marshal v. Hamilton, 41 Miss. 229; Holt County v. Scott, 53 Neb. 176; Skellinger v. Yendes, 12 Wend. (N. Y.) 306; Place v. Taylor, 22 Ohio St. 317. But see O'Marrow v. City of Port Huron, 47 Mich. 585, where the failure to approve is held to release the sureties.

[155] Ex parte Buckley, 53 Ala. 42; Hyner v. Dickinson, 32 Ark. 776; McCormick v. Johnson County Com'rs, 68 Ind. 214; State v. Cahen, 28 La. Ann. 645; State v. Fowler 41 La. Ann. 380.

[156] State v. Churchill, 48 Ark. 426; State v. McGonigle, 101 Mo. 353, 8 L. R. A. 735.

[157] Stephens v. Crawford, 1 Ga. 574; Duer v. James, 42 Md. 492; Fay v. Richardson, 24 Mass. (7 Pick.) 91; United States Pump Co. v. Drexel, 53 Neb. 771, 74 N. W. 317; Paxton v. State, 59 Neb. 460, 81 N. W. 383. Sureties on a bond cannot take advantage of a waiver by the state of its rights in respect to the filing of an official bond at the time required by law. The court further holds that they are bound on the delivery of the official bond by the principal to the state. Duffy v. Edson, 60 Neb. 812, 84 N. W. 264. Where the failure to file an approved bond within the required time is due to the inaction of the approving board, the office will not be forfeited and the approval when made will relate back to the time the bond was filed. Donnelly v. Rafferty, 172 Pa. 587, 33 Atl. 754; McFarlane v. Howell, 16 Tex. Civ. App. 246, 43 S. W. 315; King County v. Ferry, 5 Wash. 526, 32 Pac. 538; Laramie County Com'rs v. Atkinson, 4 Wyo. 334, 33 Pac. 995. Where no steps are taken to oust one from office, the failure to give a bond required is no defense in an action to recover his salary. See, also,

body who, through this act, pass upon and endorse the sufficiency of the bond both in regard to its mechanical execution and also the financial responsibility of the sureties.[158] This action is necessary in all cases where public moneys or properties are to

Pequawket Bridge v. Mathes, 8 N. H. 139.

[158] Bosely v. Woodruff County Court, 28 Ark. 306. The act of approving or disapproving a collector's bond is ministerial and in case of failure or refusal to act, mandamus will lie. Wood v. State, 63 Ark. 337, 40 S. W. 87; Ex parte Booth, 64 Ala. 312. Action relative to the approval or rejection of an official bond is final and conclusive and unless an appeal is given by statute, none can be taken.

Doane v. Scannell, 7 Cal. 393; People v. Brown, 23 Colo. 425, 48 Pac. 661; Alexander v. Ison, 107 Ga. 745, 33 S. E. 657; Bartlett v. Board of Education, 59 Ill. 364. A bond may be approved by action of the proper body though not entered in their records when the endorsement is made on the bond.

Ramsay's Estate v. People, 97 Ill. App. 283. The statutory provision requiring the approval of official bonds is a matter which does not concern the sureties. Sullivan v. State, 121 Ind. 342, 23 N. E. 150; Glass v. Hutchinson, 55 Kan. 162, 40 Pac. 287; Lynam v. Com. (Ky.) 55 S. W. 686. An additional bond may be required of the town marshal and upon a failure, the office declared vacant by the town trustees.

Beeler v. Fenn, 58 Kan. 818, 51 Pac. 284; Coleman v. Eaker, 23 Ky. L. R. 513, 63 S. W. 484; State v. Dunnington, 12 Md. 340. The proof is considered as a judicial not a ministerial act and no action will lie against an approving board for not taking the bond with sufficient security unless fraud or corruption is alleged. Schmitt v. Common Council of Clinton, 111 Mich. 99, 69 N. W. 153, construing Pub. Acts, 1895, Mo. 266, providing for the signing of an official bond by a qualified surety company.

Moreland v. Millen, 126 Mich. 381, 85 N. W. 882. An officer not having the power cannot create any rights by assuming to accept and approve an official bond. Speed v. Common Council of Detroit, 97 Mich. 198, 56 N. W. 570, followed by Attorney Gen. v. Corliss, 98 Mich. 372, 57 N. W. 410. The city council cannot determine the rights of an officer to his office by arbitrarily refusing to approve his bond.

In re Craig, 130 Mo. 590, 32 S. W. 1121; Town of Gloster v. Harrell, 77 Miss. 793, 23 So. 520, 27 So. 609; McMillin v. Richards, 45 Neb. 786, 64 N. W. 242; State v. Plambeck, 36 Neb. 401, 54 N. W. 667. A county judge cannot pass upon the validity of claims to an office by refusing in case of a contest to approve the bond of one who has that prima facie right to the office.

State v. Adams, 19 Nev. 370, 12 Pac. 488; Rice's Appeal, 158 Pa. 157, 27 Atl. 842. A willful refusal to approve a bond will not render vacant an office. Matter of Wickersham, 46 Tenn. (6 Cold.) 333; State v. Bokien, 14 Wash. 403, 44 Pac. 889; State v. Knight, 82 Wis. 151. A public official cannot be deprived of his right to a public office by the

be handled by an official; otherwise, the giving of straw bonds would be of frequent occurrence and dishonest officials would take advantage of the condition to embezzle moneys entrusted to them. The action of the proper official or body in approving or disapproving of an official bond is usually considered final and conclusive and from it no right of appeal lies unless it is expressly given by statute.[159]

§ 622. Liability of sureties.

The liability is unquestioned of the principal and the sureties on an official bond for losses resulting from the neglect or dishonesty of the public official.[160] The question of liability, there-

willful or unjust refusal to approve his official bond by those officers charged by law with this duty.

[159] Ex parte Booth, 64 Ala. 312; Ter. v. Bashford, 2 Ariz. 246, 12 Pac. 671; People v. District Court of Washington County, 18 Colo. 293, 32 Pac. 819; Kilgore v. Ferguson, 77 Ill. 213; State v. Mock, 21 Ind. App. 629, 52 N. E. 998. The failure to collect a shortage from a predecessor is not, where a sufficient excuse is shown, a breach of his official bond.

Linville v. Leininger, 72 Ind. 491. Where default has been made in condition of the bond by the misappropriation of funds, such moneys cannot be followed into the hands of third parties. The rule which applies to ordinary trustees in this respect has no application.

Wood v. Madison County Com'rs, 125 Ind. 270, 25 N. E. 188; Cedar Rapids, I. F. & N. W. R. Co. v. Cowan, 77 Iowa, 535, 42 N. W. 436; State v. Barnes, 51 Kan. 688, 33 Pac. 621. One cannot be deprived of holding office by the mere failure or neglect of the proper body to formerly approve an official bond tendered by an officer. Montmorency County v. Wiltse, 125 Mich. 47, 83 N. W. 1010. It is no defense that a treasurer accepted as cash from his predecessor, township orders, and due bills not subsequently collected. State v. Patterson, 97 N. C. 360, 2 S. E. 262; Harrington v. King, 117 N. C. 117, 23 S. E. 92; Monroe v. Beebe, 10 Okl. 581, 64 Pac. 10; Appeal of Erie County (Pa.) 14 Atl. 44.

[160] National Bank of Redemption v. Rutledge, 84 Fed. 400. The affixing of an official seal and signature to fraudulent bonds is an official act breaking the obligation of an official bond given by law to secure the faithful performance of the duties of an office. Briggs v. Coleman, 51 Ala. 561; Clay County v. Simonsen, 1 Dak. 403, 46 N. W. 592; Renfroe v. Colquitt, 74 Ga. 618. The failure to account for moneys not coming into the hands of a public officer by virtue of his office does not constitute a breach of his official bond.

People v. Slocum, 1 Idaho, 62; Ramsay's Estate v. People, 97 Ill. App. 283; State v. City Council of Baltimore, 10 Md. 504. The city in its right of sovereignty is entitled to priority in the payment of proceeds of property sold by a trustee

fore, resolves itself largely into a discussion of the question of losses or damage resulting from conditions not existing through the default, neglect or dishonesty of the public official, or which may occur from causes entirely beyond his control.

With respect to this liability, there are two lines of decisions; those leading to a strict and literal interpretation of the bond and its conditions and a more liberal rule which is based upon reasons to be considered later. Under the first cases an official bond is construed strictly in favor of the sureties where defects or other conditions arise which legally lead to a release from their obligations,[161] and, on the other hand, they are held to a strict accountability in case the obligation of the bond is violated without regard to or a consideration of the causes leading to this condition.[162] A leading case [163] in which the opinion was written by

under the direction of a court of equity.

Wright v. Kinney, 123 N. C. 618, 31 S. E. 874; Jones v. Lucas County Com'rs, 57 Ohio St. 189, 48 N. E. 882. Filing a claim for extra compensation not allowed by law and drawing money in payment thereof from the county treasurer is a breach of a bond approved for the faithful performance of the duties of the office.

State v. McDannel (Tenn. Ch. App.) 59 S. W. 451. A penalty prescribed by statute becomes a part of the sum due from a defaulting public official and his sureties are responsible therefor. Brown v. Sneed, 77 Tex. 471, 14 S. W. 248; Dunson v. Nacogdoches County, 15 Tex. Civ. App. 9, 37 S. W. 987. The obligation of an official bond is broken where an officer collects fees in criminal cases in excess of those to which he is entitled by law and fails to pay the same into a public treasury as required by law.

The fact that a smaller penalty than the sums actually disbursed is named in an official bond does not release the liability by reason of its execution. Moses v. United States, 166 U. S. 571; State v. McGill, 15 Ind. App. 289; Walters-Cates v. Wilkinson, 92 Iowa, 129; Stoner v. Keith County, 48 Neb. 279; Hume v. Kelley, 28 Or. 398.

[161] United States v. Boyd, 15 Pet. (U. S.) 187; Alexandria v. Corse, 2 Cranch, 363, Fed. Cas. No. 183; Stanton v. Shipley, 27 Fed. 498; People v. Hilton, 36 Fed. 172. Sureties are not liable for the embezzlement of moneys which their principal had no authority to receive. Hill v. Kemble, 9 Cal. 71. Sureties on an official bond are only responsible for the public acts of their principal. San Luis Obispo County v. Farnum, 108 Cal. 562; Gilbert v. Isham, 16 Conn. 525; Gartley v. People, 28 Colo. 227, 64 Pac. 208. The usual strict liability of sureties will not apply as to private funds though received under authority of law by the public official. State v. Flynn, 157 Ind. 52, 60 N. E. 684.

[162] Williams v. Lyman (C. C. A.)

[163] Detroit Sav. Bank v. Ziegler, 49 Mich. 157.

Judge Cooley holds that the contract of the sureties upon an official bond is subject to the strictest interpretation and that they

88 Fed. 237. The failure or neglect of the obligee in an official bond to enforce a compliance with its conditions will not release the sureties. Jackson County v. Derrick, 117 Ala. 348, 23 So. 193. The sureties on an official bond are not relieved of their liability because of the laches of other public officials.

Randolph v. Billing, 115 Ala. 682; McPhillips v. McGrath, 117 Ala. 549; Gartley v. People, 24 Colo. 155, 49 Pac. 272; Clay County v. Simonsen, 1 Dak. 403. By law, however, an exception to a liability may be made when the official is prevented from performing the duties of his office by an irresistible superhuman cause or by the act of public "enemies."

State v. Smith, 16 Fla. 175. The failure of the governor to remove the county collector upon demand of the sureties will not relieve them from a liability in case of embezzlement by their principal. Laches cannot be imputed to a government. Purcell v. Town of Bear Creek, 138 Ill. 524, 28 N. E. 1085. Irregularity of the tax under which public moneys were collected is no defense in an action against the sureties on an official bond.

Mason v. Road & Revenue Com'rs, 104 Ga. 35; Trustees of Tp. 2 N., R. 6 W., St. Clair County v. Baker, 34 Ill. App. 620; Swift v. Trustees of Schools, 91 Ill. App. 221. The failure of a bank in which public moneys are deposited is no defense in an action on the bond of a township treasurer though such failure occurred without any knowledge on his part of its weakness.

Rock v. Stinger, 36 Ind. 346. A township trustee is liable on his bond for whatever moneys come into his hands by virtue of his office whether the same has been stolen or burned without his fault or loaned out by him to a litigious borrower from whom he is unable to collect. Hogue v. State, 28 Ind. App. 285, 62 N. E. 656. The re-election of a treasurer already a defaulter through negligence of the common council of a city will not relieve the sureties on his official bond from their liability.

Loper v. State, 48 Kan. 540, 29 Pac. 687; Bonta v. Mercer County Court, 70 Ky. (7 Bush) 576. The failure of a public official to comply with the duties imposed by law upon him will not relieve the sureties on an official bond given to secure the faithful performance by another public officer of his official duties.

Rochereau v. Jones, 29 La. Ann. 82; Monticello v. Lowell, 70 Me. 437. The burning of the house of a town treasurer with public moneys in his possession is no defense to his liability for such moneys. Inhabitants of Winthrop v. Soule, 175 Mass. 400, 56 N. E. 575. The negligence of town officials in not discovering the embezzlement of a town treasurer will not relieve the sureties from their liability.

McCormick v. Bay City, 23 Mich. 457. A surety signing his name to an official bond in blank and delivering it to his principal to have it completed and signed by others and delivered to the proper authorities makes the principal his agent, who is estopped and bound by his action.

City of Detroit v. Weber, 26 Mich.

undertake nothing which is not within the letter of their contract. "The obligation is strictissimi juris; and nothing is to be taken by construction against the obligors. They have consented to be bound to a certain extent only, and their liability must be found

284. The negligence of public officials in respect to making required examinations of official accounts cannot operate to release the sureties on an official bond. City of Lansing v. Wood, 57 Mich. 201. The acceptance by the city council from an out-going treasurer of certificates of deposit in a bank which subsequently fails is a sufficient satisfaction of the obligation of an official bond where the council have the power to settle with outgoing treasurers.

Cheboygan County v. Erratt, 110 Mich. 156, 67 N. W. 1117; McLeod County Com'rs v. Gilbert, 19 Minn. 214 (Gil. 176); Warsaw County Com'rs v. Sheehan, 42 Minn. 57, 43 N. W. 690, 5 L. R. A. 785. The negligence of county commissioners in respect to their supervisory duties over a county treasurer is not available as a ground of defense by the sureties on his official bond.

Board of Education of Pine Island v. Jewell, 44 Minn. 427, 46 N. W. 914. It is no defense in an action on an official bond that the moneys were lost by burglary although without the fault of the treasurer in whose hands they were at the time. Pundmann v. Schoenich, 144 Mo. 149; Jefferson County Com'rs v. Lineberger, 3 Mont. 231. It is no defense to an action on a bond that the safe furnished by the county was broken into and robbed without any want of reasonable care on the part of the public officer.

Meagher County Com'rs v. Gardner, 18 Mont. 110, 44 Pac. 407. The failure to declare a liability on an official bond for the nonperformance of official duties will not release the sureties on the bond. McKinney v. State, 68 Miss. 284, 8 So. 648; Lindsey v. Marshall, 20 Miss. (12 Smedes & M.) 587. A loss of funds though without fault on the part of the public official is no defense in an action on his bond. State v. Cooper, 53 Miss. 615; Stoner v. Keith County, 48 Neb. 279, 67 N. W. 311; Holt County v. Scott, 53 Neb. 176, 73 N. W. 681. The nonapproval of an official bond until after the time prescribed by law will not affect the liability of the sureties. City of Newark v. Stout, 52 N. J. Law, 35, 18 Atl. 943. Knowledge on the part of public officers of an illegal shortage in a treasurer's account will not release sureties on his official bond.

City of Newark v. Stout, 52 N. J. Law, 35, 18 Atl. 943. Neglect of public officials in investigating an alleged misconduct will not relieve the sureties from their liability. Maloy v. Bernalillo County Com'rs, 10 N. M. 638, 62 Pac. 1106; Livingston County Sup'rs v. White, 30 Barb. (N. Y.) 72. A judgment against the county treasurer for money wrongfully appropriated by him is no defense in an action against the sureties on his bond. Hixon v. Cupp, 5 Okl. 545. Sureties are not liable for exemplary damages in the absence of a statutory provision to this effect.

Hickerson v. Price, 49 Tenn. (2 Heisk.) 623. Sureties are not necessarily released by the giving of an additional or a new bond. An-

within the terms of that consent." But a leading text book on the subject of public officers states:[164] "The officer having bound himself and his sureties, without reservation or qualification, by the express terms of his bond that he will duly deliver and pay over the public funds which come into his hands, this obligation 'can only be met or discharged by making such delivery or payment,' and that having bound himself by his solemn agreement to do this act, he must be 'held liable for its nonperformance though it is rendered impossible by events over which he had no control.' If the parties had desired exemption in a given contingency, it should have been 'so nominated in the bond.'"[165]

The reason given in the preceding paragraph for the strict accountability of a surety is based upon the terms of the contract; the same finding is supported in other cases holding to the rule of strict accountability because of public policy which requires that every depositary of public moneys should be held to a strict accountability.[166] In the opinion of Justice McLean, "public

derson County v. Hayes, 99 Tenn. 542, 42 S. W. 266. The laches of public officials in permitting an officer already a defaulter to qualify again for office is not available as a defense to the sureties in an action on the official bond.

Wilson v. Wichita County, 67 Tex. 647, 4 S. W. 67; Coe v. Nash, 91 Tex. 113, 40 S. W. 235. The liability of sureties is not defeated by knowledge on the part of the county commissioners of the misappropriation of moneys. McFarlane v. Howell, 91 Tex. 218, 43 S. W. 315. A delay in the approval and filing of an official bond will not render it void so as to release the sureties. Coe v. Foree, 20 Tex. Civ. App. 550, 50 S. W. 616. The loss of funds by robbery is no defense in an action in a county treasurer's bond for failure to account for public funds. And see Winneshiek County v. Maynard, 44 Iowa, 15. False statements made by public officers to sureties on an official bond with respect to accounts and matters concerning which, by law, they are charged with no duty will not relieve the sureties on such bonds. Citing Milford Dist. Tp. v. Morris, 91 Iowa, 198; Boone County v. Jones, 54 Iowa, 706; Webster County v. Hutchinson, 60 Iowa, 721; Independent School Dist. of Sioux City v. Hubbard, 110 Iowa, 58, 81 N. W. 241.

[164] Mechem, Pub. Off. § 298.

[165] Halbert v. State, 22 Ind. 125; Morbeck v. State, 28 Ind. 86; District Tp. of Taylor v. Morton, 37 Iowa, 550; Inhabitants of Hancock v. Hazzard, 66 Mass. (12 Cush.) 112; State v. McDonough, 9 Mo. App. 63; City of St. Louis v. Sickles, 52 Mo. 122; Rochester City Bank v. Elwood, 21 N. Y. 88; Prince v. McNeill, 77 N. C. 398. The liability of sureties on an official bond is measured by the terms of the bond as executed; not according to what it should have been by law. State v. Polk, 82 Tenn. 1.

[166] United States v. Dashiel, 71 U. S. (4 Wall.) 185; United States

policy requires that every depositary of the public money should be held to a strict accountability. Not only that he should exercise the highest degree of vigilance, but that 'he should keep safely' the moneys which come to his hands. Any relaxation of this condition would open a door to frauds, which might be practiced with impunity. A depositary would have nothing more to do than to lay his plans and arrange his proofs, so as to establish his loss, without laches on his part. Let such a principle be applied to our postmasters, collectors of the customs, receivers of public moneys, and others who receive more or less of the public funds, and what losses might not be anticipated by the public? No such principle has been recognized or admitted as a legal defense. And it is believed the instances are few, if indeed any can be found, where any relief has been given in such cases by the interposition of congress. As every depositary receives the office with a full knowledge of its responsibilities, he cannot, in case of loss, complain of hardship. He must stand by his bond, and meet the hazards which he voluntarily incurs." [167]

Still other cases holding the strict accountability theory base their findings upon the reason that because of the statutes governing the subject, the officer becomes, in effect, the debtor of the public and is, therefore, not relieved from a liability whatever the cause of a loss or a damage to property in his custody or under his control may be.[168]

v. Thomas, 82 U. S. (15 Wall.) 338; United States v. Prescott, 3 How. (U. S.) 578; Jefferson County Com'rs v. Lineberger, 3 Mont. 231; State v. Nevin, 19 Nev. 162; Inhabitants of New Providence Tp. v. McEachron, 33 N. J. Law, 339; State v. Harper, 6 Ohio St. 607; Com. v. Comly, 3 Pa. 372.

[167] United States v. Prescott, 3 How. (U. S.) 578.

[168] Morbeck v. State, 28 Ind. 86; Steinback v. State, 38 Ind. 483; Inhabitants of Hancock v. Hazzard, 66 Mass. (12 Cush.) 112; Perley v. Muskegon County, 32 Mich. 132. "In regard to county funds the treasurers are responsible as debtors, and in case of vacancy the moneys belonging to the treasury are not to be taken possession of specifically, but are to be delivered over on oath by the previous officer, if alive, and in case of his death, by his personal representatives. C. L. 1871, § 518. There is no principle which would allow private persons to meddle with county records or county funds in county possession. It can only be on the theory that the treasurer is the debtor, at all events, for the money received by him, and that the title vests in him personally, that his representatives can have anything to do with the funds. Accordingly his liability is absolute, and not affected by unavoidable loss or ac-

§ 623. **Liability on official bonds; the less strict rule.**

Another line of cases hold that the principal and sureties on an official bond are not liable where the loss or the damage occurs without the default of the public officer and where in the performance of his duties he has exercised reasonable care, diligence and honesty.[169] These cases proceed upon the principle that a public officer stands in the position of a bailee for hire and bound by virtue of his office to exercise good faith and reasonable skill and diligence in the discharge of his trust or, as has been said, in other words, "to bring to its discharge that prudence, caution and attention which careful men shall exercise in the management of their own affairs."[170] A leading case holding this theory was decided by the supreme court of the United States.[171] In the opinion by Mr. Justice Bradley it was said: "The general rule of official obligation, as imposed by law, is that the officer shall perform the duties of his office honestly, faithfully, and to the best of his ability. This is the substance of all official oaths. In ordinary cases, to expect more than this would deter upright and responsible men from taking office. This is substantially the rule by which the common law measures the responsibility of those whose official duties require them to have the custody of property, public or private. If in any case a more stringent obligation is desirable, it must be prescribed by statute or exacted by express stipulations." The liberal rule excuses the official and his sureties where the loss or the damage has occurred without his fault and by means beyond his control. Fire,[172] theft or robbery,[173]

cident, which, in case of bailments, could not fail to release him, without injustice." Looney v. Hughes, 26 N. Y. 514; Boggs v. State, 46 Tex. 10; Wilson v. Wichita County, 67 Tex. 647. "It is too well settled to require discussion that an officer who is custodian of public money does not occupy the relation of a mere bailee for hire, who is responsible only for such care of the money as a prudent man would take of his own."

[169] Walker v. British Guarantee Ass'n, 18 Q. B. 277; Rose v. Hatch, 5 Iowa, 149; Albany County Sup'rs v. Dorr, 25 Wend. (N. Y.) 440.

[170] Bartlett v. Crozier, 15 Johns. (N. Y.) 250; Guille v. Swan, 19 Johns. (N. Y.) 381.

[171] United States v. Thomas, 82 U. S. (15 Wall.) 377.

[172] But see Heppe v. Johnson, 73 Cal. 265, 14 Pac. 833; Clay County v. Simonsen, 1 Dak. 403, 46 N. W. 592. "We hold that the facts stated in the complaint are sufficient to constitute a cause of action; that the instrument sued on is a valid legal bond, substantially complying

with the requirements of the statute, and covering the duties of judge of probate in his capacity as ex officio county treasurer; and that, for the breaches alleged, the principal and his sureties are liable, unless the matters pleaded in the answer are sufficient to constitute a defense. The conditions of the bond are absolute, and provide that he 'shall well and faithfully and impartially perform the duties and execute the office * * * without fraud, deceit, or oppression.' These duties are defined by the provisions of the statute, and the performance of them is only well done, faithful, and impartial when in strict compliance with these provisions; and under these provisions, and the obligations of his bond, he is bound, not to exercise due care and diligence in the discharge of his duty, but to perform it absolutely, without conditions or exceptions, unless the party can establish facts that bring his excuse within the following provisions of our Civil Code (section 855): 'The want of performance of an obligation, or an offer to perform, in whole or in part, or any delay therein, is excused by the following causes, to the extent to which they operate. * * * (2) When it is prevented or delayed by an irresistible, superhuman cause, or by the act of public enemies of this territory, or of the United States, unless the parties have expressly agreed to the contrary.' * * * Now, the only allegation in the answer that savors of an excuse for nonperformance is stated in the following words: 'That on the said 13th day of January, 1875, the said building, and in it all the said money, books, records, and documents, were utterly consumed and destroyed by fire, without any want of reasonable care and diligence on the part of said defendant Simonsen, in the care and preservation thereof, so that all the same were entirely lost to the said Simonsen and this plaintiff, and no part thereof has ever been recovered or restored;' the liability of the treasurer upon a bond of the character of the one in suit being that of an insurer, and not measured by the law of bailments. The material inquiry now presented is, can destruction by fire come within the definition of 'an irresistible, superhuman course?' I understand these words to be equivalent to and used in the same sense as 'act of God,' which Lord Mansfield says 'is natural necessity, as wind and storms, which arise from natural causes, and is distinct from inevitable accident.' * * * This we deem settled law; and settled, too, on the highest considerations of public policy as well as in strict justice to those who by their solemn obligations undertake to answer for the custody and safe keeping of public funds and property." Citing Inhabitants of Hancock v. Hazzard, 66 Mass. (12 Cush.) 112; Perley v. Muskegon County, 32 Mich. 132; Muzzy v. Shattuck, 1 Denio (N. Y.) 233; State v. Harper, 6 Ohio St. 607, and Com. v. Comly, 3 Pa. 372.

Union Dist. Tp. v. Smith, 39 Iowa, 9.

[173] State v. Houston, 83 Ala. 361; Hancock County Com'rs v. Bradley, 53 Ind. 422; Taylor Dist. Tp. v. Morton, 37 Iowa, 550; Albany County Sup'rs v. Dorr, 25 Wend. (N. Y.) 440. But see United States v. Prescott, 3 How. (U. S.) 578; United States v. Dashiel, 71 U. S. (4 Wall.)

act of God or the public enemy,[174] and a failure of a depositary, caused by some great and sudden financial crisis or panic,[175] in which public moneys have been deposited for safe keeping and which under ordinary circumstances would have been secure, have each been assigned as reasons sufficient for the adoption of the liberal rule. Cases supporting these two doctrines will be found cited in the notes.

§ 624. Liability of the surety; the element of time considered.

The contract of suretyship is one very strictly construed. Nothing can be added to it by implication in cases of doubt or of ambiguity.[176] The obligation includes without doubt a responsi-

182; Boyden v. United States, 80 U. S. (13 Wall.) 17; Halbert v. State, 22 Ind. 125; Morbeck v. State, 28 Ind. 86; Board of Education of Pine Island v. Jewell, 44 Minn. 427, 46 N. W. 914; State v. Nevin, 19 Nev. 162; Com. v. Comly, 3 Pa. 372.

[174] United States v. Humason, 6 Sawy. 199, Fed. Cas. 15,421; Clay County v. Simonsen, 1 Dak. 403. The liability of a judge of probate ex officio a county treasurer is that of an insurer. He is to perform his duties absolutely according to conditions except as prohibited by statute, viz., "prevention by an irresistible superhuman cause or by the act of public enemies." Swift v. Trustees of Schools, 91 Ill. App. 221; Id., 189 Ill. 584, 60 N. E. 44; Maloy v. Bernalillo County Com'rs, 10 N. M. 638, 62 Pac. 1106. But see Bevans v. United States, 80 U. S. (13 Wall.) 56.

[175] Wilson v. People, 19 Colo. 199, 34 Pac. 944, 22 L. R. A. 449; City of Great Falls v. Hanks, 21 Mont. 83; People v. Faulkner, 107 N. Y. 477, 14 N. E. 415; York County v. Watson, 15 S. C. 1; State v. Copeland, 96 Tenn. 296, 34 S. W. 427, 31 L. R. A. 844; Rowlett v. White, 18 Tex. Civ. App. 688; State v. Gramm, 7 Wyo. 329, 52 Pac. 533, 40 L. R. A. 690; Roberts v. Laramie County Com'rs, 8 Wyo. 177, 56 Pac. 915. But see United States v. Morgan, 11 How. (U. S.) 154; United States v. Prescott, 3 How. (U. S.) 578; United States v. Keehler, 76 U. S. (9 Wall.) 84; Boyden v. United States, 80 U. S. (13 Wall.) 17; United States v. Thomas, 82 U. S. (15 Wall.) 337; Lamb v. Dart, 108 Ga. 602, 34 S. E. 160; Oeltjen v. People, 160 Ill. 409; Swift v. Trustees of Schools, 189 Ill. 584, 60 N. E. 44; Inglis v. State, 61 Ind. 212; District Tp. of Union v. Smith, 39 Iowa, 9; Rose v. Douglass Tp., 52 Kan. 451; State v. Bobleter, 83 Minn. 479, 86 N. W. 461; State v. Powell, 67 Mo. 395; Griffin v. Mississippi Levee Com'rs, 71 Miss. 767, 15 So. 107; Bush v. Johnson County, 48 Neb. 1, 66 N. W. 1023, 32 L. R. A. 223; Tillinghast v. Merrill, 77 Hun, 481, 28 N. Y. Supp. 1089; Havens v. Lathene, 75 N. C. 505; Nason v. Directors of Poor, 126 Pa. 445; Com. v. Baily, 129 Pa. 480, and Fairchild v. Hedges, 14 Wash. 117, 44 Pac. 125, 31 L. R. A. 851.

[176] Jeffreys v. Malone, 105 Ala. 489; Meagher County Com'rs v. Gardner, 18 Mont. 110; City of St.

bility for the acts of the public officer occurring only during the term of office for which the bond has been given,[177] or in some cases until an official successor has been appointed or elected and qualified for the office.[178] Loss or damage resulting from acts

Louis v. Sickles, 52 Mo. 122; Stoner v. Keith Couty, 48 Neb. 279; Muzzy v. Shattuck, 1 Denio (N. Y.) 233; Fake v. Whipple, 39 N. Y. 394.

[177] United States v. Honsman, (C. C. A.) 70 Fed. 581; McPhillips v. McGrath, 117 Ala. 549, 23 So. 721; People v. Aikenhead, 5 Cal. 106; Coons v. People, 76 Ill. 383; Morley v. Town of Metamora, 78 Ill. 394; Ladd v. Trustees of Town, 41 N., R. 14, 80 Ill. 233; Independent School Dist. of Sioux City v. Hubbard, 110 Iowa, 58, 81 N. W. 241. Upon the re-election of a treasurer of the school district, certificates of deposit issued by solvent banks and treated by him as cash, at his annual settlement with the school board, must be considered as cash in an action subsequently brought by them upon his official bond for a loss of such money through the failure of the banks.

Riddel v. School Dist. No. 72, 15 Kan. 168; City of Paducah v. Cully, 72 Ky. (9 Bush) 323; Archer v. State, 74 Md. 443, 22 Atl. 8; City of Cambridge v. Fifield, 126 Mass. 428; City of Grand Haven v. United States Fidelity & Guaranty Co., 128 Mich. 106, 87 N. W. 104; State v. Bobleter, 83 Minn. 479, 86 N. W. 461; Pundmann v. Schoenich, 144 Mo. 149, 45 S. W. 1112; Bush v. Johnson County, 48 Neb. 1, 66 N. W. 1023, 32 L. R. A. 223. A certificate of deposit on a solvent bank accepted from an outgoing treasurer by the incoming one, presented to the bank by him and a new one issued in its place in lieu thereof payable to him as county treasurer, charges his official bond with a liability for such payment.

State v. Sooy, 39 N. J. Law, 539; Chairman of Common Schools v. Daniel, 51 N. C. (6 Jones) 444; Eddy v. Kincaid, 28 Or. 531, 41 Pac. 156. The sureties on an official bond are not released until an official successor has been appointed and has qualified. Maddox v. Shacklett (Tenn. Ch. App.) 36 S. W. 731; Gray v. State, 95 Tenn. 317, 32 S. W. 201; Eberstadt v. State, 20 Tex. Civ. App. 164, 49 S. W. 654. A suspension from office will release the liability of sureties during the time of suspension. City of Ballard v. Thompson, 21 Wash. 669, 69 Pac. 517; Town of Parsons v. Miller, 46 W. Va. 334, 32 S. E. 1017; Cairns v. O'Bleness, 40 Wis. 469.

[178] Placer County v. Dickerson, 45 Cal. 12; People v. Smith, 123 Cal. 70; City of Cuthbert v Brooks, 49 Ga. 179; Plymouth County v. Kersebom, 108 Iowa, 304, 79 N. W. 67; Schuff v. Pflanz, 99 Ky. 97, 35 S. W. 132; Administrators of Insane Asylum of Louisiana v. McKowen (La.) 19 So. 553. Where such a rule obtains, the liability, however, will extend over a reasonable time within which an official successor by the exercise of due diligence can be appointed and become qualified for the office.

State v. Hill, 88 Md. 111; City of Camden v. Greenwald, 65 N. J. Law, 458, 47 Atl. 458. The liability of a surety will extend in such a case only within a reasonable time after the expiration of the term of of-

done before or after the expiration of a particular term can create no obligation or liability upon the part of the surety.[179]

§ 625. New or additional duties.

The same principle supporting the rule of the preceding section also applies where after the execution of an official bond, laws or regulations have been passed imposing new duties upon the official or additional ones of the same character performed by him at

fice of the official. Question for decision of jury. City of Newark v. Stout, 52 N. J. Law, 35; Baker City v. Murphy, 30 Or. 405, 42 Pac. 133; State v. Taylor, 10 S. D. 182; Roberts v. Laramie County Com'rs, 8 Wyo. 177, 56 Pac. 915.

[179] United States v. Spencer, 2 McLean, 265, Fed. Cas. No. 16,367; United States v. Nicholl, 12 Wheat, (U. S.) 505; Anaheim Union Water Co. v. Parker, 101 Cal. 483, 35 Pac. 1048; People v. Jackson, 16 Colo. App. 308, 64 Pac. 1051; Trustees of Schools v. Arnold, 58 Ill. App. 103. This principle is true although officers succeed themselves. Schoeneman v. Martyn, 68 Ill. App. 412; People v. Toomey, 122 Ill. 308, affirming 25 Ill. App. 46; People v. Foster, 133 Ill. 496; State v. Berg, 50 Ind. 496; State v. Mock, 21 Ind. App. 629, 52 N. E. 998; Goodwine v. State, 81 Ind. 109; Wapello County v. Bigham, 10 Iowa, 39; Boone County v. Jones, 54 Iowa, 706; Independent School Dist. of Sioux City v. Hubbard, 110 Iowa 58, 81 N. W. 241; District Tp. of Milford v. Morris, 91 Iowa, 198; Gilbert v. Board of Education, 45 Kan. 31, 25 Pac. 226; Administrators v. McKowen, 48 La. Ann. 251, 19 So. 328; Bigelow v. Bridge, 8 Mass. 275; Inhabitants of Rochester v. Randall, 105 Mass. 295; Paw Paw Tp. v. Eggleston, 25 Mich. 36; City of Detroit v. Weber, 29 Mich. 24. Where an official succeeds himself, the liability of sureties is to be determined in the same manner as if he had been succeeded by some other person.

Cheboygan County v. Erratt, 110 Mich. 156, 67 N. W. 1117; Village of Laurium v. Mills, 129 Mich. 536, 89 N. W. 362. Where an official, however, is to serve until his successor is duly appointed and has qualified, the sureties on his official bond will be liable for his defaults until this condition exists.

Board of Education of Preston Independent School Dist. No. 45 v. Robinson, 81 Minn. 305, 84 N. W. 105; State v. Jones, 89 Mo. 470; Mann v. Yazoo City, 31 Miss. 574; Missoula County Com'rs v. McCormick, 4 Mont. 115; Clark v. Douglas, 58 Neb. 571, 79 N. W. 158. The burden of proof is upon the sureties for a second term to show that the misappropriation, if any, occurred prior to that time.

Paxton v. State, 59 Neb. 460, 81 N. W. 383; Barker v. Wheeler, 60 Neb. 470, 83 N. W. 678; Jeffers v. Johnson, 18 N. J. Law (3 Har.) 382; Patterson v. Inhabitants of Freehold Tp., 38 N. J. Law, 255; Conover v. Inhabitants of Middletown Tp., 42 N. J. Law, 382; Kellum v. Clark, 97 N. Y. 390; Gregory v. Morisey, 79 N. C. 559; Custer County v. Tunley, 13 S. D. 7, 82 N. W. 84; Anderson County v. Hays, 99 Tenn. 542, 42 S. W. 266. The burden of proof is upon the surety

the time of the execution of the bond.[180] These conditions will release the surety from any responsibility for loss occurring through the performance of such new or additional duties. The strict letter of the contract governs the relations between the parties and determines the liabilities of sureties. "They have consented to be bound to a certain extent only and their liability must be found within the terms of that consent."

§ 626. Different offices or funds.

In many cases public officials are permitted to hold and perform the duties of two or more offices with similar duties and in each case including the control of public funds and the management of public property. It is true that the liability of sureties in these cases is limited strictly to a liability arising from acts of the official done in the performance of the duties of the particular office for which the surety assumed a liability.[181] There can be no

to show that the delinquency occurred during a term of office other than the one for which he assumed a liability.

State v. Polk, 82 Tenn. 1; Coe v. Nash, 91 Tex. 113, 41 S. W. 473; Hetten v. Lane, 43 Tex. 279. The burden of proof is upon the sureties to prove the misappropriation of moneys prior to the execution of the bond. Vivian v. Otis, 24 Wis. 518.

[180] Morrow v. Wood, 56 Ala. 1; Woodall v. Oden, 62 Ala. 125; Reynolds v. Hall, 2 Ill. 35; People v. Tompkins, 74 Ill. 482; Brown v. Sneed, 77 Tex. 471, 14 S. W. 248; Com. v. Holmes, 25 Grat. (Va.) 771; Milwaukee County Sup'rs v. Ehlers, 45 Wis. 281. But see Board of Education of Auburn v. Quick, 99 N. Y. 138.

Many cases hold, however, that an alteration, addition, or dimunition of the duties of a public officer so long as the duties required are the functions of a particular office do not discharge or release the sureties on official bonds. See the following: Norton v. Kumpe, 121 Ala. 446, 25 So. 841; Smith v. United States (Ariz.) 45 Pac. 341; Governor of Illinois v. Ridgway, 12 Ill. 14; Kindle v. State, 7 Blackf. (Ind.) 586; Mahaska County v. Ingalls, 14 Iowa, 170; Marney v. State, 13 Mo. 7; People v. Vilas, 36 N. Y. 459; Monroe County Sup'rs v. Clark, 92 N. Y. 391; Board of Education of Auburn v. Quick, 99 N. Y. 138; State v. Bradshaw, 32 N. C. (10 Ired.) 229; State v. Grizzard, 117 N. C. 105; State v. Buchanan (Tenn. Ch. App.) 52 S. W. 480.

[181] McKee v. Griffin, 66 Ala. 211; People v. Ross, 38 Cal. 76; Perry v. Woodberry, 26 Fla. 84, 7 So. 483. A county treasurer will be liable for moneys belonging to different funds passing through his hands as such officer. Cooper v. People, 85 Ill. 417; State v. Hall (Miss.) 8 So. 464; Alcorn v. State, 57 Miss.

obligation for official acts as to which no responsibility was assumed. The principle, however, applies not only in respect to the conditions suggested in this section, but also in the two preceding ones, that a surety may, by express contract, assume a responsibility or liability in excess of that for which he may be bound according to the principles here suggested or even according to common law. His liability may be one which would include losses occurring under any condition.[182] Where a public official has the handling of moneys belonging to different funds but is required to give a bond by reason of his holding the office, it will cover losses from any of the separate funds.[183]

§ 627. The right of action.

The right of an individual to recover upon an official bond will depend upon the nature of the official duties, the faithful, skilful, diligent and honest performance of which the bond was given to secure. If these duties are such as the officer owes to the com-

273; State v. Johnson, 55 Mo. 80; The Governor v. Matlock, 12 N. C. (1 Dev.) 214; State v. Medary, 17 Ohio 554; Waters v. Carroll, 17 Tenn. 102; State v. Thomas, 88 Tenn. 491, 12 S. W. 1034; Broad v. City of Paris, 66 Tex. 119, 18 S. W. 342.

[182] Clay County v. Simonsen, 1 Dak. 403, 46 N. W. 592. Where a judge of probate is county treasurer the bond given by him as probate judge will secure the performance of his duties as treasurer. District Tp. of Union v. Smith, 39 Iowa, 9.

[183] Dale v. Payne, 62 Ark. 357; Butte County v. Morgan, 76 Cal. 1, 18 Pac. 115; People v. Love, 25 Cal. 520; Redwood City v. Grimmenstein, 68 Cal. 512; Orman v. City of Pueblo, 8 Colo. 292; In re House Resolution Relating to House Bill No. 349, 12 Colo. 395, 21 Pac. 486; Prickett v. People, 88 Ill. 115; Satterfield v. People, 104 Ill. 448; Ross v. State, 131 Ind. 548, 30 N. E. 702; Robinson v. State, 60 Ind. 26; Mahaska County v. Searle, 44 Iowa, 492; Loper v. State, 48 Kan. 540; Delker v. City of Owensboro, 22 Ky. L. R. 1777, 61 S. W. 362. Local assessments are taxes, the collection and proper disbursement of which is, by law, imposed upon the tax collector and on his failure to properly disburse such assessments his sureties will be liable.

Village of Allegan v. Chaddock, 119 Mich. 688, 78 N. W. 892; City of Harrisonville v. Porter, 76 Mo. 358; Hall v. State, 69 Miss. 529, 13 So. 38; Stoner v. Keith County, 48 Neb. 279; State v. McDannel (Tenn. Ch. App.) 59 S. W. 451; City of Hallettsville v. Long, 11 Tex. Civ. App. 180, 32 S. W. 567; Kempner v. Galveston County, 73 Tex. 216, 11 S. W. 188; Burk v. Galveston County, 76 Tex. 267, 13 S. W. 455; Snohomish County v. Ruff, 15 Wash. 637, 47 Pac. 35; Oconto County Sup'rs v Hall, 47 Wis. 208.

munity at large or those which create relations between the public corporation which the official represents and that officer, there can be no recovery by the individual for a failure to perform the duties in such a manner as to be regarded a breach of the obligation of the bond;[184] but if, on the other hand, the duties are personal in their nature and the proper, honest and diligent performance of which the official owes to the individual rather than the community at large, there may arise a liability on the part of the officer and a cause of action in favor of one who considers himself aggrieved by their misperformance.[185] What constitutes a breach of the obligation of an official bond is to be determined by its tenor.[186] Public acts of the official alone are to be considered and

[184] Orton v. City of Lincoln, 156 Ill. 499, 41 N. E. 159, reversing 56 Ill. App. 79; Paxton v. Baum, 59 Miss. 531. The right of action may be given to any taxpayer by statute for the misperformance of public duties. State v. Dent, 121 Mo. 162, 25 S. W. 924; Bantley v. Baker, 61 Neb. 92, 84 N. W. 603; Borough of Rutherford v. Alyea, 53 N. J. Eq. 580; Joyner v. Roberts, 112 N. C. 111, 16 S. E. 917. A private person, however, may sue to recover a penalty prescribed by law for the failure to discharge an official duty where it comes within the words "the party injured" as used in N. C. Code, §§ 1883, 1891. Kidd v. Reynolds, 20 Tex. Civ. App. 355, 50 S. W. 600. The institution of a malicious prosecution by the town marshal being outside the scope of his official duties does not render the sureties on his official bond liable. Blanton v. Com., 91 Va. 1; Marquis v. Willard, 12 Wash. 528; Town of Cady v. Bailey, 95 Wis. 370, 70 N. W. 285.

[185] Alexander v. Ison, 107 Ga. 745, 33 S. E. 657; Levin v. Robie, 5 Misc. 529, 25 N. Y. Supp. 982; Moretz v. Ray, 75 N. C. 170; State v. Grizzard, 117 N. C. 105, 23 S. E. 93; Drolesbaugh v. Hill, 64 Ohio St. 257, 60 N. E. 202; Stephenson v. Sinclair, 14 Tex. Civ. App. 133, 36 S. W. 137; Beale's v. Com., 11 Serg. & R. (Pa.) 299. But see McConnell v. Simpson, 36 Fed. 750.

[186] United States v. Wann, 3 McLean, 179, Fed. Cas. No. 16,638; United States v. McClane, 74 Fed. 153. The failure of an Indian agent to file a receipt for moneys actually disbursed by him will not render his bondsmen liable for such amount. They cannot be held liable for mistakes of fact or law, errors of judgment or misconstruction of authority in disbursing money in good faith for the benefit of the government.

National Bank of Redemption v. Rutledge, 84 Fed. 400; Chandler v. Rutherford, 101 Fed. 774. It is the prevailing doctrine that no liability is imposed on the sureties on an official bond when the officer assumes to act in an official capacity without any authority whatever.

Priet v. De La Montanya, 85 Cal. 148, 24 Pac. 612; People v. Myers, 16 Colo. App. 371, 65 Pac. 409; City of Brunswick v. Harvey, 114 Ga. 733, 40 S. E. 754; Whitlow v. Trus-

neglect or dishonesty in the performance of duties or in the collection of moneys not authorized or required by law will afford no right of action either in favor of an individual or a public corporation.[187]

tees of Schools, 93 Ill. App. 664. The failure to make a complete and accurate statement will not discharge sureties on an official bond.

Vigo Tp. v. Knox County Com'rs, 111 Ind. 170, 12 N. E. 305; Armington v. State, 45 Ind. 10; Shelton v. State, 53 Ind. 331. The retention of moneys collected as interest on public funds where the same are not required to be turned over to the county is not a breach of an official bond. State v. Hauser, 63 Ind. 155; Morgan v. Long, 29 Iowa, 434; Madison County v. Tullis, 69 Iowa, 720; Allen v. State, 6 Kan. 915, 51 Pac. 572; State v. Hill, 88 Md. 111, 41 Atl. 61; Stevenson v. Bay City, 20 Mich. 44; People v. Wright, 34 Mich. 371; Swift County Com'rs v. Knudson, 71 Minn. 461, 74 N. W. 158; St. Louis County Com'rs v. Security Bank of Duluth, 75 Minn. 174, 77 N. W. 815; Board of Education of Preston Independent School Dist. No. 45 v. Robinson, 81 Minn. 305, 84 N. W. 105; Montgomery County v. Auchley, 103 Mo. 492, 15 S. W. 626; State v. Hall, 68 Miss. 719, 10 So. 54; City of Great Falls v. Hanks, 21 Mont. 83, 52 Pac. 785; Kane v. Union Pac. R. Co., 5 Neb. 105. The exaction of illegal fees is a breach of an official bond.

Perkins County v. Miller, 55 Neb. 141; Kruttschnitt v. Hauck, 6 Nev. 163; State v. Rhoades, 7 Nev. 434. Special deposits as provided by Nevada Statutes, 1867, p. 166, § 5, are received by the state treasurer in his official capacity, and the sureties on his official bond are liable as for other moneys.

Henniker v. Wyman, 58 N. H. 528. The giving of a note by an outgoing town treasurer although accepted by his successor with the assent of the selectmen does not discharge the obligation of his official bond.

Prince v. McNeill, 77 N. C. 398; City of Wilkes Barre v. Rockafellow, 171 Pa. 177, 33 Atl. 269, 30 L. R. A. 393. The failure to pay interest on bank balances composed of public funds is not a breach of the obligation of an official bond where such interest is not made by law a part of the public funds.

Custer County v. Tunley, 13 S. D. 7, 82 N. W. 84; Anderson County v. Hays, 99 Tenn. 542; Henderson County v. Richardson, 15 Tex. Civ. App. 699; Kempner v. Galveston County, 73 Tex. 216, 11 S. W. 188.

[187] City of San Jose v. Welch, 65 Cal. 358; San Luis Obispo County v. Farnum, 108 Cal. 562; Mason v. Com'rs of Roads and Revenues, 104 Ga. 35, 30 S. E. 513; Ada County v. Ellis, 5 Idaho, 333, 48 Pac. 1071. The sureties on an official bond are not liable for moneys received by a public official after his term of office has expired. People v. Toomey, 122 Ill. 308, affirming 25 Ill. App. 46; State v. Givan, 45 Ind. 267; Helms v. State, 19 Ind. 360, 48 N. E. 264; Wood v. State, 155 Ind. 1, 55 N. E. 959; Lower v. Morris County Com'rs, 62 Kan. 295, 62 Pac. 1009; Lowe v. City of Guthrie, 4 Okl. 287, 44 Pac. 198; Hutchinson v. Com., 6 Pa. 124;

§ 628. Parties.

An action upon an official bond against the principal and sureties should be brought by that party in whose favor the obligation of the bond runs, although in some cases the form may not be as required by law.[188] Where a default in the obligation exists, especially in respect to the wrongful retention or use of public moneys, a demand is not usually necessary before the right of action exists.[189]

Henderson County v. Richardson, 15 Tex. 699, 40 S. W. 38.

Rowlett v. White, 18 Tex. Civ. App. 688, 46 S. W. 372. The sureties on the official bond of one whose right to an office has been successfully contested are not liable to the contestant for the salary and fees received by the principal. But see Cheboygan County v. Erratt, 110 Mich. 156, 67 N. W. 1117; State v. McDaniel, 78 Miss. 1, 27 So. 994, 50 L. R. A. 118. Sureties on an official bond are liable for acts of the officials done colore officii and in the line of their official duties though they may be illegal because beyond their authority. Blaco v. State, 58 Neb. 557, 78 N. W. 1056; Feigert v. State, 31 Ohio St. 432. An official and his sureties are liable for taxes collected though the rate of taxation exceeds that allowed by law.

[188] Jackson County v. Derrick, 117 Ala. 348, 23 So. 193; Dallas County v. Timberlake, 54 Ala. 403; Butte County v. Morgan, 76 Cal. 1; Sonoma County v. Stofen, 125 Cal. 32; Cooper v. People, 28 Colo. 87, 63 Pac. 314; Stutsman County v. Mansfield, 5 Dak. 78; City of Orlando v. Gooding, 34 Fla. 244; State v. Wilson, 113 Ind. 501, 15 N. E. 596; Hollingsworth v. Knox County Com'rs, 22 Ind. App. 232; Hawthorn v. State, 48 Ind. 464; State v. Henderson, 40 Iowa, 242; Jackson County Com'rs v. Craft, 6 Kan. 145; Com. v. Tate, 89 Ky. 587, 13 S. W. 113; Hardy v. Logan County Court, 15 Ky. L. R. 405, 23 S. W. 661; Com. v. Tilton, 21 Ky. L. R. 1079, 54 S. W. 11; Mower County Com'rs v. Smith, 22 Minn. 97; Waseca County v. Sheehan, 42 Minn. 57, 43 N. W. 690, 5 L. R. A. 785; State v. Bonner, 5 Mo. App. 13; Cole County v. Schmidt (Mo.) 10 S. W. 888; Salem Tp. v. Cunningham, 45 Mo. App. 614; State v. Sappington, 68 Mo. 454; Lafayette County v. Hixon, 69 Mo. 581; Clark County v. Hayman, 142 Mo. 430, 44 S. W. 257; State v. Baker, 47 Miss. 89; Albertson v. State, 9 Neb. 429; Valley County v. Robinson, 32 Neb. 254, 49 N. W. 356; Hrabak v. Village of Dodge, 62 Neb. 591, 87 N. W. 358; County of White Pine v. Herrick, 19 Nev. 34; Town of Warrenton v. Arrington, 101 N. C. 109, 7 S. E. 652; State v. Roberts, 108 N. C. 174; Jones v. Lucas County Com'rs,

[189] Foster v. State, 22 Ind. App. 471, 53 N. E. 1095; Inhabitants of Egremont v. Benjamin, 125 Mass. 15; Carver County Com'rs v. Bongard, 82 Minn. 431, 85 N. W. 214; Coe v. Nash (Tex.) 40 S. W. 235; Joint School Dist. No. 1 v. Lyford, 27 Wis. 506. But see State v. McGill, 15 Ind. App. 289, 40 N. E. 1115, 43 N. E. 1016.

II. Termination of Official Life.

§ 629. Termination of official life.
630. Official life terminated by legislative action.
631. Expiration of term of office.
632. Term of office; uncertain.
633. Resignation.
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635. Termination of official life through removal.
636. Right to a notice and hearing.
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638. Removal for cause; tribunal.
639. The proceedings.
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641. Remedies in case of a wrongful removal.
642. Removal by impeachment.

§ 629. Termination of official life.

Whatever relations may exist between a public official and the public corporation which he serves, or the public, are terminated by the expiration of his right to serve in an official capacity which is generally effected by the expiration of his term of office, where this is certain and fixed, or his removal when he holds at the pleasure of an appointing power and also by voluntary action on his part. Official life may be terminated from the standpoint of the official by his action voluntarily or involuntarily; the former would include a resignation, an abandonment of office or the acceptance of an incompatible office while the latter would include the expiration of an official term, legislative action with reference to the office, impeachment and removal. These questions will be considered somewhat briefly in succeeding sections.

§ 630. Official life terminated by legislative action.

It is the settled doctrine in the United States that a public office contains nothing of the nature of a grant or of a contract, and in the absence of constitutional restrictions or where the office is not

57 Ohio St. 189; Hume v. Kelly, 28 Or. 398, 43 Pac. 380; State v. Welbes, 11 S. D. 86; Custer County v. Albien, 7 S. D. 482; 64 N. W. 533; State v. Barnes, 10 S. D. 306, 73 N. W. 80; Bedwell v. Jones, 77 Tenn. (9 Lea) 168; Burk v. Galveston County, 76 Tex. 267, 13 S. W. 455; Carothers v. Presidio County, 4 Tex. Civ. App. 529, 23 S. W. 491; Sweetwater County Com'rs v. Young, 3 Wyo. 684, 29 Pac. 1002; Town of Cady v. Bailey, 95 Wis. 370, 70 N. W. 285.

a constitutional one,[190] the legislature or a legislative body acting within its authority has the power to deal with public offices absolutely and without restraint in respect to their creation or abolition.[191] This rule applies to all grades of public officials, whether state or municipal, under the conditions suggested.[192]

[190] Fitch v. City & County of San Francisco Sup'rs, 122 Cal. 285, 54 Pac. 901; Becker v. People, 156 Ill. 301, 40 N. E. 944, affirming 55 Ill. App. 285; Kimberlin v. State, 130 Ind. 120, 29 N. E. 773, 14 L. R. A. 858; Indianapolis Brewing Co. v. Claypool, 149 Ind. 193, 48 Ind. 228. An act is unconstitutional that violates Indiana Const. art. 15, § 2, which prohibits the general assembly from creating office the tenure of which shall be longer than four years. Sneath v. Mager, 64 N. J. Law, 94, 44 Atl. 983; State v. Stewart, 52 Neb. 243; Canfield v. Davies, 61 N. J. Law, 26, 39 Atl. 357. Pub. Laws 1891, p. 471, relative to the terms of office of city clerks and collectors are unconstitutional, being repugnant to amended Const. art. 4, § 7, par. 11, subd. 3, prohibiting the passage of special laws regulating the internal affairs of towns. Jarvis v. Waterbury, 84 Hun, 462, 32 N. Y. Supp. 389; People v. Bull, 46 N. Y. 57; In re Burger, 21 Misc. 370, 47 N. Y. Supp. 292; People v. Randall, 151 N. Y. 479, 45 N. E. 841; People v. Palmer, 154 N. Y. 133, 47 N. E. 1084, affirming 21 App. Div. 101, 47 N. Y. Supp. 403; Bryan v. Patrick, 124 N. C. 651, 33 S. E. 151; Lewis v. Lewelling, 53 Kan. 201, 36 Pac. 351, 23 L. R. A. 510; State v. Compson, 34 Or. 25, 54 Pac. 349; State v. Kipp, 10 S. D. 495; State v. Catlin, 84 Tex. 48, 19 S. W. 302; Wright v. Adams, 45 Tex. 134. Where a constitutional provision respecting the term or duration of an elective office is of doubtful or uncertain meaning, that construction should be placed upon it which limits the office to the shortest time. See, also, as holding the same, Smith v. Bryan, 100 Va. 199, 40 S. E. 652; Kimbrough v. Barnett, 93 Tex. 301, 55 S. W. 120; State v. Cheetham, 19 Wash. 330; Reals v. Smith, 8 Wyo. 159, 56 Pac. 690. See, also, §§ 596, 597, ante.

[191] Kimberlin v. State, 130 Ind. 120, 29 N. E. 773, 14 L. R. A. 858; In re Assessment for Construction of Sewer in City of Passaic, 54 N. J. Law, 156, 23 Atl. 517; Abrams v. Horton, 18 App. Div. 208, 45 N. Y. Supp. 887. The keeper of an almshouse not a constitutional officer. David v. City of Portland, 14 Or. 98, 12 Pac. 174; Stanfield v. State, 83 Tex. 317, 18 S. W. 577; McMurray v. Hollis, 5 Wash. 458. The length of term or time of its commencement when established by the legislature may be repealed by the adoption of a constitutional provision providing otherwise.

[192] State v. Chatfield, 71 Conn. 104, 40 Atl. 922; Heath v. Salt Lake City, 16 Utah, 374, 52 Pac. 602; McGrath v. City of Chicago, 24 Ill. App. 19. The reorganization of a city under a general corporation law determines the tenure of all municipal officers. People v. Palmer, 64 Ill. 41; People v. Blair, 82 Ill. App. 570; Goodwin v. State, 142 Ind. 117, 41 N. E. 359; Campbell County v. Trapp, 23 Ky. L. R. 2356, 67 S. W. 369; People v. Coler, 71

The term of office, therefore, of a public official may be terminated by the enactment of legislation either abolishing the office or extending or diminishing the length of its term.[193] Such action on the part of the legislature cannot occasion or create a claim in favor of an officer whose official life may be thus involuntarily and abruptly terminated.[194]

§ 631. Expiration of term of office.

The phrase, term of office, in this connection, is usually understood to apply to a fixed and certain term established by law for the performance of certain official duties,[195] which if done for the

App. Div. 584, 76 N. Y. Supp. 205; State v. Wilson, 121 N. C. 480, 28 S. E. 554; State v. Jennings, 57 Ohio St. 415, 49 N. E. 404; City of San Antonio v. Micklejohn, 89 Tex. 79; McAllister v. Swan, 16 Utah, 1, 50 Pac. 812; Pratt v. Swan, 16 Utah, 483, 52 Pac. 1092.

[193] Beebe v. Robinson, 64 Ala. 171; Hale v. McGettigan, 114 Cal. 112, 45 Pac. 1049; Dillon v. Bicknell, 116 Cal. 111, 47 Pac. 937; In re House Bill No. 38, 9 Colo. 631, 21 Pac. 474; Collins v. Russell, 107 Ga. 423, 33 S. E. 444; Blodgett v. Board of Education, 105 Ga. 463; Springfield Water Com'rs v. People, 137 Ill. 660, 27 N. E. 698; People v. Brown, 83 Ill. 95; State v. Menaugh, 151 Ind. 260, 51 N. E. 117, 357, 43 L. R. A. 408; State v. Hyde, 121 Ind. 20, 22 N. E. 644; Sinking Fund Com'rs v. George, 20 Ky. L. R. 938, 47 S. W. 779; State v. Capdevielle, 104 La. Ann. 561, 29 So. 215; O'Leary v. Board of Fire & Water Com'rs, 79 Mich. 281, 7 L. R. A. 170; State v. Starkey, 49 Minn. 503, 52 N. W. 24; Primm v. City of Carondelet, 23 Mo. 22. The appointment of one to the office of city attorney for the term of one year at a salary settled by city ordinance with an acceptance of the office does not constitute a contract which precludes the city from abolishing the office before the expiration of the term.

State v. Page, 20 Mont. 238, 50 Pac. 719; State v. Board of Public Lands, 7 Neb. 42; State v. Stewart, 52 Neb. 243, 71 N. W. 998; Demarest v. Wickham, 4 Hun (N. Y.) 627; People v. Sutton, 9 App. Div. 250, 41 N. Y. Supp. 398; People v. Sturges, 21 Misc. 605, 47 N. Y. Supp. 999; People v. Lane, 53 App. Div. 531, 65 N. Y. Supp. 1004; Long v. City of New York, 81 N. Y. 425; Koch v. City of New York, 152 N. Y. 72, 46 N. E. 170; People v. Dooley, 171 N. Y. 74, 63 N. E. 815; State v. Harris, 1 N. D. 190, 45 N. W. 1101; Bryan v. Patrick, 124 N. C. 651, 33 S. E. 151; Dalby v. Hancock, 125 N. C. 325, 34 S. E. 516; State v. Bailey, 37 Ohio St. 98; Kuhlman v. Smeltz, 171 Pa. 440; State v. Smith, 4 Wash. 661, 30 Pac. 1064; State v. Twichel, 9 Wash. 530, 38 Pac. 134.

[194] In re Resolution Relating to Senate Bill No. 45, 12 Colo. 339, 21 Pac. 485; Lowe v. Com., 60 Ky. (3 Metc.) 237.

[195] Speed v. Crawford, 60 Ky. (3 Metc.) 207; Gibbs v. Morgan, 39 N. J. Eq. 126. A deputy clerk who holds his office at the pleasure of

time designated or until the time designated will terminate a further right to perform such duties.[196] This rule is modified in many cases by the provision that public officers or certain ones designated shall perform the duties of their office until their successors have been duly elected or appointed and have qualified.[197]

the county clerk has no "term of office." People v. Lacombe, 99 N. Y. 43. See note 30 Am. & Eng. Corp. Cas. 351.

[196] Ruggles v. Trustees of City of Woodland, 88 Cal. 430, 26 Pac. 520; State v. Pinkerman, 63 Conn. 176, 22 L. R. A. 653. An appointment for a vacancy is good only to the end of the unexpired term; not for the full term as established by law for such office. Opinion of the Justices, 16 Fla. 841. The converse rule also holds that a public official holds or may hold the office for the full period as fixed by the constitution.

Barrett v. State, 112 Ind. 322, 13 N. E. 677. Construing Ind. Acts, 1885, p. 69; Hench v. State, 72 Ind. 297; McDermott v. City of Louisville, 17 Ky. L. R. 617, 32 S. W. 264; Edison v. Almy, 66 Mich. 329, 33 N. W. 509; State v. Lund, 167 Mo. 228, 66 S. W. 1062, 67 S. W. 572. Where the term of an appointed officer is fixed by law with a provision for holding over, the inconvenience that results to the public from the office being vacant is no defense in a proceeding by the state in the nature of quo warranto.

People v. Stone, 78 Mich. 635; Bilderback v. Chosen Freeholders of Salem County, 63 N. J. Law, 55, 42 Atl. 843; People v. Tieman, 30 Barb. (N. Y.) 193; People v. Feitner, 27 Misc. 153, 57 N. Y. Supp. 807; State v. Knight, 31 S. C. 81, 9 S. E. 692; Pettigrew v. Bell, 34 S. C. 104, 12 S. E. 1023; In re Construction of School Law, c. 9, § 7, 2 S. D. 71, 48 N. W. 812; State v. Sheldon, 8 S. D. 525, 67 N. W. 613; State v. Williford, 104 Tenn. 694, 58 S. W. 295; Smith v. Cosgrove, 71 Vt. 196, 44 Atl. 73; State v. McKone, 95 Wis. 216, 70 N. W. 164.

[197] Barkley v. Levee Com'rs, 93 U. S. 258. Where the functions of a public corporation have been abrogated and there is no provision of law authorizing another election, the doctrine of corporate officials holding over cannot be applied. See, also, as holding the same, People v. Feitner, 30 App. Div. 241, 51 N. Y. Supp. 1094, affirmed 156 N. Y. 694; Ward v. City of Elizabeth, 121 N. C. 1, 27 S. E. 993, and Com. v. Wyman, 137 Pa. 508.

Advisory Opinion to Governor, 31 Fla. 1, 5 So. 613; People v. Murray, 15 Cal. 221; People v. Oulton, 28 Cal. 44; People v. Rodgers, 118 Cal. 393, 46 Pac. 740, 50 Pac. 668. Such a provision will not apply when one has surrendered his office and he is not entitled to it on his successor being declared ineligible. People v. Tyrrell, 87 Cal. 475; People v. Edwards, 93 Cal. 153. A constitutional provision fixing the term of office does not prevent one from holding over beyond that time until his successor has been chosen and has qualified.

People v. Knight, 116 Cal. 108, 47 Pac. 925; Ter. v. Hand, 1 Dak. 437; State v. Murphy, 32 Fla. 138, 13 So. 705; People v. Town of Fairbury, 51 Ill. 149; People v. Blair, 82 Ill. App.

This principle proceeds upon the doctrine that the necessity exists at all times for the performance of certain official or public duties in connection with the administration of government and, therefore, the right as existing in some one person to perform these duties.[198]

570; People v. Barnett Tp. Sup'r, 100 Ill. 332; State v. Spears, 1 Ind. 515; Ham v. State, 7 Blackf. (Ind.) 314; State v. Harrison, 113 Ind. 434, 16 N. E. 384. Construing Ind. Const. art. 15, §§ 2, 3; Gosman v. State, 106 Ind. 203; State v. Clendenning, 117 Ind. 111, 19 N. E. 623; School Town of Milford v. Powner, 126 Ind. 528. Officers holding over under such circumstances are officers de jure as well as de facto so long as they continue to perform the duties of the office.

Sherman v. City of Des Moines, 100 Iowa, 88; State v. Albert, 55 Kan. 154; Lafferty v. Huffman, 18 Ky. L. R. 17, 35 S. W. 123; Rounds v. Smart, 71 Me. 380; People v. Lord, 9 Mich. 227; City of Grand Haven v. United States Fidelity & Guaranty Co., 128 Mich. 106, 87 N. W. 104; State v. Lusk, 18 Mo. 333; Andrews v. State, 69 Miss. 740, 13 So. 853; Cordiell v. Frizell, 1 Neb. 130; State v. Boyd, 31 Neb. 682, 48 N. W. 739, 51 N. W. 602; Rightmire v. City Council of Camden, 50 N. J. Law, 43, 13 Atl. 30. Such a provision is not designed to authorize public officials to extend their term of office to their own advantage by neglecting or refusing to take certain steps relative to qualifying for office.

De Lacey v. City of Brooklyn, 12 N. Y. Supp. 540; In re Bradley, 66 Hun, 629, 21 N. Y. Supp. 167; Cherry v. Burns, 124 N. C. 761, 33 S. E. 136; State v. Cook, 20 Ohio St. 252; State v. Kearns, 47 Ohio St. 566, 25 N. E. 1027; State v. Wright, 56 Ohio St. 540; Eddy v. Kincaid, 28 Or. 537, 41 Pac. 156. The failure of an elective board to elect, at the time required, a railroad commissioner, does not create a vacancy in the office and the present incumbent is entitled to hold his office until his successor is "duly elected and qualified.."

Com. v. O'Neal, 203 Pa. 132, 52 Atl. 134. A city councilman under such a provision continues to hold as a de jure officer where he is a candidate for re-election and receives the same number of votes as his opponent. Erb v. Com., 91 Pa. 212; Lowrey v. City of Central Falls, 23 R. I. 284, 49 Atl. 963; Macoy v. Curtis, 14 S. C. 367; State v. Wilson, 80 Tenn. (12 Lea) 246; Pratt v. Swan, 16 Utah, 483, 52 Pac. 1092. The rule also holds with respect to municipal officers. Ex parte Lawhorne, 18 Grat. (Va.) 85; Sinclair v. Young, 100 Va. 284, 40 S. E. 907; State v. Tallman, 24 Wash. 426, 64 Pac. 759. The failure to give bond by one holding over will not destroy his eligibility, the security being sufficient.

State v. Daggett, 28 Wash. 1, 68 Pac. 340; State v. Meilike, 81 Wis. 574, 51 N. W. 875. Where candidates for an office receive a tie vote, the incumbent is entitled to hold over until his successor is duly elected

[198] Downing v. Rugar, 21 Wend. (N. Y.) 178; People v. Nostrand, 46 N. Y. 375; People v. Palmer, 52 N. Y. 83.

§ 632. Term of office; uncertain.

The term of office may also be uncertain in its duration depending upon the performance of the duties prescribed or upon the favor of the appointing power.[199] Where a public office has been created for the sole purpose of performing certain duties of a temporary character, the completion of the work effects an expiration of the term of office.[200] Where an official holds his office at the pleasure of an appointing power, his term of office is necessarily uncertain and is further limited in duration by the term of that officer.[201] The retention in office of subordinate appointees upon a re-election by a public official is held the equivalent of a reappointment.[202]

The term of office considered with reference to its commencement. A particular term of office with respect to a performance

and qualified. State v. McKone, 95 Wis. 216. But the rule stated in the text does not apply where there is constitutional provision limiting the time of holding office by an individual.

199 State v. Alt, 26 Mo. App. 673; Ward v. Elizabeth City, 121 N. C. 1; Com. v. Sutherland, 3 Serg. & R. (Pa.) 145; Williams v. Boughner, 46 Tenn. (6 Cold.) 486; Pratt v. Swan, 16 Utah, 483.

200 Currier v. Boston & M. R. Co., 31 N. H. 209; Williams v. Bowman, 40 Tenn. (3 Head) 678.

201 City Council of Augusta v. Ramsey, 43 Ga. 140; Egan v. City of St. Paul, 57 Minn. 1, 58 N. W. 267; State v. Board of Public Lands, 7 Neb. 42; Greene v. Hudson County Freeholders, 44 N. J. Law, 388; McKenna v. City of New York, 34 App. Div. 152, 54 N. Y. Supp. 634; Field v. Girard College, 54 Pa. 233; Somers v. State, 5 S. D. 321, 58 N. W. 804; State v. Williford, 104 Tenn. 694, 58 S. W. 295; In re Richmond Mayoralty Case, 19 Grat. (Va.) 673; Hunter v. Trustees of Berkeley Springs, 47 W. Va. 343, 34 S. E. 729.

202 Hubert v. Mendheim, 64 Cal. 213, 30 Pac. 633; State v. City of St. Paul (Minn.) 84 N. W. 127; People v. Denman (Colo. App.) 65 Pac. 455; Ter. v. Hand, 1 Dak. 437; Bell v. State, 129 Ind. 1, 28 N. E. 302; State v. Wells, 144 Ind. 231, 41 N. E. 461, 43 N. E. 133; State v. Harris, 152 Ind. 699, 52 N. E. 168; State v. Barlow, 103 Ind. 563; Weaver v. State, 152 Ind. 479, 53 N. E. 450. Construing "the term of a present incumbent" as found in Acts 1897, p. 288, § 1, relative to the terms of county treasurers. Aikman v. State, 152 Ind. 567, 53 N. E. 836; Moser v. Shamleffer, 39 Kan. 635, 18 Pac. 956; Jackson v. City of Richmond, 22 Ky. L. R. 94, 56 S. W. 501; State v. McGovney, 92 Mo. 428, 3 S. W. 867; State v. Weatherby, 17 Neb. 553; State v. Smith, 35 Neb. 13, 52 N. W. 700, 16 L. R. A. 791; Haight v. Love, 39 N. J. Law, 14; People v. Randall, 151 N. Y. 497; State v. McCracken, 51 Ohio St. 123; State v. Bader, 58 Ohio St. 384, 50 N. E. 813; State v. Brown, 60 Ohio St. 499, 54 N. E. 467; State v. Simon, 20 Or. 365; State v. Taylor, 21 Wash. 672, 59 Pac. 489.

of the duties may be uncertain as depending for its commencement upon some contingency, condition or shifting date, the happening of which will serve to operate as the authority for its commencement.[203] The legislature under its absolute power has the right to fix the time for the commencement or ending of the terms of office of those not fixed by the constitution.[204] In case of an appointment to office, the term begins as soon as the appointee is authorized by his own action to legally assume the duties of his office; not from the date of appointment or when he actually enters upon his office.[205] Where appointments or elections are made

[203] Bruce v. Fox, 31 Ky. (1 Dana) 447; Tatum v. Rivers, 66 Tenn. (7 Baxt.) 295.

[204] State v. Menaugh, 151 Ind. 260, 51 N. E. 117, 43 L. R. A. 408; Scott v. State, 151 Ind. 556, 52 N. E. 163; State v. Wilson, 142 Ind. 102, 41 N. E. 361; Aikman v. State, 152 Ind. 567, 53 N. E. 836; State v. Wymen, 97 Iowa, 570, 66 N. W. 786; Sherman v. City of Des Moines, 100 Iowa, 88, 69 N. W. 410; State v. Robinson, 1 Kan. 17; Farrelly v. Cole, 60 Kan. 356, 56 Pac. 492; State v. Andrews, 69 Kan. 474, 67 Pac. 870; Commissioners of Sinking Fund v. George, 20 Ky. L. R. 938, 47 S. W. 779; Lafferty v. Huffman, 99 Ky. 80, 32 L. R. A. 203; Field v. Malster, 88 Md. 691, 41 Atl. 1087; Edison v. Almy, 66 Mich. 329, 33 N. W. 509; Hallgren v. Campbell, 82 Mich. 255, 46 N. W. 381, 9 L. R. A. 408; People v. Van Andon, 116 Mich. 654, 74 N. W. 1009; State v. Wimpfheimer, 69 N. H. 166, 38 Atl. 786; Bird v. Johnson, 59 N. J. Law, 59, 34 Atl. 929. Legislation extending a term of office is plainly prospective and does not enlarge the term of one legislated before its passage.

Reid v. Gorsuch, 67 N. J. Law, 396, 51 Atl. 457; Bakely v. Nowrey, 68 N. J. Law, 95, 52 Atl. 289; People v. Lahr, 71 Hun, 271, 24 N. Y. Supp. 1020; People v. Erie County Sup'rs, 42 App. Div. 510, 59 N. Y. Supp. 476; State v. McCracken, 51 Ohio St. 123, 36 N. E. 941; Stone v. Reynolds, 7 Okl. 397, 54 Pac. 555; Com. v. Ricketts, 196 Pa. 598; State v. Lane, 16 R. I. 620, 18 Atl. 1035; State v. Sheldon, 8 S. D. 525; State v. Beardsley, 13 Utah, 502; Farrel v. Pingree, 5 Utah, 443, 16 Pac. 843. Legislation respecting tenure of office is prospective not retrospective and cannot affect the term of a treasurer elected prior to its enactment and which has not yet expired. Bartch v. Meloy, 8 Utah, 424, 32 Pac. 694. Where two acts relative to tenure of office are repugnant, the latter one will govern. State v. Beardsley, 13 Utah, 502, 45 Pac. 569; State v. Byrne, 98 Wis. 16, 73 N. W. 329.

[205] Haight v. Love, 39 N. J. Law, 14; State v. Elliott, 13 Utah, 479, 45 Pac. 346. "So when a vacancy occurs, and a person is appointed to fill the same, the appointee is entitled to hold the office, not only until the expiration of the two years, but also until a successor is elected and qualified. It follows, therefore, that when a person is elected to office in Salt Lake City, or appointed to fill a vacancy, in either case, after qualifying, he is the lawful incumbent and entitled to hold the office, as against any

to fill vacancies, the official holds as a general rule only for the unexpired term of the officer whom he succeeds [206] or until the next general or special election as may be provided by law.[207]

other appointee, until, as a result of a lawful election and qualification, a successor appears, or until some legal disability as to the incumbent occurs." People v. Page, 6 Utah, 353; People v. Hardy, 8 Utah, 68. But see Verner v. Seibels, 60 S. C. 572, 39 S. E. 274.

[206] Carson v. State, 145 Ind. 348, 44 N. E. 360, construing Rev. St. 1894, § 7583; Parmater v. State, 102 Ind. 90; Parcel v. State, 110 Ind. 122; Hale v. Bischoff, 53 Kan. 301, 36 Pac. 752; Hoke v. Richie, 100 Ky. 66, 37 S. W. 266; Id., 38 S. W. 132; Pence v. City of Frankfort, 101 Ky. 534, 41 S. W. 1011; French v. Cowan, 79 Me. 426, 10 Atl. 335; Opinion of the Justices, 50 Me. 607; State v. Pearcy, 44 Mo. 159; State v. Stonestreet, 99 Mo. 361, 12 S. W. 895; State v. Moores, 56 Neb. 1, 76 N. W. 503; State v. Muskingum County Com'rs, 7 Ohio St. 125; State v. Speidel, 62 Ohio St. 156; People v. Hardy, 8 Utah, 68, 29 Pac. 1118. In case of a failure to elect a successor at the time required, one holding the appointment will hold over for the succeeding term. But see People v. Townsend, 102 N. Y. 430.

[207] State v. Cook, 78 Tex. 406, 14 S. W. 996. "It is unquestionably the duty of the legislature to look to the object and purpose of the different sections of the constitution, which relate to the matter under consideration, when called to legislate thereon, and when a strict and literal construction of its several provisions would lead to an apparent conflict, which might be obviated by interpreting them in accordance with the object and spirit of their enactment, it is obviously its duty to pursue the latter course. * * * Doing this in reference to the matter before us, we think it is obvious that the two main purposes shown in the constitution, in regard to the office of justices of the peace, are general uniformity of time at which it is to be filled throughout the state, and general uniformity of four years for its tenure. Neither can be strictly and literally observed in creating new counties, if this is done at any other time than that fixed by law for holding general elections. The power and duty to establish new counties, when required by public convenience, cannot, however, be doubted or denied. But, in providing for the organization of such new counties, regard should be had to those general objects and purposes, and conformity to them should be secured to as great an extent and at as early a time as practicable. And, although it cannot be said, strictly speaking, that the officers first elected in such newly organized county are elected to fill vacancies, we think the analogy may be held to apply to them, and that the legislature very properly provided that the county officers which are authorized to be elected by the law creating said county of Waller, should only hold office until the next general election for county officers, and until their successors should be elected and qualified."

§ 633. Resignation.

A term of office or official life is necessarily terminated by the death or permanent insanity of the incumbent [208] and also by voluntary action on his part. It is the theory in the United States, unquestionably wrong,[209] but warranted by such long continued practice as to make it effectual as a rule that a public officer may decline to continue the performance of his public duties at any time.[210] A resignation may be made by parol [211] in the absence

[208] State v. Pidgeon, 8 Blackf. (Ind.) 132; State v. Hunt, 54 N. H. 431; State v. Speidel, 62 Ohio St. 156, 56 N. E. 871. Defendant claimed the office of sheriff because his opponent Buvinger, although receiving more votes, died suddenly at the close of election day. The court said: "The claim of Cover that he has the right to be inducted into the office of sheriff of Clermont county, has no foundation. Whether Buvinger, the deceased candidate, was elected or not, Cover was not elected. No process or reasoning can make 3,802 votes to be more than 4,369 votes. Not merely a plurality but a majority of all the votes cast for sheriff on that election day, were cast against Cover; and it does not avail him that the majority of votes were cast, in good faith, for a man who had died during the election. The majority was not for Cover, and that is all he can make of it."

[209] Edwards v. United States, 103 U. S. 471.

[210] United States v. Wright, 1 McLean, 509, Fed. Cas. No. 16,775; Price's Case, 4 Ct. Cl. 164; Miller v. Sacramento County Sup'rs, 25 Cal. 93. One cannot resign before the time designated by law.

People v. Gillespie, 1 Idaho, 52; Pariseau v. Board of Education, 96 Mich. 302, 55 N. W. 799. Resignation becomes effective after it is tendered and cannot be subsequently withdrawn.

State v. Dart, 57 Minn. 261, 59 N. W. 190; State v. Augustine, 113 Mo. 21. Distinguishing State v. Boecker, 56 Mo. 17. A resignation though tendered to the wrong authority, after acceptance, is conclusive and cannot be then withdrawn.

Reiter v. State, 51 Ohio St. 74, 36 N. E. 943, 23 L. R. A. 681; McGhee v. Dickey, 4 Tex. Civ. App. 104, 23 S. W. 404; State v. Brinkerhoff, 66 Tex. 45, 17 S. W. 109. But see Badger v. United States, 93 U. S. 599, which holds that although an official resignation is tendered to and accepted by the proper authority, the official continues in office and is not relieved from his duties and responsibilities until his successor is appointed or chosen and has qualified.

United States v. Green, 53 Fed. 769; State v. Clayton, 27 Kan. 442; State v. Boecker, 56 Mo. 17. A res-

[211] Van Orsdall v. Hazard, 3 Hill (N. Y.) 243. "The cases are entirely clear that the resignation may be either in writing or by parol, express or even by implication, so that there be an intent to resign on one side and an acceptance on the other."

of a statute law requiring it to be in writing [212] and may be either express or implied,[213] and, generally, the principle applies that when once made and presented to the authorities it cannot be subsequently withdrawn or lose its operative effect.[214]

Abandonment of an office. Official life may be also terminated by voluntary action on the part of the incumbent consisting of a refusal to qualify [215] or to further perform the duties of an of-

ignation is not complete until it is tendered and has been accepted by the governor with the knowledge and consent of the resigning incumbent under Mo. Const. art. 5, § 8. Reeves v. Ferguson, 31 N. J. Law, 107; Gorgas v. Blackburn, 14 Ohio, 252. Officers upon whom is imposed the duty of levying and collecting taxes and paying the debts of the town can, by resignation, avoid the performance of this duty.

[212] Davis v. Connor, 21 Ky. L. R. 658, 52 S. W. 945; Davis v. Humphrey, 21 Ky. 660, 52 S. W. 946; Justices Opinions, 70 Me. 570; Lewis v. Oliver, 4 Abb. Pr. (N. Y.) 121.

[213] Barbour v. United States, 17 Ct. Cl. 149; People v. Hanifan, 6 Ill. App. 158.

[214] Mimmack v. United States, 10 Ct. Cl. 584; McElrath v. United States, 12 Ct. Cl. 201; State v. Fitts, 49 Ala. 402; People v. Porter, 6 Cal. 27; Griffing v. Danbury, 41 Conn. 96; In re Advisory Opinion to Governor, 31 Fla. 1, 12 So. 114, 18 L. R. A. 594; Pace v. People, 50 Ill. 432; State v. Hauss, 43 Ind. 105; Parcel v. State, 110 Ind. 122, 11 N. E. 4; Gates v. Delaware County, 12 Iowa, 405; Bond v. White, 8 Kan. 333; Johnson v. Wilson, 15 Ky. L. R. 852, 25 S. W. 1057; State v. Foster, 36 Kan. 504, 13 Pac. 841; Killion v. Herman, 43 Kan. 37, 22 Pac. 1026; Jones v. Wilson, 95 Ky. 415, 33 S. W. 199; Davidson v. Bryce, 91 Md. 681, 48 Atl. 52; Pariseau v. Board of Education, 96 Mich. 302, 55 N. W. 799; State v. Conrades, 45 Mo. 45; State v. Augustine, 113 Mo. 21, 20 S. W. 651; State v. City Council of Lincoln, 4 Neb. 260; Wheeler v. State, 32 Neb. 472, 49 N. W. 442, following State v. Fields, 26 Neb. 393, 41 N. W. 988; State v. Beck, 24 Nev. 92, 49 Pac. 1035. A conditional resignation will not become operative except upon the happening of the conditions specified. Hawkins v. Cook, 62 N. J. Law, 84, 40 Atl. 781; Hutchinson v. Borough of Belmar, 62 N. J. Law, 450, 45 Atl. 1092; People v. Fitchie, 76 Hun, 80, 28 N. Y. Supp. 600; People v. Wende, 25 Misc. 330, 53 N. Y. Supp. 1039; People v. Scheu, 167 N. Y. 292, 60 N. E. 650, affirming 60 App. Div. 592, 69 N. Y. Supp. 597; People v. Hardy, 8 Utah, 68. But see Rogers v. Slonaker, 32 Kan. 191; Clark v. Board of Education of Detroit, 112 Mich. 656, 71 N. W. 177; Vaughn v. School Dist. No. 31, 27 Or. 57, 39 Pac. 393. A resignation to be effective must be made to the one authorized by law to receive and accept it. Bunting v. Willis, 27 Grat. (Va.) 144.

[215] Carpenter v. Titus, 33 Kan. 7; State v. Peck, 30 La. Ann. 280. No presumption of abandonment of an office will arise from a failure of the elected person to qualify within thirty days of the date of his commission.

fice [216] effecting, what the law considers, an abandonment of the office. An office may also be abandoned by a removal of the incumbent from the state [217] or from the district for which he performs public duties where the law requires an official to reside within its limits.[218]

§ 634. Holding an incompatible office.

The principle has already been suggested in a preceding section that a person may become ineligible for the holding of an office by reason of holding or of being elected to what is termed an incompatible office. This principle is further emphasized by the rule that official life may be terminated through voluntary action of an incumbent by his acceptance of or the performance of the duties of an incompatible office which action it is held is equivalent to a resignation or an abandonment of that other office.[219] It is a diffi-

[216] Barbour v. United States, 17 Ct. Cl. 149; Harrison v. People, 36 Ill. App. 319. The failure to perform the duties of an office must be so long continued as to justify the presumption that it has been abandoned. De Canio v. City of New York, 15 Misc. 38, 36 N. Y. Supp. 423; Wardlaw v. City of New York, 137 N. Y. 194, 33 N. E. 140; Ward v. Elizabeth City, 121 N. C. 1, 27 S. E. 993.

[217] State v. Allen, 21 Ind. 516; Yonkey v. State, 27 Ind. 237; Relender v. State, 149 Ind. 283, 49 N. E. 30. "Members of a board of commissioners are certainly county officers, and, by the positive command of the constitution they are required to reside within the county where they serve as such officers, and perform such duties as the law may direct. The provision of our fundamental law which restricts the evidence of a county officer to his county must be construed as requiring him to be a resident thereof,—not in the general sense of that term, but he is required to actually reside therein during the time he is an incumbent of the office. * * * That the title of a public officer may be terminated and his office vacated by abandonment is a rule of the law, settled beyond controversy. As the constitution exacts of a county officer the duty to actually reside in the county in which he holds his office, if he violates this provision of the law, by voluntarily ceasing to reside therein, during his term, it will operate as an abandonment of the office and ipso facto a surrender of all his right and title to the office." Gosman v. State, 106 Ind. 203.

[218] Relender v. State, 149 Ind. 283, 49 N. E. 30; Osborne v. State, 128 Ind. 129; Matter of Bagley, 27 How. Pr. (N. Y.) 151; State v. Walker, 17 Ohio, 135. Such a removal may be effected by a rearrangement of county lines.

[219] In the following cases, the offices have been considered incompatible and not capable of being held by the same person at the same time: United States v. Saunders, 120

cult question at times to determine when, as between two offices, an

U. S. 126, 7 Sup. Ct. 467; State v. Hutt, 2 Ark. 282. Alderman and city marshal. State Bank v. Curran, 10 Ark. 142. Justice of the peace and sheriff. People v. Saunderson, 30 Cal. 160; Magie v. Stoddard, 25 Conn. 565. Constable and justice of the peace. Attorney General v. Connors, 27 Fla. 329, 9 So. 7. Fla. Const. 1885, art. 16, § 15, does not prohibit the performance by a sheriff of the duties of city marshal, the latter not being a state office within the meaning of the provision stated. Crovatt v. Mason, 101 Ga. 246, 28 S. E. 891; Jones v. McCaskill, 112 Ga. 453, 37 S. E. 724; Kerr v. Jones, 19 Ind. 351. Colonel of militia and reporter of supreme court. Mehringer v. State, 20 Ind. 103; Howard v. Shoemaker, 35 Ind. 111; Foltz v. Kerlin, 105 Ind. 221. Township trustee and postmaster. Ferguson v. True, 66 Ky. (3 Bush) 255. Teacher and school trustee. Hoglan v. Carpenter, 67 Ky. (4 Bush) 89. Judge of county court and postmaster. Stubbs v. Lee, 64 Me. 195. Justice of the peace and coroner. Woodside v. Wagg, 71 Me. 207. Member of legislature and judge. Pooler v. Reed, 73 Me. 129. Constable and justice of the peace. Ellis v. Lennon, 86 Mich. 468, 49 N. W. 308; Attorney General v. Common Council of Detroit, 112 Mich. 145, 70 N. W. 450, 37 L. R. A. 211. Office of mayor and governor. Richards v. Town of Columbia, 55 N. H. 96; Cotton v. Phillips, 56 N. H. 220. Office of prudential committee and auditor of school district. Doyle v. Board of Education of City of Bayonne. 54 N. J. Law, 313, 23 Atl. 670; People v. Thomas, 33 Barb. (N. Y.) 287; People v. Common Council of Brooklyn, 77 N. Y. 503; State v. Thompson, 122 N. C. 493, 29 S. E. 720; State v. Taylor, 12 Ohio St. 130; State v. Hoyt, 2 Or. 246. Alderman and city marshal. State v. Goff, 15 R. I. 505, 9 Atl. 226. Justice of district court and deputy sheriff. State v. Buttz, 9 S. C. 157. Representative in congress and solicitor for judicial district. State v. Brinkerhoff, 66 Tex. 45, 17 S. W. 109. City recorder and clerk. Shell v. Cousins, 77 Va. 328. But see, Ryan v. City of Lewiston, 86 Me. 125, 29 Atl. 955; State v. Porterfield, 47 S. C. 75, 25 S. E. 39.

Offices held not incompatible: Collins v. United States, 15 Ct. Cl. 22. Retired army officer and office in executive department. Crosthwaite v. United States, 30 Ct. Cl. 300. Examiner in department of justice and special assistant attorney. Preston v. United States, 37 Fed. 417. Crier and messenger in U. S. courts. State v. Clendenin, 24 Ark. 78. Secretary of state and state senator. State v. Feibleman, 28 Ark. 424. County superintendent and circuit clerk. Lewis v. Wall, 70 Ga. 646. Town marshal and bailiff. Mohan v. Jackson, 52 Ind. 599. City clerk and justice of the peace. Answer of Justices, 68 Mo. 594. Justice and register of deeds. Kenney v. Goergen, 36 Minn. 190. County supervisor, district court clerk. State v. Bus, 135 Mo. 325, 36 S. W. 636, 33 L. R. A. 616. Deputy sheriff and school director. State v. Lusk, 48 Mo. 242. County clerk and circuit clerk. People v. Green, 58 N. Y. 295. Deputy clerk and mem-

incompatibility exists.[220] A text book writer has said[221] "that incompatibility in offices exist where the nature and duty of the two offices are such as to render it improper, from consideration of public policy, for one incumbent to retain both." Offices are usually considered incompatible and inconsistent so as not to be executed by the same person when, from the multiplicity of business in them, their duties cannot be executed with care and ability or when, from the different nature and character of the duties, the presumption exists that they cannot be as between them executed with impartiality and with honesty.[222] The holding of two offices, though they may not be incompatible, may be prohibited by law and the acceptance of one office and the performance of its duties will operate as a resignation or vacation of all other official positions held by a person.[223] Such statutory

ber of legislature. See, also, 23 Am. & Eng. Enc. Law. p. 333, and cases cited.

[220] Smith v. Moore, 90 Ind. 299; State v. Feibleman, 28 Ark. 424; People v. Green, 58 N. Y. 296.

[221] Mechem, Pub. Off. § 422; State v. Buttz, 9 S. C. (9 Rich.) 156.

[222] People v. Green, 58 N. Y. 295, Folger, J., "The force of the word, in its application to this matter is, that from the nature and relations to each other, of the two places, they ought not to be held by the same person, from the contrariety and antagonism which would result in the attempt by one person to faithfully and impartially discharge the duties of one, toward the incumbent of the other. Thus, a man may not be landlord and tenant of the same premises. He may be landlord of one farm and tenant of another, though he may not at the same hour be able to do the duty of each relation. The offices must subordinate, one the other, and they must, per se, have the right to interfere, one with the other, before they are incompatible at common law."

[223] United States v. Saunders, 120 U. S. 126, 7 Sup. Ct. 467; State v. Hutt, 2 Ark. 282; People v. Sanderson, 30 Cal. 160; Attorney General v. Connors, 27 Fla. 329, 9 So. 7. Fla. Const. 1885, art. 16, § 15, does not prohibit the performance by a sheriff of a county of the duties of city marshal, the latter not being a state office within the meaning of the provision stated.

Crovatt v. Mason, 101 Ga. 246, 28 S. E. 891; Dickson v. People, 17 Ill. 191; Dailey v. State, 8 Blackf. (Ind.) 329; Creighton v. Piper, 14 Ind. 182; Kerr v. Jones, 19 Ind. 351; Chambers v. State, 127 Ind. 365, 26 N. E. 893, 11 L. R. A. 613; Bishop v. State (Ind.) 48 N. E. 1038; Smith v. Moore, 90 Ind. 294; Foltz v. Kerlin, 105 Ind. 221; State v. Plymell, 46 Kan. 294, 26 Pac. 479; Goodloe v. Fox, 16 Ky. L. R. 653, 29 S. W. 433; Keating v. City of Covington, 18 Ky. L. R. 245, 35 S. W. 1026; State v. Taylor, 44 La. Ann. 783, 11 So. 132; Oliver v. Jersey City, 63 N. J. Law, 96, 42 Atl. 782; People v. Drake, 43 App. Div. 325, 60 N. Y. Supp. 309. One accepting a commission in the United

prohibitions may apply only to a "civil office," "place of trust or honor" [224] or "office of trust or profit," and the state prohibition is frequently found applying to the holding of a Federal office.[225]

§ 635. Termination of official life through removal.

The power to remove is usually held to be co-extensive with the power to appoint where official authority is derived from an appointment.[226] Removals from an office may be arbitrarily made

States army forfeits his position as superintendent of the water department of the City of Buffalo under N. Y. Laws, 1891, c. 105, § 475.

Rowland v. City of New York, 83 N. Y. 373; McNeill v. Somers, 96 N. C. 467, 2 S. E. 161; State v. Thompson, 122 N. C. 493, 29 S. E. 720; Gaal v. Townsend, 77 Tex. 464, 14 S. W. 365. Construing Const. Tex. art. 16 § 40. State v. Brinkerhoff, 66 Tex. 45, 17 S. W. 169; Brumby v. Boyd, 28 Tex. Civ. App. 164, 66 S. W. 874. But see Bryan v. Cattell, 15 Iowa, 538; State v. Somnier, 33 La. Ann. 237.

People v. Woodbury, 38 Misc. 189, 77 N. Y. Supp. 241. The provision of the N. Y. City charter forbidding any pensioner of the city or any of its departments to hold an office, employment or position under the city, is unconstitutional, being in violation of Const. 1894, art. 1 § 1. State v. Somers, 96 N. C. 467.

[224] Saunders v. Haynes, 13 Cal. 145; Crawford v. Dunbar, 52 Cal. 36; State v. Wilmington City Council, 3 Har. (Del.) 294; In re Corliss, 11 R. I. 638.

[225] People v. Leonard, 73 Cal. 230, 14 Pac. 853; Searcy v. Grow, 15 Cal. 117; People v. Turner, 20 Cal. 142; Packingham v. Harper, 66 Ill. App. 96; State v. Kelly, 80 Miss. 803, 31 So. 901. Miss. Const. § 226, does not apply where the right to a state office is contested.

Lindsey v. Attorney General, 33 Miss. 508. A pension agent of the United States is not disqualified from holding a state office under that provision of the state constitution which prohibits an officer of the general government from holding an office of trust or profit under this state. State v. Merry, 3 Mo. 278; State v. Clarke, 3 Nev. 566; Davenport v. City of New York, 67 N. Y. 456; Doyle v. City of Raleigh, 89 N. C. 133. The night watchman of a federal postoffice building does not hold an office of "trust or profit" under the United States.

De Turk v. Com., 129 Pa. 151, 18 Atl. 757, 5 L. R. A. 853; State v. De Gress, 53 Tex. 387. A retired army officer holds a lucrative office and one of trust and profit within the meaning of the Texas Const. and, therefore, ineligible to hold a civil office within the state. But see People v. Duane, 55 Hun, 315, 8 N. Y. Supp. 439, affirmed 121 N. Y. 367, 24 N. E. 845. A retired officer of the United States army does not come within the prohibition of New York Laws 1888, c. 584, providing that the aquaduct commissioners appointed by the mayor of the city of New York "shall hold no other, federal, state or municipal office."

[226] Taylor v. Kercheval, 82 Fed. 497; City of Mobile v. Squires, 49 Ala. 339; Patton v. Vaughan, 39 Ark. 211; People v. Hill, 7 Cal. 97.

without reason or cause where the official holds the office at the pleasure of some appointing power.[227] And this action if within the limitation of a statutory or constitutional power will not arbi-

The constitutional right to remove at pleasure cannot be abrogated by an act providing for removal only in a certain way or for a specified case. People v. Shear (Cal.) 15 Pac. 92; Smith v. Brown, 59 Cal. 672; Lamb v. People, 3 Colo. 106, 32 Pac. 618; City of Savannah v. Grayson, 104 Ga. 105, 30 S. E. 693; Carr v. State, 111 Ind. 101, 12 N. E. 107; City of Madison v. Korbly, 32 Ind. 74. Where the power to appoint exists in a city council by a majority vote, the power of removal is also possessed by a like vote.

State v. City of South Bend, 154 Ind. 693, 56 N. E. 721; Peters v. Bell, 51 La. Ann. 1621, 26 So. 442; State v. City Council of New Orleans, 107 La. 632, 32 So. 22; Hooper v. Farnen, 85 Md. 587, 37 Atl. 430; Chandler v. City of Lawrence, 128 Mass. 213; State v. Schram, 82 Minn. 420, 85 N. W. 155; Newsom v. Cocke, 44 Miss. 352; State v. Smith, 35 Neb. 13 52 N. W. 700; Mathis v. Rose, 64 N. J. Law, 45, 44 Atl. 875. The power of removal as found in the city charter cannot be restricted by the passage of an ordinance fixing the term of an appointive office at a definite period.

Sweeney v. Stevens, 46 N. J. Law, 344; People v. Dalton, 23 Misc. 294, 50 N. Y. Supp. 1028; People v. Henry, 47 App. Div. 133, 62 N. Y. Supp. 102; People v. City of Brooklyn, 149 N. Y. 215, 43 N. E. 554; State v. Archibald, 5 N. D. 359, 66 N. W. 234; Williams v. Boughner, 46 Tenn. (6 Cold.) 486; People v. McAllister, 10 Utah, 357, 37 Pac. 578; Richards v. Town of Clarksburg, 30 W. Va. 491, 4 S. E. 774. See, also, 25 Am. Law. Rev. 199, note, on the right of removal of public officers by J. R. Berryman.

[227] Handlin v. Wickliffe, 79 U. S. (12 Wall.) 173; Nolen v. State, 118 Ala. 154; Sponogle v. Curnow, 136 Cal. 580, 69 Pac. 255; Fitch v. Sup'rs City and County of San Francisco, 122 Cal. 285; Carter v. City of Durango, 16 Colo. 534; People v. Carver, 5 Colo. App. 156, 38 Pac. 332; State v. Johnson, 30 Fla. 433; City of Savannah v. Grayson, 104 Ga. 105; Heffran v. Hutchins, 160 Ill. 550. Baxter v. Town of Beacon, 112 Iowa, 744, 84 N. W. 932. The contract with a town council to act as marshal being ultra vires, the appointee may be discharged by the mayor without subjecting the town to any liability for an alleged breach of contract.

South v. Sinking Fund Com'rs, 9 Ky. L. R. 478, 5 S. W. 567; Riffe v. Tinsley, 20 Ky. L. R. 281, 45 S. W. 1046; Johnson v. Cavanah, 21 Ky. L. R. 1246, 54 S. W. 853; Campbell County v. Trapp, 23 Ky. L. R. 2356, 67 S. W. 369; State v. Rost, 47 La. Ann. 73, 16 So. 776; Townsend v. Kurtz, 83 Md. 331, 34 Atl. 1123. Construing Md. Code, Pub. Gen. Laws, art. 23, § 121, relative to removal of state insurance commissioner.

Field v. Malster, 88 Md. 691; Attorney General v. Cahill, 169 Mass. 18, 47 N. E. 433; Attorney General v. Common Council of Detroit, 112 Mich. 145, 37 L. R. A. 211; Brandau v. City of Detroit, 115 Mich. 643; Townsend v. Common Council of

trarily be reviewed by the courts.[228] The validity of an appointment may sometimes be made dependent upon the endorsement or confirmation of a designated officer or official body,[229] and although the officer possessing the power of appointment may remove one of his appointees, the removal is not effectual until the approval by such confirmatory body of his successor.[230] The

Sauk Centre, 71 Minn. 379; State v. Alt, 26 Mo. App. 673; Gibbs v. Morgan, 39 N. J. Eq. (12 Stew.) 126; Uffert v. Voght, 65 N. J. Law, 377, 47 Atl. 225; Mathis v. Rose, 64 N. J. Law, 726, 49 Atl. 1135; People v. Tierney, 31 App. Div. 309, 52 N. Y. Supp. 871; Mack v. City of New York, 37 Misc. 371, 75 N. Y. Supp. 809; People v. Nixon, 158 N. Y. 221, 52 N. E. 1117; State v. Archibald, 5 N. D. 359, 66 N. W. 234; Day's Case, 124 N. C. 362, 32 S. E. 748, 46 L. R. A. 295; Walser v. Jordan, 124 N. C. 683; Miller v. Alexander, 122 N. C. 721; Greene v. Owen, 125 N. C. 212, 34 S. E. 424; Field v. Girard College, 54 Pa. 233; Houseman v. Com., 100 Pa. 224; Lane v. Com., 103 Pa. 481; State v. Williams, 6 S. D. 119, 60 N. W. 410; Nehrling v. State, 112 Wis. 637, 88 N. W. 610. Where the power is vested in an official board it is not necessary that more than a majority shall act in cases of removal.

[228] State v. Graham, 25 La. Ann. 73. The fact of a removal is presumptive evidence that it was made for a proper cause. State v. Rost, 47 La. Ann. 53; State v. City Council of New Orleans, 107 La. Ann. 632, 32 So. 22; Attorney General v. Berry, 99 Mich. 379; State v. Archibald, 5 N. D. 359, 66 N. W. 234; Cameron v. Parker, 2 Okl. 277, 38 Pac. 14.

[229] State v. Breidenthal, 55 Kan. 308, 40 Pac. 651. The syllabus of the case is given by the court. "In 1891 an act of the legislature was passed providing for the organization of banks, the regulation of the banking business, and authorizing the appointment of a bank commissioner. The act was passed in the closing days of the legislative session, and did not take effect until a few days after the legislature had adjourned. It provided that the governor should appoint, by and with the advice and consent of the senate, a bank commissioner, whose term of office should be four years and until his successor was appointed and qualified, but made no provision for the filling of vacancies that might occur in the office. On March 21st, 1891, J. was appointed by the governor, and the senate not being in session the appointment was not confirmed. He qualified and took possession of the office, and continued to perform all the duties thereof until his successor was appointed and had qualified. At the next session of the senate, in February, 1893, B. was appointed, and his appointment was confirmed by the senate. Held, that the appointment of J. was only provisional and temporary, and the commencement of the official term began to run from the appointment of B., and that he is entitled to hold the office for four years from the time of that appointment." State v. Powell, 40 La. Ann. 241, 4 So. 447.

[230] City of Macon v. Shaw, 16 Ga. 172; Parish v. City of St. Paul,

arbitrary power to remove an appointive official does not exist where, by law, a fixed tenure of office is provided.[231]

(a) Civil service or other provision. In respect to certain offices although appointive in their character, the legislature may impose restrictions upon an arbitrary right to remove.[232] These limitations are based upon the theory that a proper performance of official and public duties is dependent upon a feeling of security in the possession of an office except in case of a negligent, lax or dishonest performance of such duties by the incumbent. Removals from office can, therefore, be made only for cause [233] and after the making of charges by the proper body or official, duly considered

84 Minn. 426, 87 N. W. 1124; State v. Heinmiller, 38 Ohio St. 101.

[231] People v. Jewett, 6 Cal. 291; State v. Chatburn, 63 Iowa, 659; Jacques v. Little, 51 Kan. 300, 33 Pac. 106, 20 L. R. A. 304; State v. Mitchell, 50 Kan. 289, 33 Pac. 104, 20 L. R. A. 306; Brown v. Grover, 69 Ky. (6 Bush) 1. Where the constitution has fixed the terms of an office and declared upon what grounds and in what manner an incumbent may be received, it is beyond the power of the legislature to remove or suspend from office for any other reason or mode than thus prescribed.

Field v. Malster, 88 Md. 691, 41 Atl. 1087; Speed v. Common Council of Detroit, 97 Mich. 198, 56 N. W. 570; Attorney General v. Corliss, 98 Mich. 372, 57 N. W. 410; State v. Smith, 35 Neb. 13, 52 N. W. 700, 16 L. R. A. 791. Where a public officer is elected or appointed for a definite term and removable only upon cause, it is necessary for charges to be preferred of which he shall have notice and an opportunity to be heard in his defense before he can be legally removed. Peal v. City of Newark, 66 N. J. Law, 265, 49 Atl. 468, reversing 66 N. J. Law, 105, 48 Atl. 576; State v. Common Council of Duluth, 53 Minn. 238; Markley v. Borough of Cape May Point, 55 N. J. Law, 104; Ter. v. Ashenfelter, 4 N. M. 85, 12 Pac. 879; Ewing v. Thompson, 43 Pa. 372; Collins v. Tracy, 36 Tex. 546.

[232] People v. Orr, 22 Colo. 142, 43 Pac. 1005; Sherman v. City of Des Moines, 100 Iowa, 88; Trainor v. Board of Auditors, 89 Mich. 162, 50 N. W. 809, 15 L. R. A. 95. Under How. St. § 483, subd. 17, certain public officials can be removed by a board of supervisors for incompetency without charges, notice or hearing. Attorney General v. Cogshall, 107 Mich. 181; People v. Keller, 31 App. Div. 248, 52 N. Y. Supp. 950; People v. Van Wyck, 34 App. Div. 573, 54 N. Y. Supp. 675. The limitation may be one of time.

[233] Croly v. Trustees of Sacramento, 119 Cal. 229; Trimble v. People, 19 Colo. 187; People v. Martin, 19 Colo. 565, 24 L. R. A. 201; Vason v. City of Augusta, 38 Ga. 542; Todd v. Dunlap, 99 Ky. 449, 36 S. W. 541; State v. Donovan, 89 Me. 448, 36 Atl. 982; State v. Common Council of Duluth, 53 Minn. 238, 55 N. W. 118. The term "sufficient cause" as used in the Duluth City charter providing for the removal of members of the board of

by a competent tribunal after notice to the person charged, and when all the proceedings prescribed by law have been followed.[234]

(b) Distinctions between an office and employment. The principles governing removal from office in respect to notice and hearing do not apply where the character of service is a mere employment and not an office unless the employe is protected by civil service rules which govern both the manner of his selection and discharge.[235] Where the power to employ at pleasure exists, the power

fire commissioners for "sufficient cause" means "legal cause" and must be one that affects the administration of the office.

State v. Brown, 57 Mo. App. 199; State v. St. Louis Police Com'rs, 88 Mo. 144; Cleary v. City of Trenton, 50 N. J. Law, 331, 13 Atl. 228; McChesney v. Inhabitants of Trenton, 50 N. J. Law, 338, 14 Atl. 578; State v. Miller, 3 N. D. 438, 57 N. W. 193. The authority vested in the governor "to take such action for the public security as the exigencies demand" will not warrant a removal from office of the trustees of a public institution.

Johnson v. City of Galveston, 11 Tex. Civ. App. 469, 33 S. W. 150. An assault with a pistol is not such misconduct in office as will warrant a removal. People v. McAllister, 10 Utah, 357, 37 Pac. 578; State v. Common Council of Watertown, 9 Wis. 254.

[234] Board of Aldermen v. Darrow, 13 Colo. 460, 22 Pac. 784; People v. Therrien, 80 Mich. 187, 45 N. W. 78; Dullam v. Willson, 53 Mich. 392; Burt v. Iron County Sup'rs, 108 Mich. 523, 66 N. W. 387. A notice to officers charged with incompetency need not extend to specific instances.

Kriseler v. LeValley, 122 Mich. 576, 81 N. W. 580. The notice must be sufficient in form and contents and properly signed to be effectual. State v. Peterson, 50 Minn. 239, 52 N. W. 655; State v. Common Council of Duluth, 53 Minn. 238, 55 N. W. 118; State v. City of St. Louis, 90 Mo. 19; State v. Smith, 35 Neb. 13, 52 N. W. 700, 17 L. R. A. 440; Keenan v. Goodwin, 17 R. I. 649, 24 Atl. 148; State v. McCarty, 65 Wis. 163.

[235] City of Chicago v. Luthardt, 91 Ill. App. 324. The chief clerk of a municipal detective bureau is under the protection of the Illinois Laws 1895, p. 88, regulating the civil service of cities and cannot be removed except for cause upon written charges and after an opportunity to be heard in his defense. People v. Plimley, 1 App. Div. 458, 37 N. Y. Supp. 152; People v. Cruger, 17 App. Div. 483, 45 N. Y. Supp. 519; People v. Constable, 27 App. Div. 74, 50 N. Y. Supp. 121; People v. Coler, 40 App. Div. 65, 57 N. Y. Supp. 636; People v. Brady, 43 App. Div. 60, 59 N. Y. Supp. 322; Van Valkenburgh v. City of New York, 49 App. Div. 208, 63 N. Y. Supp. 6; People v. Shea, 51 App. Div. 227, 64 N. Y. Supp. 973; People v. Scully, 56 App. Div. 302, 67 N. Y. Supp. 839; People v. Scully, 35 Misc. 613, 72 N. Y. Supp. 123; People v. Kearny, 36 Misc. 717, 74 N. Y. Supp. 391; People v. Dalton, 159 N. Y. 235, 53 N. E. 1113; People v. Brady, 166 N. Y. 44, 59 N. E. 701, reversing 53 App. Div. 279, 65 N. Y. Supp. 844.

to discharge without cause or arbitrarily must necessarily follow,[236] controlled only by the general principles of law relative to the making of a contract of employment.[237]

(c) Dismissal from office or its abrogation not a removal. The rules regulating removal from office as it is commonly as well as technically understood, do not apply where the power of arbitrary dismissal exists or where the loss of official position results from an abolition of the office, the lack of funds with which to carry on a particular work or business or the completion of the particular work in the performance of which a person was engaged.[238] Ordinarily, the power conferred upon public officials to reduce the number of subordinate officers or employes because of lack of funds or work cannot be exercised for the mere purpose of creating a vacancy to fill which the appointment of some other person will be necessary. The dismissal or removal under such circumstances must be made in good faith.[239]

§ 636. Right to a notice and hearing.

Where removals for cause are authorized by statute, the mere commission of the act warranting a removal will not justify action without giving notice to the party charged with the commission of the offense and a reasonable opportunity to be heard.[240] This

[236] Osborn v. Common Council of Detroit, 111 Mich. 362, 69 N. W. 644; People v. Brookfield, 13 Misc. 566, 34 N. Y. Supp. 674, construing N. Y. Laws 1892, c. 577; People v. Cram, 15 Misc. 12, 36 N. Y. Supp. 1117; People v. Murray, 5 App. Div. 288, 39 N. Y. Supp. 227; Sheehan v. City of New York, 21 Misc. 600, 48 N. Y. Supp. 662; Langdon v. City of New York, 92 N. Y. 427; People v. Constable, 27 App. Div. 774, 50 N. Y. Supp. 121; In re Goodwin, 30 App. Div. 418, 51 N. Y. Supp. 355; Ryan v. City of New York, 154 N. Y. 328, 48 N. E. 512.

[237] State v. City of New Orleans, 107 La. 632, 32 So. 22; People v. Palmer, 6 App. Div. 19, 39 N. Y. Supp. 631.

[238] People v. Health Dept., 24 Wkly. Dig. (N. Y.) 197; People v. French, 25 Hun (N. Y.) 111; People v. Fire Com'rs, 72 N. Y. 445; Phillips v. City of New York, 88 N. Y. 245; Langdon v. City of New York, 92 N. Y. 427.

[239] State v. Schumaker, 27 La. Ann. 332; People v. French, 25 Hun (N. Y.) 111.

[240] Benson v. People, 10 Colo. App. 175, 50 Pac. 212; People v. Denman, 16 Colo. App. 337, 65 Pac. 455; State v. Smith, 72 Conn. 572, 45 Atl. 355; Avery v. Studley, 74 Conn. 272, 50 Atl. 752. The right of a hearing does not necessarily include the right to appear by counsel. Todd v. Dunlap, 99 Ky. 419, 36 S. W. 541; State v. City of New Orleans, 107 La. Ann. 632. The giving of notice may be waived by vol-

right of notice and defense may exist independent of statutory provisions.[241] Where the legislature has provided for the giving of notice and the right to a hearing, these are essential to the legal removal of a public officer.[242]

§ 637. Cause for removal.

The cause for removal, where one is necessary to effect this result, may be either prescribed by law,[243] or it may be one which

untary appearance. People v. Common Council, of Auburn, 85 Hun, 601, 33 N. Y. Supp. 165; People v. La Grange, 2 App. Div. 444, 37 N. Y. Supp. 991; State v. Hewitt, 3 S. D. 187, 52 N. W. 875, 16 L. R. A. 413; Rutter v. Ter., 11 Okl. 454, 68 Pac. 507; Poe v. State, 72 Tex. 625, 10 S. W. 737; Kimball v. Olmsted, 20 Wash. 629, 56 Pac. 377.

[241] Brown v. Duffus, 66 Iowa, 193; State v. Leisure, 42 Kan. 272, 21 Pac. 1070; Lynch v. Chase, 55 Kan. 367; State v. Walbridge, 119 Mo. 383, 24 S. W. 457; State v. Markley, 55 N. J. Law, 107; Armatage v. Fisher, 74 Hun, 167, 26 N. Y. Supp. 364; State v. Shannon, 7 S. D. 319, 64 N. W. 175.

[242] In re Fire & Excise Com'rs, 19 Colo. 482, 36 Pac. 234. Construing Denver City charter, § 45 (Colo. Laws 1893, p. 172), and holding that under this section a governor has the power to remove the fire and police commissioners of the City of Denver upon the filing in writing of a cause not political and without instituting any investigation of a judicial nature. Following Trimble v. People, 19 Colo. 187, 34 Pac. 981; Lease v. Freeborn, 52 Kan. 750, 35 Pac. 817; Todd v. Tilford, 99 Ky. 449, 36 S. W. 541; Wheeler v. Fire Com'rs, 46 La. Ann. 731, 15 So. 179; Miles v. Stevenson, 80 Md. 358, 30 Atl. 646; Attorney General v. Berry, 99 Mich. 379; Markley v. Borough of Cape May Point, 55 N. J. Law, 104, 25 Atl. 259; Krueger v. Council of Borough of Chesilhurst, 64 N. J. Law, 523, 45 Atl. 780; Bowlby v. City of Dover, 68 N. J. Law, 97, 52 Atl. 289.

People v. Grady, 26 App. Div. 592, 50 N. Y. Supp. 424; In re Nichols, 57 How. Pr. (N. Y.) 395; State v. Hoglan, 64 Ohio St. 532, 60 N. E. 627. The misconstruction of a statute in regard to which there may be a reasonable difference of opinion is not such incompetency or misconduct as to warrant a removal. Maroney v. City Council of Pawtucket, 19 R. I. 3, 31 Atl. 265; State v. Kirkwood, 15 Wash. 298, 46 Pac. 331. The objection that charges are not sufficiently specific cannot be raised after a public officer has gone to trial upon them as preferred without raising this objection.

[243] Thurston v. Clark, 107 Cal. 285, 40 Pac. 435. A sheriff cannot be removed during his second term for offenses committed while serving a first term under Penal Code, § 772, relative to the removal of officers for a violation of duty. Trimble v. People, 19 Colo. 187, 34 Pac. 981; People v. Martin, 19 Colo. 565, 36 Pac. 543, 24 L. R. A. 201; Trustees of Town of Gillett v. People, 13 Colo. App. 553, 59 Pac. 72; Shaw v. City of Macon, 19 Ga. 468; Miller v. Smith, 7 Idaho, 294,

is indictable,[244] or still further, one which while not indictable, is of such a grave character, considering the administration of government, as to warrant the action of removal.[245] The latter class would include acts of general insubordination, the negligent performance of public duties or such an attitude or course of conduct, either in respect to matters concerning private life or opinions, as for reasons of public policy, will justify a removal.[246] Generally

61 Pac. 824; Ponting v. Isaman, 7 Idaho, 283, 62 Pac. 680. The collection of illegal fees under Rev. St. § 7459 is ground for the removal of a public officer.

Randolph v. Pope County Board, 19 Ill. App. 100; State v. City of Noblesville, 157 Ind. 31, 60 N. E. 704; McComas v. Krug, 81 Ind. 327. A statute providing for removal from office for intoxication is valid under the constitutional provision for the removal of public officers on account of crime, incapacity or negligence.

Attorney General v. Jochim, 99 Mich. 358, 58 N. W. 611, 23 L. R. A. 699. The members of a board of state canvassers, who are required by law to make and certify to a statement of the votes cast at an election, are guilty of gross neglect of duty such as to warrant a removal in signing without examination a clerk's statement of the votes cast on a constitutional amendment.

Minkler v. State, 14 Neb. 181; In re Smith, 48 App. Div. 634, 63 N. Y. Supp. 1018. Under N. Y. Laws 1897, c. 414 § 313, a village officer interested in a contract with a village is liable to removal. It will be no justification that he acted in good faith and received no more on his contract than other contractors for doing the same work. State v. Sullivan, 58 Ohio St. 504, 51 N. E. 48; Bradford v. Ter., 2 Okl. 228; State v. City of Ballard, 10 Wash. 4, 38 Pac. 761.

[244] Woods v. Barnum, 85 Cal. 639, 24 Pac. 843; State v. Ragsdale, 59 Mo. App. 590. A conviction under Mo. Rev. St. 1889, § 3732, will effect a forfeiture of a public office without further proceedings. Tyrrell v. Common Council of Jersey City, 25 N. J. Law (1 Dutch.) 536. Receiving bribes by common councilmen is sufficient ground for removal under a charter power to remove for disorderly conduct. People v. Brady, 48 App. Div. 128, 62 N. Y. Supp. 603; Brackenridge v. State, 27 Tex. App. 513, 4 L. R. A. 360.

[245] Donahue v. Will County, 100 Ill. 94; Ayers v. Hatch, 175 Mass. 489, 56 N. E. 612; People v. Fire Com'rs, 12 Hun (N. Y.) 500; People v. City of New York, 19 Hun (N. Y.) 441; People v. Nichols, 79 N. Y. 582.

[246] Avery v. Studley, 74 Conn. 272, 50 Atl. 752; People v. Blair, 82 Ill. App. 570. The neglect of a mayor to nominate a city marshal will not justify the council in removing him. State v. Welsh, 109 Iowa, 19, 79 N. W. 369. Voluntary intoxication while engaged in the performance of an official duty is ground for a removal. Loper v. State, 48 Kan. 540, 29 Pac. 687; Lynch v. Chase, 55 Kan. 367, 40 Pac. 666; McPherson v. State, 59 Kan. 57, 51 Pac. 910. The wrongful withdrawal of money from a

it is not necessary to warrant removal where provision is made for this by law for cause that the official charged with the misconduct or misfeasance in office should have been indicted for the offense or convicted upon an indictment if found.[247]

county under a bounty law is official misconduct and will warrant a removal from office, and a subsequent return of the money is no defense.

Rogers v. Morrill, 55 Kan. 737, 42 Pac. 355. The removal of a regent of the state university was properly made when, during his term of office, he was addicted to the use of intoxicating liquors and where in other respects his conduct and example was detrimental to the best interests of the university.

Com. v. Williams, 79 Ky. 42. In Kentucky, intoxication is not held "misfeasance in office" and a statute declaring it such and providing for the removal of an officer is unconstitutional. State v. Doherty, 25 La. Ann. 118; State v. Rost, 47 La. Ann. 53, 16 So. 776. The question of whether an official possessing the power of removal acted improperly and without cause will not be reviewed by the courts.

State v. Bourgeois, 47 La. Ann. 184. A technical disregard of laws under the advice of counsel in good faith will not warrant a removal. State v. Cannon, 47 La. Ann. 278, 16 So. 666, reversing 15 So. 626. A failure to pay over promptly all moneys collected consists a misconduct in office justifying a removal. Townsend v. Common Council of Sauk Centre, 71 Minn. 379, 74 N. W. 150. The refusal of a mayor to sign an order for the payment of property purchased by the city upon the ground of financial condition is not such a disregard of duty as to authorize the council to remove him for cause.

State v. Taylor, 93 Mo. App. 327, 67 S. W. 672. A state of intoxication while in performance of an official act or duty will warrant removal from office under Mo. Rev. St. 1899, § 2334.

State v. Walbridge, 69 Mo. App. 657; Stewart v. Bole, 61 Neb. 193, 85 N. W. 33. Where a county clerk permits election ballots committed to his official care to be abstracted from his office, it is sufficient official misconduct to warrant his removal from office. People v. Common Council of Auburn, 85 Hun, 601, 33 N. Y. Supp. 165; In re Guden, 71 App. Div. 422, 75 N. Y. Supp. 794. A promise to appoint one as his counsel in the event of his election to a public office is sufficient ground for a removal under Const. art. 10, § 1.

Cameron v. Parker, 2 Okl. 277, 38 Pac. 14; State v. Alcorn, 78 Tex. 387; State v. Burke, 8 Wash, 412, 36 Pac. 281; Nehrling v. State, 112 Wis. 637, 88 N. W. 610. The use of public funds for the purchase of personal books and for paying freight bills on personal property is a "misdemeanor" and also "incompetency" as contemplated by Wis. Laws 1882, c. 328, § 7.

[247] Kilburn v. Law, 111 Cal. 237; Daily v. Freeholders of Essex County, 58 N. J. Law, 319; Francis v. City of Newark, 58 N. J. Law, 522; Cavenaugh v. Freeholders of Essex County, 58 N. J. Law, 531; Horan v. Board of Education, 58 N. J. Law, 533; State v. Archibald,

§ 638. Removal for cause; tribunal.

Assuming the existence of a cause for removal with regular or statutory proceedings leading to this end, it is still, nevertheless essential that the charges be considered by a tribunal especially provided by law [248] or one having, by reason of its general powers, jurisdiction to consider and render a competent judgment.[249] Such a tribunal involves the essentials of authority to act, competency in respect to a hearing, and determination of the charges and impartiality with respect to the person charged.[250]

5 N. D. 359; Myrick v. McCabe, 5 N. D. 422; Minnehaha County v. Thorne, 6 S. D. 449; Bland v. State (Tex.) 38 S. W. 252; Taylor v. City Council of Tacoma, 15 Wash. 92.

[248] State v. Whitlock, 41 Ark. 403; People v. Onahan, 170 Ill. 449, 48 N. E. 1003; Gibbs v. Board of Aldermen of Louisville. 99 Ky. 490, 36 S. W. 524; Hoke v. Richie, 100 Ky. 66, 37 S. W. 83, 38 S. W. 132; Com. v. Willis, 19 Ky. L. R. 962, 42 S. W. 1118; State v. Judge of Civil Dist. Court, 50 La. Ann. 655, 23 So. 886; Andrews v. King, 77 Me. 224; State v. Common Council of Duluth, 53 Minn. 238, 55 N. W. 118: State v. Ward, 70 Minn. 58, 72 N. W. 825; State v. Walker, 68 Mo. App. 110; City of Hoboken v. Gear, 27 N. J. Law (3 Dutch.) 265; State v. Pritchard, 36 N. J. Law, 101; People v. Trustees of Village of Saratoga Springs, 4 App. Div. 399, 39 N. Y. Supp. 607; In re Guden, 171 N. Y. 529, 64 N. E. 451, affirming Matter of Guden, 71 App. Div. 422, 75 N. Y. Supp. 794. The action of the governor in removing officers under Const. art. 10, § 1, is executive and the exercise of the power is not subject to review by the courts. Saunders v. Wagener, 42 Tex. 562; State v. Common Council of Watertown, 9 Wis. 254.

[249] In re Curtis, 108 Cal. 661, 41 Pac. 793; Trustees of Gillett v. People, 13 Colo. App. 553, 59 Pac. 72; Graham v. Cowgill, 13 Kan. 114; Yoe v. Hoffman, 61 Kan. 265, 59 Pac. 351. Where the removal of an officer is attempted under Session Laws of 1889, c. 239, which gives to a legislative committee power to investigate charges against certain public officials, courts of competent jurisdiction have the right to determine whether the charges on which such proceedings are based are sufficient to justify a removal and are within the provisions of the statute. Citing the following: Carter v. City of Durango, 16 Colo. 534; Andrews v. King, 77 Me. 230; Williams v. City of Gloucester, 148 Mass. 256; State v. City of Duluth, 53 Minn. 238; State v. Hastings, 37 Neb. 96; People v. Thompson, 94 N. Y. 451; State v. Patrick, 124 N. C. 651; Dubuc v. Voss, 19 La. Ann. 210, 92 Am. Dec. 526.

People v. Therrien, 80 Mich. 187, 45 N. W. 78; State v. McClinton, 5 Nev. 329; Com. v. Allen, 70 Pa. 465.

[250] Fuller v. Ellis, 98 Mich. 96, 57 N. W. 33. A member of a board of control is not disqualified from participating as one of the board in hearing and determining charges against an officer because of his signing the original charges against that official.

People v. Common Council of Auburn, 85 Hun, 601, 33 N. Y. Supp.

§ 639. The proceedings.

The proceedings relative to the removal of a public official for cause are generally prescribed by statute and as these differ widely in different states or even from time to time in the same state, no general principle can be stated relative to them except such as may have been already suggested in the preceding sections, namely, the authority for removal, the giving of notice to the person charged, the existence of and consideration by a competent and impartial tribunal and the rendition of a judgment or order in the manner prescribed by law.[251] The privilege of holding an office and performing its duties where a removal can only be effected for cause before the expiration of the term of office or service, establishes the right in an incumbent which the law protects and of which he can only be deprived after an orderly course of procedure or by due process of law which includes as their fundamental essentials, the conditions already enumerated.[252] Statutory or constitutional provisions fixing the manner in which

165. Certain members of the common council are not disqualified from participating in and determining charges against a city attorney in proceedings to remove from office because of the fact that they were a committee of tne council appointed to investigate and prefer the charges. But see People v. Village of Saratoga Springs, 4 App. Div. 399, 39 N. Y. Supp. 607. A village trustee who prefers charges is disqualified to sit as a member of the trial tribunal for otherwise he would act as both accuser and judge. People v. Diehl, 165 N. Y. 643, 59 N. E. 1128.

[251] Miles v. Stevenson, 80 Md. 358, 30 Atl. 646; Attorney General v. Berry, 99 Mich. 379; State v. Dart, 57 Minn. 26; Bradford v. Ter., 2 Okl. 228, 37 Pac. 1061; Taylor v. City Council of Tacoma, 15 Wash. 92, 45 Pac. 641; McDonald v. Guthrie, 43 W. Va. 595, 27 S. E. 844; Roberts v. Paull, 50 W. Va. 528, 40 S. E. 470. The resignation of an officer pending proceedings to remove will terminate them.

Nehrling v. State, 112 Wis. 637, 88 N. W. 610. Witnesses in a proceeding for the removal of a public officer need not be sworn under Laws 1882, c. 328, §§ 3, 7. State v. Common Council of Superior, 90 Wis. 612, 64 N. W. 304. Proceedings for the removal of a city officer before the city council are not governed by the strict rules of criminal trials and a charge is sufficient if it informs the defendant with the substance of the accusation against him.

[252] Allen v. State, 32 Ark. 241; Kilburn v. Law, 111 Cal. 237, 43 Pac. 615. Such a proceeding is regarded as criminal in its character; not civil. Cobb v. Smith, 102 Ga. 585, 27 S. E. 763. The prosecution for the removal of a public officer under Ga. Civil Code, § 4366, is a quasi criminal proceeding. Evans v. Populus, 22 La. Ann. 121. Where the arbitrary power of removal is

public officials may be tried for misdemeanors or misconduct in office or impeached, are exclusive and where no provision is made for trial by jury, an official charged with the commission of an offense is deprived of this right.[253] Constitutional provisions of course control and legislative enactments in contravention of them will be considered void.[254] Where the legislative power is unrestricted by the constitution, it is free to act in the passage of legislation respecting removals.

§ 640. Evidence.

Where charges have been made against a public official on a hearing, only that evidence can be considered which is competent, relevant and material, determined with reference to the charges

given by the legislature to the governor, the exercise of this power will be presumed to have been for a good cause.

Com. v. Cooley, 83 Mass. (1 Allen) 358; Murdock v. Phillips Academy, 29 Mass. (12 Pick.) 244; State v. Dart (Minn.) 59 N. W. 190. The resignation of an officer will not abate pending proceedings for his removal on account of malfeasance in office. People v. City of New York, 19 Hun (N. Y.) 441. Before an officer can be removed a specific charge must be served upon him with a reasonable time to appear and answer it and an opportunity with the aid of counsel to examine and rebut the evidence produced. Mere politcial bias or personal dislike of the officer having the power of removal is not a "cause" under a provision for removal from office by the mayor for cause. Wishek v. Becker, 10 N. D. 63, 84 N. W. 590. Under Rev. Code, c. 24, § 5743, an action for the removal of a county judge cannot be brought by a private person.

Bradford v. Ter., 2 Okl. 228, 37 Pac. 1061. Quo warranto is the proper proceeding to remove a county clerk for maladministration in office. Com. v. Pennsylvania Beneficial Institution, 2 Serg. & R. (Pa.) 141. But see People v. Thompson, 94 N. Y. 451.

[253] Woods v. Varnum, 85 Cal. 639, 24 Pac. 843; Trimble v. People, 19 Colo. 187, 34 Pac. 981; Hays v. Simmons, 6 Idaho, 651, 59 Pac. 182; State v. Jorda, 26 La. Ann. 374; State v. Peterson, 50 Minn. 239. But see State v. Walbridge, 119 Mo. 383, 24 S. W. 457.

[254] Nolen v. State, 118 Ala. 154, 24 So. 251. "A tax assessor can be removed from office only in the mode prescribed by the organic law; that is, by impeachment under section 3 of article 7 of the constitution. That provision of the act of February 28, 1887, which undertakes to authorize the governor to 'suspend' tax assessors, and appoint tax commissioners to perform the duties of assessors so 'suspended,' and providing that such suspension of an assessor shall continue indefinitely, or, more accurately speaking, perpetually, 'unless the general assembly by joint resolution restore him to his office,' is violative of the constitution, and void." People v.

made.[255] Ordinarily, these questions are for the determination of the tribunal as questions of law while the sufficiency of the evidence is a question of fact also for their determination.[256] To justify a removal, it is not necessary to show on the part of the person charged a wrongful intent[257] unless statutory provisions require it, and ignorance of the law is also usually considered no defense.

§ 641. Remedies in case of a wrongful removal.

Where a removal from office has been wrongfully made, even if under some established course of procedure the party thus wrongfully removed is not given, usually, the right to recover any damages which he may have sustained,[258] but only the right to recover his compensation or fees for the time during which he may have been wrongfully deprived of the office.[259] Special remedies may

Hill, 7 Cal. 97; Lowe v. Com., 60 Ky. (3 Metc.) 237; Brown v. Grover, 69 Ky. (6 Bush.) 1; Page v. Hardin, 47 Ky. (8 B. Mon.) 648; Com. v. Williams, 79 Ky. 42; State v. Wiltz, 11 La. Ann. 439.

[255] Yoe v. Hoffman, 61 Kan. 265, 59 Pac. 351, reversing 9 Kan. App. 394, 58 Pac. 802. The proceedings and evidence introduced thereunder must be confined to the charges made against the official.

[256] Ponting v. Isaman, 7 Idaho, 581, 65 Pac. 434; State v. City of New Orleans, 107 La. Ann. 632; People v. Martin, 15 Misc. 6, 36 N. Y. Supp. 437; People v. Barker, 1 App. Div. 532, 37 N. Y. Supp. 555. A removal from office on the charge of physical incapacity not warranted by the evidence. People v. Wright, 7 App. Div. 185, 40 N. Y. Supp. 285; In re Odell, 28 App. Div. 464, 51 N. Y. Supp. 122; People v. Magee, 57 App. Div. 281, 67 N. Y. Supp. 906; People v. Dooling, 60 App. Div. 321, 70 N. Y. Supp. 26; People v. Coler, 159 N. Y. 569, 54 N. E. 1094. But see People v. Diehl, 165 N. Y. 643, 59 N. E. 1128, and Hawkins v. Kercheval, 78 Tenn. (10 Lea) 535.

[257] Yoe v. Hoffman, 61 Kan. 265, 59 Pac. 351, reversing 9 Kan. App. 394, 58 Pac. 802, citing McMaster v. Herald, 56 Kan. 231. But see Quintanilla v. State, 23 Tex. Civ. App. 479, 56 S. W. 614, and State v. Alcorn, 78 Tex. 387, 14 S. W. 663.

[258] Rowe v. Bateman, 153 Ind. 633, 54 N. E. 1065, 55 N. E. 754. Where the prosecution for the removal of a public officer upon an accusation in writing verified by the oath of the person fails, costs cannot be recovered either against the state or the party making the accusation.

[259] Sweeney v. Coulter, 23 Ky. L. R. 2391, 67 S. W. 264; Long v. Coulter, 23 Ky. L. R. 2389, 67 S. W. 272; State v. Bovee, 24 La. Ann. 594; Galveston County v. Ducie, 91 Tex. 665, 45 S. W. 798; Griggs v. Weston County Com'rs, 5 Wyo. 274.

The rule stated in the text, it is hardly necessary to add, only applies where there has been a wrong-

be given also by specific statutes.[260] The official wrongfully removed may be guilty of such laches or acquiescence as will prohibit a consideration of his claims.[261]

§ 642. Removal by impeachment.

Constitutions may provide for the removal of a public officer by impeachment, the language relative to this, establishing the tribunal, the course of procedure including notice and hearing and the acts, the commission of which will warrant either the commencement of the proceedings or the rendition of a judgment of impeachment.[262] The Federal Constitution provides [263] that "the

ful removal. If it appears that the charges of misconduct are well founded, no right for compensation will exist. See Westberg v. City of Kansas, 64 Mo. 493.

There are also cases which hold that even where there is a wrongful removal, no right to recover compensation exists on the ground that compensation is merely incident to services actually rendered, not to the right to the office. This is especially true where fees and commissions constitute the compensation provided by law. Saline County Com'rs v. Anderson, 20 Kan. 298; Auditors of Wayne County v. Benoit, 20 Mich. 176; City of Hoboken v. Gear, 27 N. J. Law, 265; Dolan v. City of New York, 68 N. Y. 274; McVeany v. City of New York, 80 N. Y. 185.

[260] Eastman v. Householder, 54 Kan. 63, 37 Pac. 989; People v. Drake, 43 App. Div. 325, 60 N. Y. Supp. 309. Where an officer holds office at the pleasure of a board of public works, he cannot maintain mandamus for reinstatement after removal although this was done in an irregular way and without notice to him.

[261] People v. Lantry, 27 Misc. 160, 57 N. Y. Supp. 770; In re Hayes, 56 App. Div. 20, 67 N. Y. Supp. 340; People v. Guilfoyle, 61 App. Div. 187, 70 N. Y. Supp. 442.

[262] State v. Savage, 89 Ala. 1, 7 So. 7, 7 L. R. A. 426; State v. Tally, 126 Ala. 25, 15 So. 722; State v. Buckley, 54 Ala. 599; In re Opinion of Justices, 167 Mass. 599. County commissioners are not "officers" subject to impeachment within the meaning of the Constitution, part 2, c. 1, § 2, art. 8.

Opinion of Judges, 3 Neb. 463. During impeachment proceedings against the governor of a state, he is incapable of performing his public duties. State v. Hill, 37 Neb. 80, 55 N. W. 794, 20 L. R. A. 573. The legislature has no authority to prepare articles of impeachment against an ex officer. State v. Leese, 37 Neb. 92, 55 N. W. 798, 20 L. R. A. 579. The authority to adopt and present amended articles of impeachment rests alone with the joint convention of the two houses of the legislature. State v. Hewitt, 3 S. D. 187, 52 N. W. 875, 16 L. R. A. 413. The phrase "State official" as used in Const. art. 16, § 3, does not apply to a trustee of the state agricultural college though he is appointed under the provisions of the Const. art. 14, § 4.

president, vice-president and all civil officers of the United States, shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors;" and that a judgment of impeachment shall not extend further than to removal from office and disqualification to hold and enjoy any office of honor, trust or profit under the United States with no exemption, however, from an indictment, trial, judgment and punishment for the offense committed according to law.[264] With respect to offenses warranting an impeachment, the same differences of policy in different states obtain as given in the section relative to removals for cause.[265] In some states the rule is followed that a public officer can be impeached not only for offenses which are indictable but also for such a general course of conduct which, if permitted in a public officer, would be subversive of good government.[266] In other states, only offenses which are indictable will warrant impeachment proceedings as authorized by constitutional or statutory provisions.[267] An interesting discussion of these differences will be found in the authorities cited in the notes.[268]

[263] Art. I, § 2, par. 5; art. I, § 3, par. 6 and 7; Const. U. S. art. II, § 4.

[264] People v. Jerome, 36 Misc. 256, 73 N. Y. Supp. 306. The following cases support the doctrine that officers may be punished by indictment as well as impeachment. People v. Calhoun, 3 Wend. (N. Y.) 420; People v. Stocking, 50 Barb. (N. Y.) 573; People v. Meakim, 133 N. Y. 214.

[265] See § 637, ante.

[266] State v. Tally, 102 Ala. 25, 15 So. 722. The guilt of the officer charged in impeachment proceedings must be established by the evidence beyond a reasonable doubt. State v. Hastings, 37 Neb. 96, 55 N. W. 774. Impeachment proceedings relative to the evidence is here considered a criminal prosecution and the guilt of the person charged must be established beyond a reasonable doubt, the rule applying both to the production of the evidence and the quantum of proof. Brackenridge v. State, 27 Tex. App. 513, 11 S. W. 630, 4 L. R. A. 360.

[267] State v. Green, 52 S. C. 520, 30 S. E. 683.

[268] McComas v. Krug, 81 Ind. 327; State v. Gilmore, 20 Kan. 551; Com. v. Williams, 79 Ky. 42; Barker v. People, 3 Cow. (N. Y.) 686; Pomeroy, Const. Law, § 716; Story, Const. §§ 792, 793; Horton, Cr. Law, §§ 163, 164; 6 Am. Law. Reg. (N. S.) 257, 641; Mechem, Pub. Off. 468 et seq.; Thoop, Pub. Off. §§ 399, 400.

III. Powers, Duties and Rights.

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§ 643. Public officers; their powers and authority.

The authority for the administration of governmental affairs in this country rests in the people of the different states and of the United States by whom it has been delegated to public officers and employes through constitutional or statutory provisions.[269] The

[269] United States v. Marble, 3 Mackey (D. C.) 32. A government official cannot question the constitutionality of a law directing him to perform a ministerial duty. State v. Womack, 4 Wash. 19, 29 Pac. 939.

source of official power as possessed by these must, therefore, be found in some act or expression of the sovereign people and without which the exercise of governmental and administrative powers by an individual is clearly regarded as a usurpation and an unwarranted and illegal assumption of power.[270] Since the authority of public officials can only be created by law and is, therefore, a matter of public record, all persons dealing with them are bound to take notice of its existence and must ascertain that it is sufficient in an assumed use.[271] Their power and authority is special and limited, not general, and their right to act in a specific instance must be ascertained and determined by an inspection of the law interpreted strictly.[272]

Presumption in favor of proper exercise of powers. The presumption of law, however, is in favor of the proper performance of official duties,[273] but this rule, however, does not include a vital

[270] Hussey v. Smith, 99 U. S. 20; Wagner v. Frederick County Com'rs (C. C. A.) 91 Fed. 969. The genuineness of a signature of a justice of the peace in the state of Maryland cannot be certified to by the secretary of the state under existing statutes. Hungerford v. Moore, 65 Ala. 232; Opinion of Justices, 3 Me. (3 Greenl.) 481; Ames v. Port Huron Log Driving & Booming Co., 11 Mich. 139. "It is difficult to perceive by what process a public office can be obtained or exercised without either election or appointment. * * * It is absurd to suppose that any official power can exist in any person by his own assumption, or by the employment of some other private person; and still more so, to recognize in such an assumption a power of depriving individuals of their property. Such claims are inconsistent with any idea of government whatever." See, also, § 585, ante.

[271] Kaufman v. Stone, 25 Ark. 336. Courts will take judicial notice of the appointment of commissioners of deeds and parties litigant are not bound to furnish further evidence of an official character than the certificate and official seal of such an officer. Tamm v. Lavalle, 92 Ill. 263; Schaw v. Dietrichs, 1 Wils. (Ind.) 153; State v. Peelle, 124 Ind. 515, 24 N. E. 440, 8 L. R. A. 228; State v. Bank of the State, 45 Mo. 528; Taft v. Town of Pittsford, 28 Vt. 286; Bardsley v. Sternberg, 17 Wash. 243, 49 Pac. 499.

[272] Hentzler v. Bradbury, 5 Kan. App. 1, 47 Pac. 330, citing and following McCollister v. Shuey, 24 Iowa, 362; State v. Anderson, 39 Iowa, 274; Willis v. Sproule, 13 Kan. 257; Chase County Com'rs v. Cartter, 30 Kan. 581; Troy v. Doniphan County Com'rs, 32 Kan. 507.

[273] Bank of United States v. Dandridge, 12 Wheat. (U. S.) 64. "By the general rules of evidence, presumptions are continually made in cases of private persons of acts even of the most solemn nature, when those acts are the natural result or necessary accompaniment of other circumstances. In aid of this salutary principle, the law itself, for the purpose of strengthen-

jurisdictional fact [274] and one especially which results in a seizure or forfeiture of private property.[275]

ing the infirmity of evidence, and upholding transactions intimately connected with the public peace, and the security of private property, indulges its own presumptions. It presumes that every man, in his private and official character, does his duty, until the contrary is proved; it will presume that all things are rightly done, unless the circumstances of the case overturn this presumption, according to the maxim, omnia presumuntur rite et solemnitur esse acta, donec probetur in contrarium. Thus, it will presume that a man acting in a public office has been rightly appointed; that entries found in public books have been made by the proper officer; that, upon proof of title, matters collateral to that title shall be deemed to have been done; as, for instance, if a grant or feoffment has been declared on, attornment will be intended, and that deeds and grants have been accepted, which are manifestly for the benefit of the party."

Den v. Den, 6 Cal. 81; Doe d. Vaughn v. Biggers, 6 Ga. 188; Bergman v. Bullitt, 43 Kan. 709; Lowell v. Flint, 20 Me. 401; Bailey v. Winn, 101 Mo. 649; Davany v. Koon, 45 Miss. 71; Miller v. Lewis, 4 N. Y. (4 Comst.) 554; Thurman v. Cameron, 24 Wend. (N. Y.) 87; Mandeville v. Reynolds, 68 N. Y. 528. "The presumption is, that no official person, acting under oath of office, will do aught which it is against his official duty to do, or will omit to do aught which his official duty requires should be done."

[274] In re City of Buffalo, 78 N. Y. 362. "Before the city can take lands for a street, these resolutions must have been passed; and the last one with the prescribed vote; for it is a familiar principle, that when the sovereign delegates the power to take the property of the citizen, all the prerequisites to the exercise of that power that have been prescribed must be strictly observed and conformed to. The need is upon the city, before it can take the lands, to be able to show that these requirements have been met. For the basis of the power of the city to act is the concurring judgment of two-thirds of the members of the common council that there is a necessity for the taking; without which, action of the city to take lands is wholly unauthorized and illegal. Nor may it be presumed, as the appellants claim. In such

[275] Little v. Herndon, 77 U. S. (10 Wall.) 26; Parker v. Rule's Lessee, 9 Cranch (U. S.) 64; Elliot v. Eddins, 24 Ala. 508; Keane v. Cannovan, 21 Cal. 291; Brooks v. Rooney, 11 Ga. 423; Anderson v. McCormick, 129 Ill. 308; Ellis v. Brownlee, 9 Ky. (2 A. K. Marsh.) 210; Worthing v. Webster, 45 Me. 270; Bonham v. Weymouth, 39 Minn. 92; Annan v. Baker, 49 N. H. 161; Miller v. Brown, 56 N. Y. 383; Jewell v. Van Steenburgh, 58 N. Y. 85; Hilton v. Bender, 69 N. Y. 75. "Courts will not aid in supplying fundamental defects in such case by presumptions." Eastern Land, Lumber & Mfg. Co. v. State Board of Education, 101 N. C. 35; Emery v. Harrison, 13 Pa. 317; Dawson v. Ward, 71 Tex. 72; Townsend v. Downer's Estate, 32 Vt. 183.

§ 644. Title to office.

The right by one to exercise governmental powers must not only have its source, as suggested in the preceding section, but the particular individual must have derived the necessary conditions or personal power and authority to perform on behalf of the people certain specific duties or, in other words, the individual must possess a title to an office at least prima facie, conclusive and good.[276] Title to office is usually obtained through the possession of a certificate of election or an appointment,[277] where the office is an appointive one, and the assumption and the performance of the duties and exercise of the powers pertaining to the particular office.[278] The legal right of title as dependent upon the qualifications possessed and the manner of securing it has been discussed in preceding sections,[279] and it is necessary now only to state the

case as this, the presumption that official duty has been done cannot be made. Though there appears upon the records of the common council a resolution as adopted, it cannot be presumed from that that two-thirds of the members voted for it, for there was no duty upon them so to vote. The duty that they owed was to vote for or against as an intelligent and honest judgment bade them. Though it was the duty of the president of the common council to declare the resolution lost, unless there was such vote for it; and the duty of the clerk not to enter upon the records that it was adopted; still, in such case as this, it may not be presumed that, having done otherwise, they did their duty, though a general presumption should be aided somewhat by particular circumstances. To found the power to act against a private right of property, there must be affirmative proof of a compliance with the prerequisites; it is a jurisdictional fact that may not be presumed nor inferred." City of Albany v. McNamara, 117 N. Y. 168, 6 L. R. A. 212.

[276] Opinion of Justices, 70 Me. 570.

[277] United States v. Sykes, 58 Fed. 1000. When the commission to the deputy collector has been assigned and placed in the mail and he is notified by telegram, he is authorized to act. Pratt v. Luther, 45 Ind. 250. A town trustee has no power to act officially until the certificate of his election has been filed in the office of the clerk of the circuit court. State v. Capers, 37 La. Ann. 747; Luzerne County v. Trimmer, 95 Pa. 97; Booker v. Young, 12 Grat. (Va.) 303; Carr v. Wilson, 32 W. Va. 419, 9 S. E. 31, 3 L. R. A. 64.

[278] Justices of Jefferson County v. Clark, 17 Ky. (1 T. B. Mon.) 82; Bruce v. Fox, 31 Ky. (1 Dana) 447; Toney v. Harris, 85 Ky. 453, 3 S. W. 614; Page v. Hardin, 47 Ky. (8 B. Mon.) 648.

[279] State v. Swearingen, 12 Ga. 23. Where residence in the city is not required by law as a qualification to the office of clerk and treasurer, the one receiving the highest number of votes is entitled to hold this office although a nonresident at that time. Town of Springfield v. People's Deposit Bank, 111 Ky. 105,

further and general principles that title to office cannot be questioned in a collateral proceeding [280] and that the possession of an office and the performance of its duties by virtue of authority prima facie valid and proper on its face is prima facie conclusive of the right of an individual to perform those duties.[281]

§ 645. Official powers; where exercised.

It is axiomatic that, since a public corporation can only exercise its functions within the geographical limits of its jurisdiction, that its officers and agents are limited also in this respect and can only perform their official duties within the limits of the corporation they represent.[282]

Powers; when exercised. The further general principle is also true that public officials can only exercise the duties of an office

63 S. W. 271; Hayter v. Benner, 67 N. J. Law, 359, 52 Atl. 351. See §§ 585 et seq., ante.

[280] United States v. Alexander, 46 Fed. 728. But a sufficient inquiry may be made to ascertain whether the incumbent of an office is an intruder. Ex parte Henshaw, 73 Cal. 486, 15 Pac. 110; Douglass v. Wickwire, 19 Conn. 489; Corbitt v. McDaniel, 77 Ga. 544, 2 S. E. 692; Creighton v. Piper, 14 Ind. 182; State v. Crowe, 150 Ind. 455, 50 N. E. 471; Creager v. Hooper, 83 Md. 490; Facey v. Fuller, 13 Mich. 527; Tower v. Welker, 93 Mich. 332, 53 N. W. 527; Bean v. Thompson, 19 N. H. 290; Richman v. Adams, 59 N. J. Law, 280, 36 Atl. 699; In re Board of Health of Lansinburgh, 43 App. Div. 236, 60 N. Y. Supp. 27; In re Brenner, 35 Misc. 306, 71 N. Y. Supp. 44; Id., 35 Misc. 212, 70 N. Y. Supp. 744; In re Guden, 71 App. Div. 422, 75 N. Y. Supp. 794, reversing 37 Misc. 390, 75 N. Y. Supp. 786. Where the title to office is void beyond a substantial doubt, it may be passed on in a collateral proceeding. Com. v. McCombs, 56 Pa. 436.

[281] State v. Jones, 19 Ind. 356; State v. Peelle, 124 Ind. 515, 24 N. E. 440, 8 L. R. A. 228; Manor v. State, 149 Ind. 310, 49 N. E. 160; Groome v. Gwinn, 43 Md. 572; Kobs v. City of Minneapolis, 22 Minn. 159; State v. Frantz, 55 Neb. 167, 75 N. W. 546; State v. Meder, 22 Nev. 264; Conklin v. Cunningham, 7 N. M. 445, 38 Pac. 170. But see In re Dudley, 33 App. Div. 465, 53 N. Y. Supp. 742.

[282] Collier v. State, 2 Stew. (Ala.) 388. A county clerk may lawfully make, though not at that time within his county, a certificate of attestation of a record.. Hervy v. Armstrong, 15 Ark. 162; Moulton v. Parks, 64 Cal. 166, 30 Pac. 613; State v. Gurley, 37 Minn. 475, 35 N. W. 179; Gage v. Dudley, 64 N. H. 437, 13 Atl. 865; People v. Feitner, 156 N. Y. 694, 51 N. E. 1093. A deputy tax commissioner under § 888 of the Greater New York charter is not limited in the performance of his duties to the borough from which he was selected. Respublica v. M'Clean, 4 Yeates (Pa.) 399; Newburn v. Durham, 88 Tex. 288, 31 S. W. 195. But see Chrisman v. Carney, 33 Ark. 316.

during their term of office which is limited by the time of its legal commencement and termination.[283] In some instances, however, the law authorizes an officer to do certain official acts after the expiration of his term of office, which are necessary to complete official action or correct errors made during his term of office.[284] And those cases, therefore, bearing upon the time of the beginning and the end of an official term of office are important because indirectly they determine the right of an officer to act authoritatively on behalf of his principal.[285]

[283] Morrison v. Decatur County Com'rs, 16 Ind. App. 317, 44 N. E. 65. "The only question presented for our consideration is whether, under the circumstances, the county is liable for the supplies shipped by appellants in October, 1892, for use at the November election of that year, on the order made by the auditor in April, 1891, which supplies were not accepted or used by appellee. The judgment of the trial court was against appellants. In our opinion, no reason has been shown that would justify the court in reversing the judgment. The order was given by the auditor after his successor had been elected, within a few months of the expiration of his term of office. The supplies in question were not to be used until one year after the expiration of his term of office. No reason has been suggested for giving the order so long in advance of the time when the supplies would be required. Moreover, five months after the order was given, and fourteen months after the election, the board of commissioners entered into a contract with another to furnish supplies required in the conduct of public business. At this time appellee had no knowledge of the order given by the auditor to appellants. It is conceded that at this time appellants had done nothing in pursuance of the order, and the circumstances indicate that appellants had good reasons for believing that appellee and the successful bidder construed the contract between them as including the election supplies in question. * * * In our opinion, in any view of the case, the auditor was not acting within the scope of his authority in giving an order for such supplies after his successor had been elected." Town of Lemington v. Stevens, 48 Vt. 38. A conveyance of public lands executed during the official term of selectmen may be acknowledged by them after the expiration of their term of office.

[284] Matthews v. Houghton, 11 Me. 377; O'Brien v. Annis, 120 Mass. 143; Kiley v. Cranor, 51 Mo. 541; Rugle v. Webster, 55 Mo. 246; Gibson v. Bailey, 9 N. H. 168; People v. Taylor, 9 Hun (N. Y.) 143; McKay v. Harrower, 27 Barb. (N. Y.) 463; German American Bank v. Morris Run Coal Co., 68 N. Y. 585; Oliver v. Town, 24 Wis. 512. A circuit judge may settle a bill of exceptions after his term is expired. But see Griffing v. Danbury, 41 Conn. 96; Johnson v. Foran, 58 Md. 148; Halleck v. Inhabitants of Boylston, 117 Mass. 469; People v. Caledonia Highway Com'rs, 16 Mich. 63.

[285] Matter of Dorsey, 7 Port (Ala.) 393; Chism v. Martin, 57 Ark. 83.

§ 646. Powers exercised as affected by the nature of an office.

The authority and power of a public officer to act in respect to a certain transaction, even where the apparent authority may exist, is determined in all cases not only by the existence of the office with its accompanying duties and powers but also by the character of those duties or the nature of the governmental functions performed by an official. The threefold division of governmental functions or powers into legislative, judicial and executive has already been fully considered in a preceding chapter [286] and in this connection it is considered advisable to call attention to a familiar principle of the law that the inherent nature of an office or the character of its duties is not established or fixed by the terminology of a legislative or constitutional provision or by legislative action.[287] A recent case [288] is instructive on this point.

§ 647. Public officials; executive or administrative.

The execution of legislation is given to the executive branch of government,[289] and where the powers possessed by an official in this department partake of a political nature as well as administrative, the manner and the time of the exercise of the power or the performance of a duty discretionary in its character is dependent alone upon the will and the good judgment of the official to whom it has been entrusted.[290] A distinction is frequently made between an office political in its character with respect to the nature of its duties, and executive or administrative, using those terms in their proper sense; with respect to the former the official is less subject to restraint than in respect to the latter; being answerable alone to the source of his authority, namely, those placing him in office whether this be an elective or an appointive one.

§ 648. Official duties; legislative.

The making of laws has been confided by the American people to a particular branch of the government known as the legislative

[286] Chapter VII, "Governing Bodies."

[287] State v. Valle, 41 Mo. 29; Wines v. City of New York, 9 Hun (N. Y.) 659; Wood County Com'rs v. Pargillis, 6 Ohio Cir. Ct. Dec. 717.

[288] Western Union Tel. Co. v. Myatt (C. C. A.) 98 Fed. 335.

[289] Hudman v. Slaughter, 70 Ala. 546. The powers exercised by a mayor and council in counting votes at an election and declaring the result, are ministerial, not judicial. State v. Womack, 4 Wash. 19.

[290] Biggs v. State, 49 Ala. 311;

or law-making department,[291] and, under our theories, this branch or department is regarded as one of the co-ordinate branches of government and responsible within its powers to no other.[292] The legality of its action as tested or determined by well recognized legal and equitable principles controlling and affecting all branches of government it is true is for the judiciary to determine,[293] but in respect to the expediency or advisability or character of legislation, the law-making branch is answerable to none and attempts by executive or judicial officers to dictate the character or the subjects of legislation can be justifiably resented as an unwarranted and impertinent interference.[294] The presumption exists that a legislative body intended to keep within its constitutional powers and the courts will only declare its action invalid where a violation of constitutional provisions is clear.[295] The judiciary are not at liberty to hold legislative action void because of its inexpediency or apparent injustice nor because, in their opinion, the principles of good government have been abused, transcended or ignored.[296]

§ 649. Official authority; the judiciary.

To judicial officers is given the power of interpreting legislative action and determining its ultimate validity according to constitu-

Doyle v. Aldermen of Raleigh, 89 N. C. 133.

[291] St. Paul Gaslight Co. v. Village of Sandstone, 73 Minn. 225; Leeper v. State, 103 Tenn. 500, 53 S. W. 962. Tenn. Laws 1899, c. 205, providing for uniform text books in public schools and for a commission to select the same is not unconstitutional as delegating to such commissioner legislative power. Burton v. Dupree, 19 Tex. Civ. App. 275. See chapter VII, ante, on Governing Bodies.

[292] Kavanaugh v. State, 41 Ala. 399; State v. Finn, 8 Mo. App. 341.

[293] State v. Doherty, 25 La. Ann. 119.

[294] Koehler v. Hill, 60 Iowa, 617; Gibson v. Mason, 5 Nev. 283; State v. Tufly, 19 Nev. 391. See §§ 496 et seq., ante.

[295] Pitman v. Brownlee, 9 Ky. (2 A. K. Marsh) 210. The usual rule obtains also, that all officers will be presumed to have acted correctly and within their powers until the contrary is shown. Lowell v. Flint, 20 Me. 401. The presumption exists that persons acting in an official capacity are properly authorized and that their official signatures are genuine. Eldodt v. Ter., 10 N. M. 141, 61 Pac. 105; Sheldon v. Wright, 7 Barb. (N. Y.) 39. The same presumption applies to the performance of official duties by executive or administrative officers.

[296] Bansemer v. Mace, 18 Ind. 27; State v. Buckles, 39 Ind. 272. The

tional standards.[297] The legality of executive action is also for its determination under rules laid down in the original plan of government.[298]

§ 650. Character of official action as determining its validity.

The powers of different departments or officials have been affirmatively stated in the three preceding sections and, stated negatively, it follows that where their action encroaches upon or is of a similar character to the power and authority of other departments, it will be held unconstitutional as an unlawful assumption or exercise of powers and duties belonging to or devolving upon other departments of government for their performance and exe-

principle stated in the text will apply also to the right of one executive official to question the act of another within his official authority even though in the opinion of the former it may be erroneous.

[297] Bowen v. Clifton, 105 Ga. 459; Johnson v. Wells County Com'rs, 107 Ind. 15; Richman v. Muscatine County Sup'rs, 77 Iowa, 513; City of Clinton v. Walliker, 98 Iowa, 655; People v. Governor, 29 Mich. 320; Quinn v. Scott, 22 Minn, 456. An erroneous judicial decision unaccompanied by any fact indicating a corrupt or dishonest motive is wholly insufficient to predicate the charge of corrupt misconduct in office. In re Van Antwerp, 56 N. Y. 261; Brown v. City of New York, 63 N. Y. 239; Tifft v. City of Buffalo, 82 N. Y. 204; Ter. v. Hopkins, 9 Okl. 133, 59 Pac. 976. A state auditor has no power to pass upon the validity of municipal bonds under the act providing for the exercise of judicial power by the courts therein enumerated. Nottage v. City of Portland, 35 Or. 539, 59 Pac. 883. An act making certain sections of the city charter applicable to invalid local assessments made before its passage is not a usurpation of judicial authority. Donley v. City of Pittsburgh, 147 Pa. 348; Whitney v. City of Pittsburgh, 147 Pa. 351; May v. Holdridge, 23 Wis. 93; Dill v. Roberts, 30 Wis. 178.

[298] Hedges v. Lewis & Clarke County Com'rs, 4 Mont. 280. "The certificate of probable cause mentioned in this section is a judicial act, and cannot be reviewed, except by judicial authority. The county commissioners have no judicial powers. They cannot, in any sense, exercise the functions of a court. By the organic act, the judicial powers of the territory are vested in the supreme court, the district courts, the probate courts, and courts of justices of the peace, and any statute of the territory that attempts to clothe county commissioners with judicial authority is necessarily null and void. They cannot be given authority or discretionary power to say when the criminal laws of the territory shall take effect or be enforced. They have no authority to declare that a statute giving an officer certain designated fees for services performed by him is a nullity." People v. D'Oench, 44 Hun (N. Y.) 33.

cution.[299] Subordinate officers of public quasi corporations are necessarily vested, in many cases, with the performance of duties

[299] Washington County v. Parlier, 10 Ill. 232. The action of county commissioners in making settlement to the collectors of revenue is not judicial in its character and mistakes made in such settlements may be inquired into and corrected. State v. Carr, 129 Ind. 44, 28 N. E. 88, 13 L. R. A. 177. It is the function under Indiana Const. art 3, § 1, of the judiciary to adjudicate the claims of two adverse claimants for an office and an act of the legislature that directs the payment to one of the salary pertaining to the office is unconstitutional as an attempted determination of the claimant's title to the office.

Houseman v. Montgomery, 58 Mich. 364. The performance of administrative or executive duties cannot be imposed upon the judiciary by the legislature. Maybury v. Bolger, 128 Mich. 355, 87 N. W. 366. The power of appointment to office is not essentially an executive function and an act, therefore, authorizing a city council to appoint a commissioner of parks and boulevards is valid. Anderson v. Manchester Fire Assur. Co., 59 Minn. 182, 60 N. W. 1095, 63 N. W. 241, 28 L. R. A. 609; Hedges v. Lewis & Clarke County Com'rs, 4 Mont. 280; Gaines v. Hudson County Avenue Com'rs, 37 N. J. Law, 12; State v. City of Elizabeth (N. J.) 49 Atl. 1106; People v. Foote, 19 Johns (N. Y.) 58; Gough v. Dorsey, 27 Wis. 119. But see Reynolds v. Oneida County Com'rs, 6 Idaho, 787, 59 Pac. 730. Session Acts 1899, pp. 405–7, which provide that the board of county commissioners shall fix a reasonable compensation for the services of county officers, is not unconstitutional as conferring a legislative power on the board. Hunt v. State, 93 Ind. 311. The annual settlement by the county commissioners with the county treasurer is not a judicial proceeding. In re Siebert, 61 Kan. 112, 58 Pac. 971. An act which authorizes clerks of the district court to issue warrants of arrest and admit to bail in certain specific cases is not unconstitutional as conferring a judicial power upon a ministerial officer. Brown v. Holland, 97 Ky. 249, 30 S. W. 629. An act providing for the selection of a mayor according to a method to be prescribed by ordinance is not an improper delegation of legislative power under Const. § 160, which provides that mayors of cities and of certain classes may be appointed or rejected.

Martin v. Witherspoon, 135 Mass. 175; State v. Wagener, 77 Minn. 488, 80 N. W. 633, 46 L. R. A. 442. Minn. Laws, 1899, c. 225, entitled "An act to license, regulate and define the business of commission merchants or persons selling agricultural products and farm produce on commission" is not unconstitutional as a delegation of legislative powers. Nelson v. Troy, 11 Wash. 435, 39 Pac. 974. Colusa County v. De Jarnett, 55 Cal. 373. County supervisors act in a quasi judicial capacity when passing upon a claim against the county in its settlement and allowance and it is an adjudication which is conclusive.

Cox v. Whitfield County Com'rs, 65 Ga. 741; State v. Johnson, 105 Ind. 463. The Indiana Drainage

which may be quasi legislative or judicial in their character but this fact does not, because of the necessity for such a principle, render invalid action by them.[300]

§ 651. Official authority and power; how given.

The statement has been made that the authority of public officials is limited and special rather than general.[301] This rule is necessarily applicable because of the fact that their principal is a public corporation, a governmental agent, created and maintained

Act of April 6, 1885, does not vest a county surveyor with judicial functions by making it his duty to certify the cost of the drain. Campbell v. Polk County, 3 Iowa, 467. A county judge is partly a ministerial and partly a judicial officer. In drawing warrant on a county he acts in the former capacity and in an action upon one, since there has been no judicial determination of the question, want of consideration may be set up as a defense. Custer County Com'rs v. Yellowstone County Com'rs, 6 Mont. 39; State v. Common Council of Jersey City, 27 N. J. Law (3 Dutch.) 493; State v. Smith, 1 Or. 250.

[300] People v. Schoomaker, 13 N. Y. (3 Kern.) 238; Boner v. Adams, 65 N. C. 639.

[301] Murphy v. State, 68 Ala. 31; Ferrel v. Town of Derby, 58 Conn. 234, 20 Atl. 460, 7 L. R. A. 776; Town of Petersburg v. Mappin, 14 Ill. 193; Hentzler v. Bradbury, 5 Kan. App. 1, 47 Pac. 330; State v. Lewis, 22 La. Ann. 33. The capacity of a public officer to perform the duties of his office cannot be inquired into collaterally. Sterling v. Parish of West Feliciana, 26 La. Ann. 59; Steines v. Franklin County, 48 Mo. 167. County courts are only the agents of a county with no powers except those which are granted, defined and limited by law and, like other agents, they must pursue their authority and act within the scope of their authority.

Kobs v. City of Minneapolis, 22 Minn. 159. "When it appears that a municipal corporation, by its charter, has the exclusive care, supervision and control of all streets within its limits, and is charged with the power of authorizing work to be done thereon, when required by any public necessity, and with the duty of preventing it if injurious and unauthorized; and it further appears that an officer receiving his appointment from the corporation, subject to its control and removal, and whose general duties require him to take charge of all streets in his ward, superintend the local improvements therein, and to carry into effect all orders of the city council, has done an act which, as respects its character and place of performance, falls within the scope of his general official powers and duties, and in the very line and course of his ordinary employment, the presumption arises, in the absence of any evidence to the contrary, in favor of his authority to do such particular act."

Hawkins v. Carroll County Sup'rs, 50 Miss. 735; Carlton v. Bath, 22 N. H. 559; Waitz v. Ormsby County, 1 Nev. 370. County commissioners cannot borrow money or issue war-

for the benefit of the community rather than the particular advantage of the individual members of that community. The general statement can, therefore, with confidence, be made that official power to be legally exercised must be specifically and expressly given.[302] The doctrine of implied powers does not obtain in only so far as it may be necessary to hold that a public officer is given the right by implication to exercise such powers as may be necessary to enable him to do an act, the performance of which is expressly and specifically granted or enjoined.[303]

rants as collateral security for money borrowed. Chapman v. City of Brooklyn, 40 N. Y. 372; Van Alstyne v. Freday, 41 N. Y. 174; Kennedy v. Ryall, 67 N. Y. 379; City of Newberne v. Jones, 63 N. C. 606; State v. Hancock County Com'rs, 11 Ohio St. 183; Hopple v. Brown Tp., 13 Ohio St. 311. Town trustees possess only the powers conferred upon them by statute. Dinwiddie County v. Stuart, 28 Grat. (Va.) 526; Parrish v. Reed, 2 Wash. St. 491, 27 Pac. 230, 28 Pac. 372, construing Wash. Laws 1889–90, p. 249, creating a mining bureau and defining its duties. State v. Manitowoc County Clerk, 48 Wis. 112; Town of Butternut v. O'Malley, 50 Wis. 329.

[302] Smith v. Jones, 50 Ala. 465; Dana v. City & County of San Francisco, 19 Cal. 486. A county auditor has no authority under the law to issue a bill of exchange nor give the form and qualities of such an instrument. San Francisco & F. Land Co. v. Banbury, 106 Cal. 129, 37 Pac. 801, 39 Pac. 439; Glass v. Ashbury, 49 Cal. 571; Talcott v. Blanding, 54 Cal. 289. Where joint authority is given to a number of public officials, a majority of them can act unless otherwise expressly provided.

Santa Cruz County v. McPherson, 133 Cal. 282, 65 Pac. 574; In re House Bill No. 349, 12 Colo. 395. The performance of constitutional duties cannot be shifted by the legislature from one executive officer to another. Pulaski County v. Vaughn, 83 Ga. 270, 9 S. E. 1065; Crawford v. Glasgow, 86 Ga. 358, 12 S. E. 747; Gorman v. Boise County Com'rs, 1 Idaho, 627; Town of Harwood v. Hamilton, 13 Ill. App. 358; Town of Kankakee v. Kankakee & I. R. Co., 16 Ill. App. 542; Sherlock v. Village of Winnetka, 68 Ill. 530; Madison County v. Kridler, 56 Iowa, 32; Shawnee County v. Carter, 2 Kan. 115; Keller v. Wilson, 12 Ky. L. R. 471, 14 S. W. 332; Kennard v. Lafargue, 23 La. Ann. 168; Morgan v. Police Jury of Rapides, 26 La. Ann. 281; Nichols v. City of Boston, 98 Mass. 39; Burgess v. Uxbridge School Dist., 100 Mass. 132; Just v. Wise Tp., 42 Mich. 573. A township clerk has no authority to sign names of highway commissioners. Monet v. Jones, 18 Miss. 237; Fire Dept. of New York v. Atlas S. S. Co., 106 N. Y. 566, 13 N. E. 329. Official authority granted in particular cases may not be exclusive. People v. Bennett, 37 N. Y. 117; People v. Ransom, 56 Barb. (N. Y.) 514; State v. Raine, 47 Ohio St. 447, 25 N. E. 54; Black v. Rempublicam, 1 Yeates (Pa.) 140; Carolina Nat. Bank v. State, 60 S. C. 465, 38 S. E. 629.

[303] Sherlock v. Village of Winnetka, 68 Ill. 530; Connett v. City

§ 652. Official power or authority and duty.

Official authority as granted may be ministerial and imperative or discretionary in its character. When of the former character, it can be said that official authority and duty is coincident and the performance of an act can be compelled in a proper proceeding by one authorized to maintain it.[304] What can be stated as the converse of this rule is also true, namely, that public officials cannot

of Chicago, 114 Ill. 233, 29 N. E. 280; City of Belleville v. Citizens' Horse R. Co., 152 Ill. 171, 38 N. E. 534, 26 L. R. A. 681. Power to protect public interests will be implied. Collins v. Welch, 58 Iowa, 72. County supervisors use their judgment in favor of the county under Iowa Code, § 303, which grants them power "to represent their respective counties and have the care and management of the property and business of the county in all cases where no provisions shall be made."

State v. McCann, 67 Me. 372; People v. Common Council of East Saginaw, 33 Mich. 164; Petrie v. Doe, 30 Miss. 698; City of New York v. Exchange Fire Ins. Co., 3 Abb. Pr. Dec. (N. Y.) 261; Overseers of Poor of Pittstown v. Overseers of Poor of Plattsburg, 18 Johns. (N. Y.) 407; Sharp v. City of New York, 40 Barb. (N. Y.) 256. But the implied power must be such as the corporation itself could exercise. Shanklin v. Madison County Com'rs, 21 Ohio St. 575; Spalding v. Preston, 21 Vt. 9; Burton v. Inhabitants of Norwich, 34 Vt. 345; Clay v. Wright, 44 Vt. 538. The authority to protect and defend suits does not carry with it by implication the right to settle them. Haner v. Town of Polk, 6 Wis. 350. Town supervisors have the implied power to appear and defend a suit against the town and prosecute an appeal.

[304] Ex parte Rowland, 104 U. S. 604. The power of county commissioners is exhausted in the levy and assessment of special taxes; they cannot be compelled by mandamus to collect it. Babcock v. Goodrich, 47 Cal. 488; Commissioners of Highways v. Jackson, 61 Ill. App. 381; City of Logansport v. Wright, 25 Ind. 512; Smith v. State, 1 Kan. 365. The performance of an act becomes a duty whenever it concerns the public interests. Clark v. McKenzie, 70 Ky. (7 Bush) 523; German Security Bank v. Coulter, 112 Ky. 577, 66 S. W. 425; People v. Fitch, 9 App. Div. 439, 41 N. Y. Supp. 349; Morton v. Comptroller General, 4 S. C. (4 Rich.) 430. "A duty imposed by law upon an officer is specific when a case or state of circumstances exists proper for its discharge; it may be imposed directly, or may arise out of a general duty imposed by law; it is certain, when it must be absolutely performed, and the officer has no discretion; and it is ministerial when an individual has such a legal interest in its performance that neglect becomes a wrong to him." State v. Barber, 4 Wyo. 409, 34 Pac. 1028, 27 L. R. A. 45. Where the statutes require the secretary of state to affix the state seal and countersign all commissions issued by the governor, he cannot refuse to do this because in his judgment the governor has no authority to make a particular appointment.

be enjoined from doing official acts unless it appears that they are proceeding without authority.[305] As a rule the greater number of official acts, especially of executive and administrative officials are of a discretionary character both in respect to the manner and the time of their performance and a failure or a neglect to perform them in a particular manner or a particular time or the converse can lead to no rights in an individual as against the official.[306] This principle especially applies to those duties in connection with the general administration of government affairs and determination of a governmental policy which are necessarily quasi political in their character and in respect to which, as already stated, public officials are answerable alone to the people who elect them or place them in office,[307] and their action in this respect is not subject to review by courts.[308] Official duties discretionary or ju-

[305] People v. Shasta County, 75 Cal. 179, 16 Pac. 776; Warren County Agricultural Joint Stock Co. v. Barr, 55 Ind. 30. Where county commissioners are proceeding to appropriate county funds to assist an agricultural society they may be enjoined from so doing. Davany v. Koon, 45 Miss. 71. The acts of an officer in his official capacity are presumed to be valid and within his authority, unless a departure from or a violation of law is apparent on the face of the transaction. People v. Washoe County Com'rs, 1 Nev. 460; Appeal of Delaware County, 119 Pa. 159, 13 Atl. 62.

[306] State v. Woody, 17 Ga. 612. The exercise of discretionary power if done in good faith and without the violation of private rights, is not subject to judicial review. Andrews v. Knox County Sup'rs, 70 Ill. 65; Martin County Com'rs v. Kierolf, 14 Ind. 284; Bunnell v. White County Com'rs, 124 Ind. 1, 24 N. E. 370; Washington County Com'rs v. Kemp, 14 Ind. App. 604, 43 N. E. 314. The act of letting county printing is administrative and ministerial in its character. Holliday v. Henderson, 67 Ind. 103; Murphy v. Oren, 121 Ind. 59; Hubbard v. Woodsum, 87 Me. 88, 32 Atl. 802; State v. Kearney County Com'rs, 12 Neb. 6; Potts v. City of Philadelphia, 195 Pa. 619, 46 Atl. 195; Brumby v. Boyd, 28 Tex. Civ. App. 164, 66 S. W. 874.

[307] Smith v. Jefferson County Com'rs, 10 Colo. 20; Towle v. State, 3 Fla. 202; McWhorter v. Pensacola & A. R. Co., 24 Fla. 417, 2 L. R. A. 504; Rood v. Wallace, 109 Iowa, 5, 79 N. W. 449; State v. Robinson, 1 Kan. 188; State v. Board of Liquidation, 42 La. Ann. 647; Detroit Free Press Co. v. State Auditors, 47 Mich. 135; Balch v. City of Utica, 42 App. Div. 567, 59 N. Y. Supp. 516; Alter v. City of Cincinnati, 7 Ohio Dec. 368; School Dist. No. 17 v. Zediker, 4 Okl. 599; Carr v. Northern Liberties, 35 Pa. 324; White v. City Council of Charleston, 2 Hill (S. C.) 572; Eureka City v. Wilson, 15 Utah, 53; Goss v. State Capitol Commission, 11 Wash. 474.

[308] Farrelly v. Cole, 60 Kan. 356, 56 Pac. 492. The action of the governor in calling an extra session of

dicial in their character that require the exercise of personal judgment and discretion in their performance are conclusive unless fraud or mistake be shown,[309] and further, cannot be controlled by mandamus or injunction.[310] Official authority to act cannot, as a rule, be questioned in a strictly collateral proceeding.[311]

§ 653. Official authority; how exercised.

The necessity for a personal execution of public duties depends upon their character as ministerial, clerical or otherwise. Ministerial or clerical duties can be performed by subordinate appointees or employes,[312] while all acts judicial in their character

the legislature will not be judicially reviewed since his determination of whether an extraordinary occasion exists is a particular discretionary act and conclusive. People v. Wayne County Auditors, 41 Mich. 4; Attorney General v. Common Council of Detroit, 112 Mich. 145, 37 L. R. A. 211; Stephens v. Santee, 49 N. Y. 39; State v. King, 20 N. C. (4 Dev. & B.) 661; State v. Hawkins, 44 Ohio St. 98; State v. Buchanan (Tenn. Ch. App.) 52 S. W. 480; State v. Forrest, 13 Wash. 268, 43 Pac. 51.

[309] McCoy v. Able, 131 Ind. 417, 30 N. E. 528, 31 N. E. 453; Farnsworth v. Kalkaska County Sup'rs, 56 Mich. 640; Ter. v. Yellowstone County Com'rs, 6 Mont. 147; Stenberg. v. State, 48 Neb. 299, 67 N. W. 190; People v. Dutchess County Sup'rs, 9 Wend. (N. Y.) 508; Culpeper County Sup'rs v. Gorrell, 20 Grat. (Va.) 484. Whether county supervisors have exercised a discretionary power properly cannot be inquired into in a collateral proceeding. But see State v. Brown, 10 Or. 215.

[310] Provident Sav. Life Assur. Soc. v. Cutting, 181 Mass. 261, 63 N. E. 433; People v. Chapin, 103 N. Y. 635; State v. Fire Com'rs of Cleveland, 26 Ohio St. 24; State v. Public Bldg. Com'rs, 12 Rich. Law (S. C.) 300. But see as to when mandamus will lie. Board of Liquidation v. McComb, 92 U. S. 531; State v. Rotwitt, 17 Mont. 537; State v. Cromer, 35 S. C. 213.

Injunction will lie, see Johnson v. Towsley, 80 U. S. (13 Wall.) 72; Crampton v. Zabriskie, 101 U. S. 601; Walton v. Develing, 61 Ill. 201; Lane v. Schomp, 20 N. J. Eq. (5 C. E. Green) 82; People v. Canal Board, 55 N. Y. 390.

[311] Western Wheeled Scraper Co. v. Sadilek, 50 Neb. 105, 69 N. W. 765. "Counsel for the plaintiff indulge in some criticism upon the action of the defendant on account of the deposit in bank of the county funds, and the payment of the warrant after having been endorsed 'Not paid for want of funds.' To the first criticism a sufficient answer is that neither the validity nor propriety of the defendant's action in depositing the funds entrusted to his care can be questioned in this collateral proceeding."

[312] Hope v. Sawyer, 14 Ill. 254; Abrams v. Ervin, 9 Iowa, 87. Ministerial duties of a public officer may be discharged by deputy when not otherwise provided by law; the

or involving the elements of judgment and discretion as depending upon particular official qualifications require a personal performance.[313] The latter rule is also true where the law imposes a personal execution of official duties.[314] The referring of public business to a committee or a subcommittee with power to act is usually held as not coming within the principle requiring personal execution of official duties.[315]

rule will not apply to judicial duties. "When the duties of a public officer are of a ministerial character, they may be discharged by deputy. Duties of a judicial character cannot be so discharged. The clerk is a ministerial officer. When the law gives him power to appoint a deputy, such deputy, when created, may do any act that the principal might do. He cannot have less power than his principal. He has the right to subscribe the name of his principal; and the act of the deputy, in the name of the principal, within the scope of his authority, is the act of his principal." Ellison v. Stevenson, 22 Ky. (6 T. B. Mon.) 275; Triplett v. Gill, 30 Ky. (7 J. J. Marsh.) 432; Philadelphia & R. R. Co. v. Com., 104 Pa. 86.

[313] City of Stockton v. Creanor, 45 Cal. 643; Richardson v. Heydenfeldt, 46 Cal. 68; Dyer v. Brogan, 70 Cal. 136, 11 Pac. 589; Glidden v. Hopkins, 47 Ill. 525; Kansas City v. Hanson, 8 Kan. App. 290, 55 Pac. 513; Chapman v. Inhabitants of Limerick, 56 Me. 390; State v. Shaw, 64 Me. 263; People v. Governor, 29 Mich. 320. "Where a duty is devolved upon the chief executive of the state rather than upon an inferior officer, it will be presumed to have been done because his superior judgment, discretion and sense of responsibility were confided in for a more accurate, faithful and discreet performance than could be relied upon if the duty were put upon an officer chosen for inferior duties; and such a duty can seldom be considered as barely ministerial."

Danforth v. City of Paterson, 34 N. J. Law, 163; Turner v. City of Newburgh, 109 N. Y. 301, 16 N. E. 344; Beam v. Jennings, 96 N. C. 82, 2 S. E. 245. The official acts of the secretary of state in North Carolina must be performed personally. Duluth, S. S. & A. R. Co., v. Douglass County, 103 Wis. 75, 79 N. W. 34. But see Sheehan v. Gleason, 46 Mo. 100.

[314] Coquard v. Chariton County, 14 Fed. 203; People v. Town of Linden, 107 Cal. 94, 40 Pac. 115; Dowling v. Adams (Cal.) 41 Pac. 413; San Francisco Gaslight Co. v. Dunn, 62 Cal. 580; In re Ah You, 88 Cal. 99, 25 Pac. 974, 11 L. R. A. 408; Rauer v. Lowe, 107 Cal. 229; Warren v. Ferguson, 108 Cal. 535; Dorsett v. Garrard, 85 Ga. 734; Lattin v. Smith, 1 Ill. (Breese) 361; City of Jeffersonville v. Patterson, 32 Ind. 140; Benjamin v. Webster, 100 Ind. 15; Anderson v. Claman, 123 Ind. 471; Pleasant View Tp. v. Shawgo, 54 Kan. 742, 39 Pac. 704; Crittenden County Ct. v. Shanks, 88 Ky. 475; City of Westport v. Mastin, 62 Mo. App. 647; Rotenberry v. Yalobusha County Sup'rs, 67 Miss. 470.

[315] Holland v. State, 23 Fla. 123, 1 So. 521; Phinney v. Mann, 1 R. I. 205. But see People v. Williams, 36 N. Y. 441.

(a) Must be exercised in the name of the public. The performance of all acts in connection with the transaction of public affairs must be in the name and on behalf of the corporation.[316] Officers derive the sole authority and power to perform their official duties from the public they represent.

(b) Must be exercised in the manner prescribed by law. Official power and authority must also be exercised in the manner prescribed by law in respect to the performance or transaction of specific acts.[317] Such provisions, whether constitutional or statutory, are usually held mandatory, and in the absence of a compliance with them no authority will exist.[318]

(c) Independence of official action. The rule has been already stated that the different departments of government are not subject to the control of any other except in accordance with existing constitutional provisions, if any.[319] A similar principle also applies to different officers in the same branch or department of government. Every office is created by law and its incumbent vested with the official authority to perform certain acts and exercise certain powers. In this he may be subject to the supervision and control of other officers or entirely independent and subject to no restraint or supervision of this character. Where the latter condition exists, it is unnecessary to add that other officials have no legal authority to direct where, when or how the

[316] State v. Dews, R. M. Charlt. (Ga.) 397; Hunter v. Field, 20 Ohio, 340; Lehigh Coal & Nav. Co. v. Inter-County St. R. Co., 167 Pa. 75, 31 Atl. 471. Official action induced by bribery confers no rights.

[317] City of Little Rock v. State Bank, 8 Ark. 227; Hudson v. Jefferson County Ct., 28 Ark. 359; Glass v. Ashbury, 49 Cal. 571; Gorman v. Boise County Com'rs, 1 Idaho, 627; Hoxie v. Shaw, 75 Iowa, 427, 39 N. W. 673; Shawnee County Com'rs v. Carter, 2 Kan. 115; Weston v. Dane, 53 Me. 372; Wickes' Lessee v. Caulk, 5 Har. & J. (Md.) 36. Where acts of commissioners are void for want of jurisdiction, they are not validated by any length of acquiescence.

Illinois v. Delafield, 8 Paige, (N. Y.) 527; In re Orange St., 50 How. Pr. (N. Y.) 244; Stiles v. City of Guthrie, 3 Okl. 26, 41 Pac. 383; Jewell Nursery Co. v. State, 4 S. D. 213, 56 N. W. 113; Ireland v. Taylor, 68 Tex. 158, 4 S. W. 65; Endion Imp. Co. v. Evening Telegram Co., 104 Wis. 432, 80 N. W. 732.

[318] Winn v. Shaw, 87 Cal. 631, 25 Pac. 968; Glidden v. Hopkins, 47 Ill. 525; State v. Pierce, 52 Kan. 521, 35 Pac. 19; Free Press Ass'n v. Nichols, 45 Vt. 7; State v. Manitowoc County Clerk, 48 Wis. 112.

[319] Benford v. Gibson, 15 Ala. 521; Allen v. State, 32 Ark. 241.

duties of an office shall be performed and its authority exercised;[320] or refrain from performing duties imposed upon them by law because in respect to the same transaction, duties imposed upon other officers have been, in their judgment, erroneously done.[321]

§ 654. Personal execution of official duties.

It is customary in many cases to provide by law for the performance of official duties through deputies[322] or by designated officials in case of the absence or temporary disablement of a public officer,[323] and where these provisions exist, the existence of the conditions given will authorize such action as may be contemplated by law. The performance of official duties in these cases by either a deputy or a substitute will be regarded as legal and will have the same force and effect as the personal execution by the head of the department.[324]

§ 655. Joint authority; how exercised.

Official authority or power must be exercised not only in the manner prescribed by law and in the name of the public but also when exercised by an official board or body by that board or body

[320] Halbert v. State, 22 Ind. 126; State v. Buckles, 39 Ind. 272; Long v. Kentucky Central Lunatic Asylum, 9 Ky. L. R. 699, 6 S. W. 335. Concurrent authority and supervision may be given by law. City Savings Bank v. Huebner, 84 Mich. 391, 47 N. W. 690; Cornell v. Irvine, 56 Neb. 657, 77 N. W. 114; Lowber v. City of New York, 5 Abb. Pr. (N. Y.) 325; Balch v. City of Utica, 42 App. Div. 567, 59 N. Y. Supp. 516.

[321] Hommerich v. Hunter, 14 La. Ann. 225; Thomas v. Owens, 4 Md. 189; Weimer v. Bunbury, 30 Mich. 201; People v. Flagg, 16 Barb. (N. Y.) 503; Bates v. Fries, 2 Disn. (Ohio) 511; Com. v. Taylor, 36 Pa. 263; Cunningham v. Mitchell, 67 Pa. 78. But see Com. v. Henry, 49 Pa. 530.

[322] Merlette v. State, 100 Ala. 42, 14 So. 562; Roberts v. People, 9 Colo. 458, 13 Pac. 630; Nesbit v. People, 19 Colo. 441, 36 Pac. 221; Amrine v. Kansas Pac. R. Co., 7 Kan. 178; Maloney v. Mahar, 1 Mich. 26; McNair v. Hunt, 5 Mo. 300.

[323] Galveston Railroad v. Cowdrey, 78 U. S. (11 Wall.) 459; Lynde v. Winnebago County, 83 U. S. (16 Wall.) 6; Barnard v. Taggart (N. H.) 29 Atl. 1027.

[324] People v. Shorb, 100 Cal. 537, 35 Pac. 163; Whitford v. Lynch, 10 Kan. 180; State of New York v. City of Buffalo, 2 Hill (N. Y.) 434; Miller v. Lewis, 4 N. Y. (4 Comst.) 554.

acting as such [325] at a meeting duly called and authorized by law [326] and at which under the law or regular rules of procedure particular action can be taken.[327] The question of whether the action of a majority of the board or body is to be considered as the legal action of the whole may depend upon the phraseology of their authority which may require unanimous consent.[328] If the

[325] People v. Coghill, 47 Cal. 361; Conger v. Latah County Com'rs, 5 Idaho, 347, 48 Pac. 1064; Louk v. Woods, 15 Ill. 256; Bouton v. McDonough County Sup'rs, 84 Ill. 384; Loesnitz v. Seelinger, 127 Ind. 422, 25 N. E. 1037, 26 N. E. 887; Blue v. Briggs, 12 Ind. App. 105, 39 N. E. 885; Forcum v. Independent School Dist., 99 Iowa, 435; Leavenworth County Com'rs v. Hamlin, 31 Kan. 105; Clark v. Cushman, 5 Mass. 505; Pell v. Ulmar, 21 Barb. (N. Y.) 500; McCortle v. Bates, 29 Ohio St. 419. An agreement before hand among members of a board of officers such as a township board of education, as to how they will vote or act at a future meeting is void as contrary to public policy. Their duty is to meet and discuss questions of corporate business. Matter of Beekman, 31 How. Pr. (N. Y.) 16; Mitchell v. Williams (Tenn. Ch. App.) 46 S. W. 325; Ball v. Presidio County, 88 Tex. 60, 29 S. W. 1042; Goshorn's Ex'rs v. County Court of Kanawha County, 42 W. Va. 735, 26 S. E. 452.

[326] Goedgen v. Manitowoc Sup'rs, 2 Biss. 328, Fed. Cas. No. 5,501; Campbell v. Brackenridge, 8 Blackf. (Ind.) 471; Butterfield v. Treichler, 113 Iowa, 328, 85 N. W. 19. An adjournment of a regular meeting is considered a continuation of the regular meeting and, therefore, legal. State v. Powell, 101 Iowa, 382; Paola & Fall River R. Co. v. Anderson County Com'rs, 16 Kan. 302. The powers of a county are vested in a board of commissioners as a corporate entity and not in the commissioners as individual officers. Before a county board can act it must be, therefore, convened in legal session either regular, or special and a casual meeting of a majorty of the commissioners does not create such a legal session.

Schafer v. School Dist. No. 1, 116 Mich. 206, 74 N. W. 465; Green v. Lancaster County, 61 Neb. 473, 85 N. W. 439. The presumption exists that a meeting has been legally convened for the transaction of business. Schumm v. Seymour, 24 N. J. Eq. (9 C. E. Green) 143; Townsend v. School Dist. No. 12, 41 N. J. Law, 312; Bronx Gas & Elec. Co. v. City of New York, 17 Misc. 433, 41 N. Y. Supp. 358; Pike County v. Rowland, 94 Pa. 238; Tamaqua & L. St. R. Co. v. Inter-County St. R. Co., 167 Pa. 91, 31 Atl. 473.

[327] Mitchell County Sup'rs v. Horton, 75 Iowa, 271, 39 N. W. 394; Standeford v. Wingate, 63 Ky. (2 Duv.) 440; Brumfield v. Douglas County Com'rs, 2 Nev. 65.

[328] Schenck v. Peay, 1 Woolw. 175, Fed. Cas. No. 12,450; Pulaski County v. Lincoln, 9 Ark. 320; People v. Coghill, 47 Cal. 361; Town of Haddam v. Town of East Lyme, 54 Conn. 34; Coffin v. Inhabitants of Nantucket, 59 Mass. (5 Cush.) 269; New York Life Ins. & Trust Co. v. Staats, 21 Barb. (N. Y.) 570; North Carolina R. Co. v. Swepson, 71 N. C. 350.

law does not provide otherwise, the rule commonly obtains that a majority, but not less, can legally act and bind their associates by their action.[329]

§ 656. De facto officers.

In the preceding sections has been briefly considered the power and authority of officials to act on behalf of the public, they being those regarded by the law as de jure or acting under a legal election or appointment, and who are not only eligible but have properly qualified, and in a proceeding brought to determine the validity of their title to the office can successfully defend their claims.[330] It frequently happens that one performing the duties of an office is a de facto officer only, and questions arise concerning the legality of his acts, his rights and liabilities. The presumption exists that one is an officer de jure and not de facto and that all acts and conditions necessary to constitute one as such have been done and exist.[331]

(a) De facto officers; definition. A de facto officer has been defined as one "who has the reputation of being the officer he assumes

[329] Cumberland County Sup'rs v. Webster, 53 Ill. 141; Merrill v. Inhabitants of Berkshire, 28 Mass. (11 Pick.) 269; Inhabitants of Plymouth v. Plymouth County Com'rs, 82 Mass. (16 Gray) 341; Petrie v. Wofford, 30 Miss. 698; People v. Walker, 23 Barb. (N. Y.) 304; Parrott v. Knickerbocker Ice Co., 8 Abb. Pr. (N. S., N. Y.) 234; State v. King, 20 N. C. (4 Dev. & B.) 661; Austin v. Helms, 65 N. C. 560; Treichler v. Berks County, 2 Grant's Cas. (Pa.) 445; Cooper v. Lampeter Tp., 8 Watts (Pa.) 125; Jefferson County v. Slagle, 66 Pa. 202; Eshleman v. Martic Tp., 152 Pa. 68, 25 Atl. 178; Guyette v. Town of Bolton, 46 Vt. 228; Walker v. Rogan, 1 Wis. 597.

[330] Buck v. City of Eureka, 109 Cal. 504, 42 Pac. 243, 30 L. R. A. 409. A de facto officer is estopped from showing that the prescribed mode for the creation of his office was not followed. State v. Bulkeley, 61 Conn. 287, 23 Atl. 186, 14 L. R .A. 657.

[331] People v. Clingan, 5 Cal. 389; Bryan v. Walton, 14 Ga. 185; Allen v. State, 21 Ga. 217; Bradford v. Justices of Inferior Ct., 33 Ga. 332; North v. People, 139 Ill. 81, 28 N. E. 966; Burke v. Cutler, 78 Iowa, 299, 43 N. W. 204; Willis v. Sproule, 13 Kan. 257; Wilson v. Brown, 22 Ky. L. R. 708, 58 S. W. 595; Chambers v. Adair, 110 Ky. 942, 62 S. W. 1128; Damon v. Carrol, 163 Mass. 404, 40 N. E. 185; Perkins v. Fielding, 119 Mo. 149; People v. Holcomb, 5 Misc. 459, 26 N. Y. Supp. 230; Nalle v. City of Austin, 23 Tex. Civ. App. 595, 56 S. W. 954; Callison v. Hedrick, 15 Grat. (Va.) 244; Spaulding v. Vincent, 24 Vt. 501; State v. Oates, 86 Wis. 634, 57 N. W. 296.

to be, and yet is not a good officer in point of law.''[332] There has been some doubt as to what conditions are necessary that one may be a de facto officer, because of the different occasions in which the question may be raised. Where the state is inquiring into the claim of an individual to an office,[333] the requirements that must exist in order that one be considered a de facto officer are greater than where the question of the legality with respect to the public of the acts of one filling an official position and performing its duties alone is raised.[334] An officer de facto, it has been held, is one who exercises the duties of an office under color of right, by virtue of an appointment or election to that office,[335] being distinguished

[332] Rex v. Bedford Level, 6 East, 356. Definition by Lord Ellenborough. Wright v. United States, 158 U. S. 232, following Norton v. Shelby County, 118 U. S. 425; In re Manning, 139 U. S. 504; Ball v. United States, 140 U. S. 118.

[333] People v. Weber, 86 Ill. 283; State v. Oates, 86 Wis. 634, 57 N. W. 296; Mechem, Pub. Off. § 317.

[334] Petersilea v. Stone, 119 Mass. 465. Where the court in its opinion say: "Third persons, from the nature of the case, cannot always investigate the right of one assuming to hold an important office, even so far as to see that he has color of title to it by virtue of some appointment or election. If they see him publicly exercising its authority; if they ascertain that this is generally acquiesced in, they are entitled to treat him as such officer, and, if they employ him as such, should not be subjected to the danger of having his acts collaterally called in question. * * * The principle, upon which the acts of officers de facto have been valid, has sometimes been extended so far as to protect them, under certain circumstances, when they have been directly proceeded against. The question then presented is not the same as that where the rights of third persons only are involved, and in such cases it would not be sufficient that they had publicly exercised such office, but they might properly be called upon to show they did so by virtue of some appointment or election, which they had a right to believe valid, even if it were otherwise." Gourley v. Hankins, 2 Iowa, 75; Patterson v. Miller, 59 Ky. (2 Metc.) 493; Fetterman v. Hopkins, 5 Watts (Pa.) 539; Venable v. Curd, 39 Tenn. (2 Head) 582.

[335] Town of Plymouth v. Painter, 17 Conn. 585; Rice v. Com., 66 Ky. (3 Bush) 14; Brown v. Lunt, 37 Me. 423; Hooper v. Goodwin, 48 Me. 79; Holt County v. Scott, 53 Neb. 176, 73 N. W. 681; People v. Albertson, 8 How. Pr. (N. Y.) 363. "To constitute an officer de facto there must be color of title; a claim to an appointment of title to an office which, by law was elective or a claim to an election to an office which by law must be filled by appointment is no color of title and cannot constitute a claim of an officer de facto so that perjury can be assigned by an oath administered by him."

People v. McDowell, 70 Hun, 1, 23 N. Y. Supp. 950; Trenton Com'rs v. McDaniel, 52 N. C. (7 Jones)

on one hand from an officer de jure [336] and on the other from a mere usurper of an office [337] or, as again defined, one who performs the duties of an office with apparent right and under claim and color of an election or appointment but without being actually qualified in law so to act.[338] There must be, in order that one be constituted an officer de facto, a colorable title to the office and a presumption that he is rightfully in office.[339] After a decision by a competent tribunal against the claim of one to an office, this presumption cannot be said to exist.[340] The subject and definitions have been thoroughly considered in a Connecticut case.[341]

107; Baker v. Hobgood, 126 N. C. 149, 35 S. E. 253. It is not necessary to constitute a de facto officer that one should be recognized by the public generally. Nalle v. City of Austin, 23 Tex. Civ. App. 595, 56 S. W. 954.

[336] Town of Plymouth v. Painter, 17 Conn. 585; Kimball v. Alcorn, 45 Miss. 151; McMillin v. Richards, 45 Neb. 786; People v. Staton, 73 N. C. 546; Hamlin v. Kassafer, 15 Or. 456.

[337] Usurper defined: Brown v. O'Connell, 36 Conn. 449; Hooper v. Goodwin, 48 Me. 79; Tucker v. Aiken, 7 N. H. 113; McCraw v. Williams, 33 Grat. (Va.) 510.

[338] Northwestern Mut. Life Ins. Co. v. Seaman, 80 Fed. 357; Jeffords v. Hine, 2 Ariz. 162, 11 Pac. 351; People v. Hecht, 105 Cal. 621, 38 Pac. 941, 27 L. R. A. 203; Mapes v. People, 69 Ill. 523; McCahon v. Leavenworth County Com'rs, 8 Kan. 437. An officer de facto must be in the actual possession of the office and have the same under his control. Carli v. Rhener, 27 Minn. 292; Brinkerhoff v. Jersey City, 64 N. J. Law, 225, 46 Atl. 170; People v. Terry, 108 N. Y. 1, 14 N. E. 815.

Hamlin v. Kassafer, 15 Or. 456. A color of right which constitutes one an officer de facto may consist in an election or an appointment or in holding over after the expiration of one's term or acquiescence by the public in the action of such an officer for such a length of time as to raise the presumption of colorable right by election or appointment.

[339] State v. Miltenberger, 33 La. Ann. 265; Kimball v. Alcorn, 45 Miss. 151. To constitute an officer de facto there must be a color of right by election or appointment or an acquiescence by the public for that length of time which affords a strong presumption of a colorable right.

Ex parte Strang, 21 Ohio St. 610. It is sufficient to constitute one an officer de facto of a legally existing office if he derives his appointment from one having colorable authority to appoint though not one competent to invest him with a good title to the office.

[340] Mattingly v. Vancleave, 22 Ky. L. R. 1761, 61 S. W. 257; Petition of Town of Portsmouth, 19 N. H. 115; Hugg v. Ivins, 59 N. J. Law, 139, 36 Atl. 685; Rochester & G. V. R. Co. v. Clarke Nat. Bank, 60 Barb. (N. Y.) 234. "It is well settled that there must be color for the claim, and a colorable title to the office. * * * When the color of title notoriously ceases, the rea-

(b) De jure officer and usurper defined. A de jure officer is one whose legal title to an office is clear; while a usurper is one who has intruded upon an office and assumes to exercise its functions without either color of right or the lawful title to it,[342] though when his assumption to office is acquiesced in, he may grow into an officer de facto.[343]

son for sustaining their acts as the acts of officers de facto ceases. * * * Such presumption cannot be said to exist after the decision of a competent tribunal to the contrary."

[341] State v. Carroll, 38 Conn. 449. "An officer de facto is one whose acts, though not those of a lawful officer, the law, upon principles of policy and justice, will hold valid, so far as they involve the interests of the public and third persons, where the duties of the office were exercised." Douglas v. Wickwire, 19 Conn. 492; State v. Brennan's Liquors, 25 Conn. 283; Brown v. O'Connell, 36 Conn. 447; Carlton v. People, 10 Mich. 250; Mallett v. Uncle Sam Gold & Silver Min. Co., 1 Nev. 188; People v. Collins, 7 Johns, (N. Y.) 549; Parker v. Baker, 8 Paige (N. Y.) 428; People v. Kane, 23 Wend. (N. Y.) 414; People v. White, 24 Wend. (N. Y.) 520; Com. v. McCombs, 56 Pa. 436.

[342] Town of Plymouth v. Painter, 17 Conn. 585; Olson v. Trego County Com'rs, 8 Kan. App. 414, 54 Pac. 805; Elliott v. Burke, 24 Ky. L. R. 292, 68 S. W. 445. A de facto officer is entitled to continue in office as against a usurper. Fitchburg R. Co. v. Grand Junction R. & D. Co., 83 Mass. (1 Allen) 552; Petersilea v. Stone, 119 Mass. 465; Montgomery v. Odell, 67 Hun, 169, 22 N. Y. Supp. 412; Hand v. Deady, 79 Hun, 75, 29 N. Y. Supp. 633; People v. Erie County Sup'rs, 33 App. Div. 634, 56 N. Y. Supp. 318; People v. Dike, 37 Misc. 401, 75 N. Y. Supp. 801; Hamlin v. Kassafer, 15 Or. 456; Brumby v. Boyd, 28 Tex. Civ. App. 164, 66 S. W. 874; Cummings v. Clark, 15 Vt. 653; McCraw v. Williams, 33 Grat. (Va.) 510. "A mere usurper is one who intrudes himself into an office which is vacant, and ousts the incumbent without any color of title whatever; and his acts are void in every respect." Kempster v. City of Milwaukee, 97 Wis. 343, 72 N. W. 743.

[343] State v. Carroll, 38 Conn. 449, and cases therein cited. See, also, as distinguishing between an officer de facto, one de jure and an intruder, the following cases: Conover v. Devlin, 15 How. Pr. (N. Y.) 470. "The distinction between an officer de facto, one de jure, and a mere usurper, is recognized by the law for the benefit of the public and of third persons, and of the officer only in suits where he is not a party. A person unquestioned, claiming, entering upon, and exercising the duties of an officer under the forms or color of an appointment, or of an election; or a person without even the color of an election or appointment, permitted by the government for a length of time, unquestioned, to perform the duties of an office, acquires the reputation of being an officer in fact, although he may not be an officer in point of law. The public and third persons cannot be supposed to know, or to investigate his title to the office, whether he has com-

§ 657. Conditions under which a de facto officer may exist.

A de facto officer may exist where one is performing the duties of an office and acting under an invalid or irregular election or appointment;[344] where one is acting as a public official and performing the duties of an office, although he may be ineligible to perform

plied with the forms of law, taken the oath of office, filed a bond, etc., or even whether, if appointable, the governor or the mayor has the appointment. The public and third persons, in their dealings with each other and with him as such acting officer, have, therefore, a right to act upon such reputation, and as to them, he is a good officer, whether he has a legal title to the office or not, so far as they are interested in his acts."

People v. Staton, 73 N. C. 546. "I scarcely think it necessary to cite authorities, to show the distinction between mere usurpers, and officers de facto and de jure. A usurper is one who takes possession without any authority. His acts are utterly void unless he continues to act for so long a time or under such circumstances as to afford a presumption of his right to act. And then his acts are valid as to the public and third persons. But he has no defence in a direct proceeding against himself. A de facto officer is one who goes in under color of authority— * * * or who evercises the duties of the office so long, or under such circumstances as to raise a presumption of his right; in which cases his necessary official acts are valid, as to the public and third persons, but he may be ousted by a direct proceeding. A de jure officer is one, who is regularly and lawfully elected or appointed and inducted into office and exercises the duties as his right. All his necessary official acts are valid and he cannot be ousted. The only difference between an officer de facto and an officer de jure is, that the former may be ousted in a direct proceeding against him, while the latter cannot be. So far as the public and third persons are concerned, there is no difference whatever. The acts of one have precisely the same force and effect as the acts of the other."

[344] Lockhart v. City of Troy, 48 Ala. 579; Diggs v. State, 49 Ala. 311; State v. Carroll, 38 Conn. 449. The opinion of Butler, C. J., in this case has been characterized by the supreme court of the United States as "An elaborate and admirable statement of the law, with a review of the English and American cases, on the validity of the acts of de facto officers, however illegal the mode of their appointment." The definition of a de facto officer and the conditions under which one will exist is given as follows: "An officer de facto is one whose acts, though not those of a lawful officer, the law, upon principles of policy and justice, will hold valid, so far as they involve the interests of the public and third persons, where the duties of the office were exercised.

"First, without a known appointment or election, but under such circumstances of reputation or acquiescence as were calculated to induce people, without inquiry, to

those duties, or eligible but has not taken the steps required by law to properly qualify for the office;[345] and, finally, where one enters upon the performance of the duties of an officer before the commencement of his term as established by law or continues after the termination of his official term.[346]

submit to or invoke his action, supposing him to be the officer he assumed to be.

"Second, under color of a known and valid appointment or election, but where the officer had failed to conform to some precedent, requirement or condition, as to take an oath, give a bond, or the like.

"Third, under color of a known election or appointment, void because the officer was not eligible, or because there was a want of power in the electing or appointing body, or by reason of some defect or irregularity in its exercise, such ineligibility, want of power, or defect being unknown to the public.

"Fourth, under color of an election or appointment by or pursuant to a public unconstitutional law, before the same is adjudged to be such." Brown v. Flake, 102 Ga. 528, 29 S. E. 267; Waller v. Perkins, 52 Ga. 233; Bailey v. Fisher, 38 Iowa, 229; Wheeler & Wilson Mfg. Co. v. Sterrett, 94 Iowa, 158, 62 N. W. 675; Tucker v. Aiken, 7 N. H. 113; Mallett v. Uncle Sam Gold & Silver Min. Co., 1 Nev. 188; Hamlin v. Dingman, 5 Lans. (N. Y.) 61; Trenton Com'rs v. McDaniel, 52 N. C. (7 Jones) 107; Smith v. Lynch, 29 Ohio St. 261; Gregg Tp. v. Jamison, 55 Pa. 468; State v. Elliott, 13 Utah, 471, 45 Pac. 346; State v. Seavey, 7 Wash. 562, 35 Pac. 389; Chicago & N. W. R. Co. v. Langlade County, 56 Wis. 614; Cole v. Village of Black River Falls, 57 Wis. 110. Town officers elected under an unconstitutional act are officers de facto. Yorty v. Paine, 62 Wis. 154.

[345] Darrow v. People, 8 Colo. 417; Coles County v. Allison, 23 Ill. 437; Case v. State, 69 Ind. 46; Wapello County v. Bigham, 10 Iowa, 39; State v. Powell, 101 Iowa, 382, 70 N. W. 592; Woodside v. Wagg, 71 Me. 207; Koontz v. Burgess of Hancock, 64 Md. 134, 20 Atl. 1039; Springett v. Colerick, 67 Mich. 362, 34 N. W. 683; People v. Payment, 109 Mich. 553, 67 N. W. 689; City of Vicksburg v. Groome (Miss.) 24 So. 306; Paxton v. State, 59 Neb. 460, 81 N. W. 383. The failure of a state officer to qualify within the time fixed by law may be waived by the state and it may elect to deal with him not only as the officer de facto but as one de jure.

Farrier v. Dugan, 48 N. J. Law, 613, affirming 47 N. J. Law, 383; Adams v. Tator, 42 Hun (N. Y.) 384; Oliver v. Jersey City, 63 N. J. Law, 634, 44 Atl. 709, 48 L. R. A. 412, reversing 63 N. J. Law, 96, 42 Atl. 782; Morford v. Ter., 10 Okl. 741, 63 Pac. 958, 54 L. R. A. 513; Roche v. Jones, 87 Va. 484, 12 S. E. 965. But see Creighton v. Com., 83 Ky. 142.

[346] Waite v. City of Santa Cruz, 89 Fed. 619; Cary v. State, 76 Ala. 78; People v. Beach, 77 Ill. 52; Morton v. Lee, 28 Kan. 286; Hale v. Bischoff, 53 Kan. 301, 36 Pac. 752; Dugan v. Farrier, 47 N. J. Law, 383; State v. Callahan, 4 N. D. 481, 61 N. W. 1025; State v. McJunkin, 7 S. C. (7 Rich.) 21; State v. Lee,

§ 658. There must be a legal office.

In order that one be considered an officer de facto, it is necessary that there should exist a legal office for which there can be an officer de jure.[347] If this office does not exist, it is clear that no person, by performing the duties of an imaginary one, can establish even the relations which flow from the existence of a de facto

35 S. C. 192, 14 S. E. 395; State v. Williams, 5 Wis. 308. But see Woods v. Inhabitants of Bristol, 84 Me. 358, 24 Atl. 865; Hallgren v. Campbell, 82 Mich. 255, 46 N. W. 381, 9 L. R. A. 408, and Town of La Pointe Sup'rs v. O'Malley, 46 Wis. 35, 50 N. W. 521.

[347] Norton v. Shelby County, 118 U. S. 425. "But it is contended that if the act creating the board was void, and the commissioners were not officers de jure, they were nevertheless officers de facto, and that the acts of the board as a de facto court are binding upon the county. This contention is met by the fact that there can be no officer, either de jure or de facto, if there be no office to fill. As the act attempting to create the office of commissioner never became a law, the office never came into existence. Some persons pretended that they held the office, but the law never recognized their pretensions, nor did the supreme court of the state. Whenever such pretensions were considered in that court, they were declared to be without any legal foundation, and the commissioners were held to be usurpers.

"The doctrine which gives validity to acts of officers de facto, whatever defects there may be in the legality of their appointment or election, is founded upon considerations of policy and necessity, for the protection of the public and individuals whose interests may be affected thereby. Offices are created for the benefit of the public, and private parties are not permitted to inquire into the title of persons clothed with the evidence of such offices and in apparent possession of their powers and functions. For the good order and peace of society their authority is to be respected and obeyed until in some regular mode prescribed by law their title is investigated and determined. It is manifest that endless confusion would result if in every proceeding before such officers their title could be called in question. But the idea of an officer implies the existence of an office which he holds. It would be a misapplication of terms to call one an officer who holds no office, and a public office can exist only by force of law. This seems to us so obvious that we should hardly feel called upon to consider any adverse opinion on the subject but for the earnest contention of plaintiff's counsel that such existence is not essential and that it is sufficient if the office be provided for by any legislative enactment, however invalid. Their position is, that a legislative act, though unconstitutional, may in terms create an office, and nothing further than its apparent existence is necessary to give validity to the acts of its assumed incumbent. That position, although not stated in this broad form, amounts to nothing else. It is difficult to meet it by any argu-

office and the pretended officer is merely a usurper to whose acts no validity can be attached. Where the legal existence of an office depends upon the validity of a corporate organization until an irregular or illegally formed corporation is declared as such, its officers are considered de facto and binding upon the people residing within the limits of such corporate organization.[348]

ment beyond this statement. An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed. * * * State v. Carroll, 38 Conn. 449; People v. Knopf, 183 Ill. 410, 56 N. E. 155; In re Hinkle, 31 Kan. 712.

Carleton v. People, 10 Mich. 259. "Where there is no office there can be no officer de facto, for the reason that there can be none de jure. The county offices existed by virtue of the Constitution the moment the new county was organized. No act of legislation was necessary for that purpose. And all that is required where there is an office, to make an officer de facto, is, that the individual claiming the office is in possession of it, performing its duties, and claiming to be such officer under color of an election or appointment, as the case may be. It is not necessary his election or appointment should be valid, for that would make him an officer de jure. The official acts of such persons are recognized as valid on grounds of public policy, and for the protection of those having official business to transact with public functionaries."

Burt v. Winona & St. P. R. Co., 31 Minn. 472; Adams v. Lindell, 5 Mo. App. 197. When money and labor have been expended under a contract made by an officer after the abolition of his office, such contract will be validated; where the officer was ignorant of the abolition of his office owing to a false announcement of election returns. Jester v. Spurgeon, 27 Mo. App. 477; Ayers v. Lattimer, 57 Mo. App. 78; Ex parte Snyder, 64 Mo. App. 58; Flaucher v. City of Camden, 56 N. J. Law, 244, 28 Atl. 82. There can be no de facto incumbent of an office by an unconstitutional statute. In re Quinn, 152 N. Y. 89, 46 N. E. 175; Blackburn v. Oklahoma City, 1 Okl. 292, 31 Pac. 782, 33 Pac. 708; State v. Lane, 16 R. I. 620, 18 Atl. 1035; State v. Lee, 35 S. C. 192; Daniel v. Hutcheson, 4 Tex. Civ. App. 239, 22 S. W. 278; Williams v. Clayton, 6 Utah, 86, 21 Pac. 398. One cannot be a de facto officer who is constantly in hiding.

[348] Leach v. People, 122 Ill. 420, 12 N. E. 726. The acts of a board of supervisors in levying taxes and performing other duties appurtenant to the office where the public and third persons are interested are valid though they are elected under an unconstitutional act. Garfield Tp. v. Finnup, 8 Kan. App. 771; Walnut Tp. v. Jordan, 38 Kan. 562, 16 Pac. 812; Attorney General v. Town of Dover, 62 N. J. Law, 138, 41 Atl. 98; Kirker v. City of Cincinnati, 48 Ohio St. 507, 27 N. E. 898; Merchants' Nat. Bank v. McKinney, 2 S. D. 106, 48 N. W. 841.

(a) Possession of office. If the officer de jure is in possession of and performing the duties of the office, there can exist with reference to the office no de facto officer.[349]

(b) Collateral attack. The rule which obtains with respect to the title of the de jure officer to his office also applies to one de facto.[350] Similar reasons sustaining the principle in both cases and also the same principle which exists in all those cases where the doctrine of what is termed collateral attack is applied; that principle which denies to an individual the right of raising questions with respect to the legality of acts or the existence of a state of facts in a proceeding other than one brought directly to determine them.

§ 659. Acts of de facto officers; validity of.

The rule obtains that all reasonable presumptions must be made in favor of the legality and validity of the acts of public officers.

[349] McCahon v. Leavenworth County Com'rs, 8 Kan. 437; Fulton v. Town of Andrea, 70 Minn. 445, 73 N. W. 256; Cohn v. Beal, 61 Miss. 398; Wimberly v. Boland, 72 Miss. 241; Attorney General v. Marston, 66 N. H. 485, 13 L. R. A. 67; State v. Blossom, 19 Nev. 312, 10 Pac. 430; Boardman v. Halliday, 10 Paige (N. Y.) 232; Conover v. Devlin, 15 How. Pr. (N. Y.) 470; State v. Callahan, 4 N. D. 481; School Dist. No. 13 in St. Johnsbury v. Smith, 67 Vt. 566, 32 Atl. 484. But see Brady v. Theritt, 17 Kan. 468.

[350] Northwestern Mut. Life Ins. Co. v. Seaman, 80 Fed. 357; Woodward v. Fruitvale Sanitary Dist, 99 Cal. 554, 34 Pac. 239; Town of Kissimmee City v. Cannon, 26 Fla. 3, 7 So. 523; Samuels v. Drainage Com'rs, 125 Ill. 436, 17 N. E. 829; People v. Nelson, 133 Ill. 565; Osborne v. State, 128 Ind. 129, 27 N. E. 345; Goldsman v. Gillespie, 43 La. Ann. 83, 8 So. 880; State v. Brooks, 39 La. Ann. 817, 2 So. 498; City of Monroe v. Hoffman, 29 La. Ann. 651; State v. Pertsdorf, 33 La. Ann. 1411; State v. Judge of 9th Jud. Dist. Court, 42 La. Ann. 1172, 8 So. 883; Fowler v. Bebee, 9 Mass. 231; Clark v. Town of Easton, 146 Mass. 43, 14 N. E. 795; Damon v. Carrol, 163 Mass. 404; Bliss v. Day, 68 Me. 201; Washington County School Com'rs v. Washington County School Com'rs, 77 Md. 283; Ballou v. O'Brien, 20 Mich. 304; Druse v. Wheeler, 22 Mich. 439; Attorney General v. Parsell, 99 Mich. 381, 58 N. W. 335; Boehme v. City of Monroe, 106 Mich. 401, 64 N. W. 204; Carlisle v. City of Saginaw, 84 Mich. 134, 47 N. W. 444; Cooper v. Moore, 44 Miss. 386; Perkins v. Fielding, 119 Mo. 149, 24 S. W. 444, 27 S. W. 1100; State v. Cook, 17 Mont. 529; State v. Horton, 19 Nev. 199, 8 Pac. 171; City of New York v. Tucker, 1 Daly (N. Y.) 107; People v. Bartlett, 6 Wend. (N. Y.) 422; Crosier v. Cornell Steamboat Co., 27 Hun (N. Y.) 215; Hagan v. City of Brooklyn, 126 N. Y. 643, 27 N. E. 265; People v. Orleans

This principle is applied to the acts of de facto officers [351] and the decisions are uniformly to the effect that the acts of an officer de facto, within the scope of his actual authority, are valid so far as the public and third persons are concerned.[352] This doctrine has

County Court, 28 Hun (N. Y.) 14; Cornish v. Young, 1 Ashm. 153 (Pa.); Campbell v. Com. 96 Pa. 344; State v. Hart, 106 Tenn. 269, 61 S. W. 780; Aulanier v. Governor, 1 Tex. 653; Dane v. State, 36 Tex. Cr. App. 84, 35 S. W. 661; Northwestern Lumber Co. v. Chehalis County, 24 Wash. 626, 64 Pac. 909.

[351] Brady v. Sweetland, 13 Kan. 41; Yancy v. Town of Fairview, 23 Ky. L. R. 2087, 66 S. W. 636; Friedman v. Horning, 128 Mich. 606, 87 N. W. 752; Simpson v. McGonegal, 52 Mo. App. 540; Sawyer v. Dooley, 21 Nev. 390; In re Powers' Estate, 65 Vt. 399; Cooper v. Moore, 44 Miss. 386. The official acts of the incumbent of a judicial office discharging its ordinary functions are conclusive as to all persons interested. See, also, cases cited in the following note.

[352] Vaccari v. Maxwell, 3 Blatchf. 368, Fed. Cas. No. 16,810; In re Ah Lee, 6 Sawy. 410, 5 Fed. 899; Murphy v. Shepard, 52 Ark. 356, 12 S. W. 707, following Equalization Board v. Land Owners, 51 Ark. 516, 11 S. W. 822; People v. Hecht, 105 Cal. 621, 38 Pac. 941, 27 L. R. A. 203; Smith v. State, 19 Conn. 493; State v. Brennon, 25 Conn. 278; Soudant v. Wadhams, 46 Conn. 218; Village of Chester v. Leonard, 68 Conn. 495, 37 Atl. 397; Waller v. Perkins, 52 Ga. 233; Gunn v. Tackett, 67 Ga. 725; School Dist. No. 7 v. Tingley, 73 Ill. App. 471; People v. Lieb, 85 Ill. 484; People v. Weber, 89 Ill. 347; Sharp v. Thompson, 100 Ill. 447; Golder v. Bressler, 105 Ill. 419; Gumberts v. Adams Express Co., 28 Ind. 181; Davidson v. State, 135 Ind. 254, 34 N. E. 972; State v. Crowe, 150 Ind. 455, 50 N. E. 471. The validity of the acts of a de facto officer are not affected by a subsequent judgment of ouster.

Roberts v. Hill, 137 Ind. 215; Peirce v. Weare, 41 Iowa, 378; Wheeler & Wilson Mfg. Co. v. Sterrett, 94 Iowa, 158, 62 N. W. 675; Metropolitan Nat. Bank v. Commercial State Bank, 104 Iowa, 682, 74 N. W. 26; Stickney v. Stickney, 77 Iowa, 699; Dolan v. Topping, 51 Kan. 321; Hale v. Bischoff, 53 Kan. 301; Whiting v. City of Ellsworth, 85 Me. 301, 27 Atl. 177; Auditors of Wayne County v. Benoit, 20 Mich. 176; School Dist. No. 8 v. Root, 61 Mich. 373, 28 N. W. 132; Attorney General v. Parsell, 99 Mich. 381; McCormick v. Fitch, 14 Minn. 252 (Gil. 185); Carli v. Rhener, 27 Minn. 292; Fulton v. Town of Andrea, 70 Minn. 445, 73 N. W. 256; Wimberly v. Boland, 72 Miss. 241, 16 So. 905; Ex parte Johnson, 15 Neb. 512; Magneau v. City of Fremont, 30 Neb. 843, 47 N. W. 280, 9 L. R. A. 786; Dredla v. Baache, 60 Neb. 655, 83 N. W. 916; Sawyer v. Dooley, 21 Nev. 390, 32 Pac. 437; Town of Lisbon v. Town of Bow, 10 N. H. 167; Attorney General v. Town of Marston, 66 N. H. 485, 22 Atl. 560, 13 L. R. A. 670; Savage v. Ball, 17 N. J. Eq. (2 C. E. Green) 142; Hoagland v. Culvert, 20 N. J. Law (Spencer) 387; Kimball v. Hendee, 57 N. J. Law, 307, 30 Atl. 894; Jersey City v. Erwin, 159 N. J. Law, 282, 35 Atl. 948. A de jure officer cannot be created by a de

been well stated by a text book writer [353] and applies both in respect to the creation of rights or relations between third parties and also between the corporation they represent and others.[354]

facto board. Erwin v. City of Jersey City, 60 N. J. Law, 141, 37 Atl. 732; Flaucher v. City of Camden, 56 N. J. Law, 244; Barrett v. Sayer, 58 Hun, 608, 12 N. Y. Supp. 170; Snyder v. Schram, 59 How. Pr. (N. Y.) 404; Dolan v. City of New York, 68 N. Y. 274; People v. McDowell, 70 Hun (N. Y.) 1; Gilliam v. Reddick, 26 N. C. 368; People v. Staton, 73 N. C. 546. The general rule is now settled by the American and English cases that there is no difference between the acts of de facto and de jure officers so far as the public and third persons are concerned.

Blackburn v. Oklahoma City, 1 Okl. 292; Morford v. Territory, 10 Okl. 741, 63 Pac. 958, 54 L. R. A. 513; Angell v. Steere, 16 R. I. 200, 14 Atl. 81; Pearce v. Hawkins, 32 Tenn. (2 Swan) 87; Maley v. Tipton, 39 Tenn. (2 Head.) 403; Kelley v. Story, 53 Tenn. (6 Heisk.) 202; Douglas v. Neil, 54 Tenn. (7 Heisk.) 438; Stokes v. Acklen (Tenn. Ch. App.) 46 S. W. 316; Daniel v. Hutcheson, 4 Tex. Civ. App. 239; McAllister v. Swan, 16 Utah, 1; Burr's v. McDonald, 3 Grat. (Va.) 215; Roche v. Jones, 87 Va. 484, 12 S. E. 965; In re Powers Estate, 65 Vt. 313, 26 Atl. 640; Knight v. Town of West Union, 45 W. Va. 194, 32 S. E. 163. But see Miller v. Callaway, 32 Ark. 666; Conway v. City of St. Louis, 9 Mo. App. 488; Fylpaa v. Brown County, 6 S. D. 634, 62 N. W. 962. See, also, article by Wilbur L. Stonex, 34 Cent. Law J. 212, on the validity of the acts of de facto officers.

[353] Mechem, Pub. Off. § 328. "Third persons who have occasion to deal with a public officer and to rely upon his acts, finding a person in the apparent possession of the office and ostensibly exercising its functions lawfully and with the acquiescence of the public, can neither be expected to know, nor to investigate, in every instance, his title to the office or his eligibility to election to it. As to them, he must be held to be, what he appears to be, the lawful occupant of the office. This rule is demanded by public policy as the only one affording protection to the public."

[354] City of Lampasas v. Talcott (C. C. A.) 94 Fed. 457. Officers acting under an irregular municipal organization are de facto officers and bonds issued by them on behalf of a municipal corporation are not void. "In the case at bar the legal charter under the special act was laid aside. One illegal, but having all the appearances of legality, was formed. It named the necessary officers, elected them, and performed all the functions of a municipal corporation for a period of nearly seven years. The state, during this period, did not challenge its exercise of power. It issues $40,000 of bonds, and obtains the benefit of their sale. Then, by judgment of the court, the officers are removed as officers of the new organization, and others elected under the first charter. Can it be held that the city, composed of the same people, including the same resources for revenue, is now absolved of all liability upon the bonds? Can a city, under an illegal and irregular

§ 660. Rights of de facto officers to compensation.

An officer de facto is not entitled to compensation for services performed during the time he was acting as such and cannot maintain an action therefor,[355] but if such compensation, whether fees, salary or commissions is paid to him, it cannot be recovered in an action brought for that purpose.[356] On the other hand, the officer de jure who may have been prevented from performing the duties of an office by reason of the existence of a de facto officer has no right of action as against the state or the public for the compensation of which he has been deprived.[357] His remedy is in an action against the de facto officer to whom it may have been paid.[358]

change of limits, preserving the same name, obtain credit for public improvements, and, when the irregular charter is vacated, return to the use of the first, which has all along been in force, and then stand freed of the debt? The people and property now sought to be charged were all, or nearly all, included and represented in the irregular corporation which issued the bonds. They get the benefit of the bonds. The facts show that the city and citizens were acting in good faith. The bonds were issued with public approval, and without objection. The improvements were accepted, and it was intended that the bonds should be paid. * * * The officers representing the city in the issuance of the bonds believed that they were clothed with authority by the procedure of 1883. In this they were mistaken. The charter of 1873 was still in existence. It authorized the election of officers of the city. The officers had been elected. Although they believed that they held office under the new organization, they were officers de facto of the city, actually filling places created by the special act of 1873. The special act of incorporation authorized the issuance of the bonds for public improvement. An ordinance was passed to issue them. The bonds, we hold, were not made invalid by reason of the illegal effort at incorporation made in 1883."

[355] Belcher v. United States, 34 Ct. Cl. 400; People v. Potter, 63 Cal. 127; Mayfield v. Moore, 53 Ill. 428; McCue v. Wapello County, 56 Iowa, 698; Garfield Tp. v. Crocker, 63 Kan. 272, 65 Pac. 273; City of Vicksburg v. Groome (Miss.) 24 So. 306; Christian v. Gibbs, 53 Miss. 314; Meagher v. Storey County, 5 Nev. 244; Jersey City v. Erwin, 59 N. J. Law, 282; Ex parte Norris, 8 S. C. (8 Rich.) 408.

[356] Badeau v. United States, 130 U. S. 439.

[357] Rasmussen v. Carbon County Com'rs, 8 Wyo. 277, 56 Pac. 1098, 45 Pr. (N. Y.) 448; Terhune v. City of New York, 88 N. Y. 247; Palmer v. Darby, 64 Ohio St. 520, 60 N. E. 626.

[358] Coughlin v. McElroy, 74 Conn. 397, 50 Atl. 1025; Rice v. Tevis' Adm'r, 21 Ky. L. R. 110, 50 S. W. 1101; Nichols v. McLean, 63 How.

§ 661. De facto officers; liability.

Since the law regards the acts of de facto officers as valid both with respect to the public and third persons dealing with them, they cannot, on the other hand, claim an exemption from a liability which may attach to their acts [359] or offer as an excuse for their wrong doing their legal condition as a de facto officer and not one de jure.[360] They will be protected, however, from a personal liability in the performance of their official acts by those same rules of law and under the same circumstances which are applied and which, when they exist, protect an officer de jure.[361]

§ 662. Official acts; corporate liability.

A public corporation is in its legal nature an artificial person and can, therefore, act only through its duly authorized agents. The liability of the corporation for their acts will be either that based upon a contract relation or one sounding in tort. The contract liability has already been considered in chapter five, subdivision six, discussing the power of a public corporation to contract and a liability founded upon a tortious act of one of its officials or employes will be more fully considered in chapter ten.[362]

L. R. A. 295. See, also, City of Chicago v. Luthardt, 191 Ill. 516, 61 N. E. 410. Where compensation attached to an office has not been paid a de facto officer, it can be lawfully paid to the de jure official. Whitaker v. City of Topeka, 9 Kan. App. 213, 59 Pac. 668; Blydenburgh v. Carbon County Com'rs, 8 Wyo 303, 56 Pac. 1106.

[359] Miller v. Callaway, 32 Ark. 666; People v. Weber, 86 Ill. 283; Gourley v. Hankins, 2 Iowa, 75; Fowler v. Bebee, 9 Mass. 231, 235; Petersilea v. Stone, 119 Mass. 465, 468; Short v. Symmes, 150 Mass. 298; Stubbs v. Lee, 64 Me. 195; Pooler v. Reed, 73 Me. 129; State v. Dierberger, 90 Mo. 369; Brewster v. Hyde, 7 N. H. 206; Blake v. Sturtevant, 12 N. H. 567; Green v. Burke, 23 Wend. (N. Y.) 490; People v. Nostrand, 46 N. Y. 375; Cummings v. Clark, 15 Vt. 653.

[360] Diggs v. State, 49 Ala. 311; Chiles v. State, 45 Ark. 143; State v. Goss, 69 Me. 22. The term "public officer" as used in the statutes providing for the punishment of public officers guilty of larceny includes officers de facto as well as officers de jure. Holt County v. Scott, 53 Neb. 176, 73 N. W. 681.

[361] McCracken v. Soucy, 29 Ill. App. 619; Dolan v. Topping, 51 Kan. 321, 32 Pac. 1120; State v. Dierberger, 90 Mo. 369; State v. Barnard, 67 N. H. 222, 29 Atl. 410.

[362] Haupt v. Maricopa County (Ariz.) 68 Pac. 525. A county is not liable for the destruction of goods under sanitary regulations. Hurlburt v. Marsh, 1 Root (Conn.) 520; City of Chicago v. Hislop, 61

A fuller statement of some principles already or to be suggested will now be given bearing upon the subject of the results of official action, the sections considering the two subjects discussing them respectively from the standpoint of the law of contracts and the law of torts rather than from that of official action.

§ 663. Contract liability.

In determining the contract liability of a public corporation as depending upon an act of one of its officials or employes, it must be remembered that a public corporation is one of limited or special powers [363] and that its officers and agents are not possessed of the general power and authority usually imputed to officers and agents of either natural persons or private corporations, but have special and limited powers only.[364] Two questions are naturally involved, therefore, and must be answered in the affirmative before a contract liability can exist. First, is the act one within the powers of the corporation either as expressly granted to it or as impliedly existing because absolutely necessary to its corporate life or to the exercise of some power expressly given.[365]

Ill. 86; City of Chicago v. O'Malley, 95 Ill. App. 355; Connolly v. City of Waltham, 156 Mass. 368, 31 N. E. 302.

[363] Clark v. City of Des Moines, 19 Iowa, 199, 87 Am. Dec. 423; Greer County Com'rs v. Watson, 7 Okl. 174, 54 Pac. 441. See chapter V, subd. 1, ante.

[364] Parsel v. Barnes, 25 Ark. 261; People v. Warfield, 20 Ill. 159; Reddick v. People, 82 Ill. App. 85; Lee County v. Deming, 3 G. Greene (Iowa) 101; Hull v. Marshall County, 12 Iowa, 142; Casady v. Woodbury County, 13 Iowa, 113; Jackson Tp. v. Home Ins. Co., 54 Ind. 184; Mathe v. Parish of Plaquemines, 28 La. Ann. 77; Citizens' Bank v. Police Jury of Concordia, 28 La. Ann. 263; Small v. Inhabitants of Danville, 51 Me. 359; Goff v. Inhabitants of Rehoboth, 53 Mass. (12 Metc.) 26; Thayer v. City of Boston, 36 Mass. (19 Pick.) 511; Clark v. Russell, 116 Mass. 455; Davis v. Kalamazoo Tp., 1 Mich. N. P. 16; Gray v. Coahoma County, 72 Miss. 303, 16 So. 903; Benton County Sup'rs v. Patrick, 54 Miss. 240; Rollins v. Town of Chester, 46 N. H. 411; Burns v. City of New York, 5 T. & C. (N. Y.) 371; Weed v. Tucker, 19 N. Y. 422; People v. Ulster County Sup'rs, 93 N. Y. 397; State v. Lake Shore & M. S. R. Co., 1 Ohio N. P. 292; Bank of Spring City v. Rhea County (Tenn. Ch. App.) 59 S. W. 442; Miles v. Town of Albany, 59 Vt. 79; State v. Hastings, 12 Wis. 596. See, also, authorities cited under §§ 275 et seq., ante. But see Gifford v. Town of White Plains, 25 Hun (N. Y.) 606.

[365] Marion County v. Coler (C. C. A.) 67 Fed. 60; Covington & M. R. Co. v. City of Athens, 85 Ga. 367, 11 S. E. 663; Lawrence County Com'rs v. McLahlon (Ind. App.) 37 N. E. 557; Moser v. Boone

Second, is the act one within the narrow and special authority possessed by an officer or employe.[366] It must be remembered in this connection that where authority is special, the right of a public officer or employe to act must be affirmatively shown, the usual presumption of law that an officer or agent is acting within the usual scope of his power and authority applying only to a slight extent.[367] Another general rule or principle of law also applies, that since a public corporation is one of limited powers expressly given and its officers and agents also having but special

County, 91 Iowa, 359, 59 N. W. 39; Center Tp. v. Gilmore, 31 Kan. 675; Hendricks v. Chautauqua County Com'rs, 35 Kan. 483, 11 Pac. 450; Wilson v. City of Shreveport, 29 La. Ann. 673; Babbitt v. Selectmen of Savoy, 57 Mass. (3 Cush.) 530; Farnsworth v. Inhabitants of Melrose, 122 Mass. 268; State v. Treasurer, 41 Mo. 590;; Bedwell v. Custer County, 51 Neb. 387; Perkins v. Grafton County, 67 N. H. 282, 29 Atl. 541; McIntire v. Pembroke, 53 N. H. 462; Kernitz v. Long Island City, 50 Hun, 428, 3 N. Y. Supp. 144; Parker v. Saratoga County Sup'rs, 106 N. Y. 392, 13 N. E. 308; Clark v. Saratoga County Sup'rs, 107 N. Y. 553, 14 N. E. 428; De Rackin v. Lincoln County, 19 Wash. 360, 53 Pac. 351. Contract for publication of delinquent taxes.

[366] Bernards Tp. v. Morrison, 133 U. S. 523; Indiana v. Glover, 155 U. S. 513; El Dorado County v. Elstner, 18 Cal. 144; Town of Sharon v. Town of Salisbury, 29 Conn. 113; Goodwin v. Town of East Hartford, 70 Conn. 18; Rayburn v. Davis, 2 Ill. App. 548; Town of Harwood v. Hamilton, 13 Ill. App. 358; Coleman v. City of Elgin, 45 Ill. App. 64; Thompson v. Jo Daviess County, 98 Ill. App. 293; Condran v. City of New Orleans, 43 La. Ann. 1202, 9 So. 31; Dennett v. Nevers, 7 Me. (7 Greenl.) 399; Emerson v. Inhabitants of Washington County, 9 Me. (9 Greenl.) 89; State v. Sanderson, 26 Minn. 333; McKenzie v. Polk County Com'rs, 61 Minn. 145, 63 N. W. 613; Luse v. Rankin, 57 Neb. 632, 78 N. W. 258; Feusier v. Virginia City, 3 Nev. 58. An attorney authorized to bring suit on behalf of the city may bind it for sheriff's fees incurred in service of process in the case. Town of Andover v. Grafton, 7 N. H. 298; Town of Holderness v. Baker, 44 N. H. 414; Bartholomew v. Lehigh County, 148 Pa. 82, 23 Atl. 1122; Com. v. Colley Tp. Sup'rs, 29 Pa. 121; Jewell Nursery Co. v. State, 4 S. D. 213, 56 N. W. 113; George D. Barnard & Co. v. Wahkiakum County, 7 Wash. 210, 34 Pac. 920; Snohomish County Abstract Co. v. Anderson, 9 Wash. 349, 37 Pac. 471.

[367] City of Elgin v. Goff, 38 Ill. App. 362. In a commission of a tort it will be presumed that city officials are acting within the scope of their authority. Gilpatrick v. City of Biddeford, 51 Me. 182. Where officials are personally interested in a transaction they cannot even when acting within the scope of their authority bind the city. See City of San Diego v. San Diego & L. A. R. Co., 44 Cal. 106; Davenport v. Town of Johnson, 49 Vt. 403, and Judevine v. Town of Hardwick, 49 Vt. 180.

and limited powers, all grants of power either to the corporation or to its officers and employes are to be construed strictly and against the existence of the power,[368] and that they are considered in cases of doubt mandatory in their character.[369] Where clearly mandatory, the question of doubt, of course, cannot arise, the rule just given applying to the existence of the power and the manner and the time of its exercise.

§ 664. Irregular exercise of power.

In determining the liability of a public corporation upon a contract whether implied or express, the distinction must be remembered between what the courts hold a total want of power and a mere irregular exercise of a given power.[370] An act which is

[368] See sections 113, 114, 246 and 247, ante.

[369] Henry County Com'rs v. Gillies, 138 Ind. 667, 38 N. E. 40. "The third proposition advanced by counsel is, that the statute is directory and not mandatory, and that the intent and policy of the act have not been violated. If the position here taken were tenable it would amount to a total abrogation of the law in question. That statute requires that statements should be filed with the board by the several county officers, showing the supplies needed. The court finds that no such statements were filed, and that none were requested by the board. * * * The statutes of the state are not to be wiped out in that manner. Boards of county commissioners are themselves but the creatures of the legislature, and they must pursue and exercise their powers in strict compliance with the letter and spirit of the statute. It is theirs to obey, not to disregard, the commands of the law-making power of the state."

[370] Hitchcock v. City of Galveston, 96 U. S. 341. "There may be a difference between the case of an engagement made by a corporation to do an act expressly prohibited by its charter, or some other law, and a case of where legislative power to do the act has not been granted. Such a distinction is asserted in some decisions. But the present is not a case in which the issue of the bonds was prohibited by any statute. At most, the issue was unauthorized. At most, there was a defect of power. The promise to give bonds to the plaintiffs in payment of what they undertook to do was, therefore, at farthest, only ultra vires; and, in such a case, though specific performance of an engagement to do a thing transgressive of its corporate power may not be enforced, the corporation can be held liable on its contract. Having received benefits at the expense of the other contracting party, it cannot object that it was not empowered to perform what it promised in return, in the mode in which it promised to perform." Treadway v. Schnauber, 1 Dak. 236; Maher v. City of Chicago, 38 Ill. 266; State Board of Agriculture v. Citizens' St. R. Co., 47 Ind. 407; City of St. Louis v. Davidson, 102

clearly considered as ultra vires, under the rule of strict construction, cannot be made binding or operative or subsequently ratified.[371] Where, however, a power or right exists but which must be exercised in a manner specified to be legally binding, if it is exercised in an informal way, and without a compliance with statutory requirements either as to the manner or the time of its exercise, it may be made binding and operative by the courts or subsequently ratified[372] in order to render substantial justice as between the parties to the transaction, and this doctrine is especially applicable where there has been an acceptance and use of its benefits or for many years an acquiescence in its results.[373] This

Mo. 149; Allegheny City v. McClurkan, 14 Pa. 81.

[371] Holland v. City of San Francisco, 7 Cal. 361. But an irregular exercise of power may be ratified. See section 246 et seq.

[372] Killian v. State, 15 Ind. App. 261, 43 N. E. 955; Chicago Lumber & Coal Co. v. Sugar Leaf Tp., 64 Kan. 163, 67 Pac. 630; Brown v. Inhabitants of Melrose, 155 Mass. 587, 30 N. E. 87. Facts creating a ratification. Inhabitants of Arlington v. Peirce, 122 Mass. 270; Murphy v. Moies, 18 R. I. 100, 25 Atl. 977; Brown v. State, 14 S. D. 219, 84 N. W. 801. See Mechem, Pub. Off. §§ 526 et seq.

[373] Hitchcock v. City of Galveston, 96 U. S. 341. "In the view which we shall take of the present case, it is, perhaps, not necessary to inquire whether those cases justify the court's conclusion; for, if it were conceded that the city had no lawful authority to issue the bonds, described in the ordinance and mentioned in the contract, it does not follow that the contract was wholly illegal and void, or that the plaintiffs have no rights under it. They are not suing upon the bonds, and it is not necessary to their success that they should assert the validity of those instruments. It is enough for them that the city council have power to enter into a contract for the improvement of the sidewalks; that such a contract was made with them; that under it they have proceeded to furnish materials and do work, as well as to assume liabilities; that the city has received and now enjoys the benefit of what they have done and furnished; that for these things the city promised to pay, and that after having received the benefit of the contract the city has broken it. It matters not that the promise was to pay in a manner not authorized by law. If payments cannot be made in bonds because their issue is ultra vires, it would be sanctioning rank injustice to hold that payment need not be made at all. Such is not the law. The contract between the parties is in force, so far as it is lawful.

"There may be a difference between the case of an engagement made by a corporation to do an act expressly prohibited by its charter, or some other law, and a case of where legislative power to do the act has not been granted. Such a distinction is asserted in some decisions. But the present is not a case in which the issue of the bonds was prohibited by any statute. At

principle as well as the further one that an act without the powers of a public corporation cannot be ratified have been fully considered in Chapter V, subdivisions one and six.

§ 665. Contract liabilities.

Some illustrations of contract liability arising from official action in addition to those before given are noted in the cases cited.[374]

most, the issue was unauthorized. At most, there was a defect of power. The promise to give bonds to the plaintiffs in payment of what they undertook to do was, therefore, at farthest, only ultra vires; and, in such a case, though specific performance of an engagement to do a thing transgressive of its corporate power may not be enforced, the corporation can be held liable on its contract. Having received benefits at the expense of the other contracting party, it cannot object that it was not empowered to perform what it promised in return, in the mode in which it promised to perform. This was directly ruled in State Board of Agriculture v. Citizens' St. R. Co., 47 Ind. 407. There it was held that 'Although there may be a defect of power in a corporation, to make a contract, yet if a contract made by it is not in violation of its charter, or of any statute prohibiting it, and the corporation has by its promise induced a party relying on the promise and in execution of the contract to expend money and perform his part thereof, the corporation is liable on the contract.' See, also, substantially to the same effect, Silver Lake Bank v. North, 4 Johns. Ch. (N. Y.) 370; Argenti v. City of San Francisco, 16 Cal. 256; Maher v. City of Chicago, 38 Ill. 266; Oneida Bank v. Ontario Bank, 21 N. Y. 490, and Allegheny City v. McClurkan, 14 Pa. 81." Brown v. City of Webster City, 115 Iowa, 511, 88 N. W. 1070; Backman v. City of Charleston, 42 N. H. 125; Parker v. Saratoga County Sup'rs, 106 N. Y. 392, 13 N. E. 308; Messenger v. City of Buffalo, 21 N. Y. 196; Dewey v. Niagara County Sup'rs, 62 N. Y. 294; Kramrath v. City of Albany, 127 N. Y. 575, 28 N. E. 400. But see Condran v. City of New Orleans, 43 La. Ann. 1202, 9 So. 31, and Agawam Nat. Bank v. Inhabitants of South Hadley, 128 Mass. 503.

[374] Malone v. Escambia County, 116 Ala. 214, 22 So. 503. Liability of county for medical attendance to sick and insolvent persons. Rice v. Trustees of Town of Haywards, 107 Cal. 398; McGuire v. City of Rapid City, 6 Dak. 346, 43 N. W. 706, 5 L. R. A. 752; City of Alton v. Mulledy, 21 Ill. 76; First Nat. Bank v. Peck, 43 Kan. 643, 23 Pac. 1077; State v. Shawnee County Com'rs, 57 Kan. 267, 45 Pac. 616. Contracts involving use of patented articles. City of Louisville v. Wible, 84 Ky. 290, 1 S. W. 605. Contracts for the exclusive right to remove carcasses of dead animals from within limits of a municipality for a period of five years is valid and the city cannot capriciously defer the commencement of the

§ 666. Corporate liability for admissions of officers or employes.

The admissions of public officers are only binding when made in the performance of an official act within the actual scope of their authority.[375] As public officers and employes possess limited and

term nor the obligation of this contract.

Prather v. City of New Orleans, 24 La. Ann. 41; Inhabitants of Industry v. Starks, 65 Me. 167; Wilson v. City of Cambridge, 101 Mass. 142. The expense of printing an address relating to a case of corporal punishment not properly chargeable to a municipality. Haynes v. Blue Earth County Com'rs, 65 Minn. 384, 67 N. W. 1005. Authority of county surveyor. Call Pub. Co. v. City of Lincoln, 29 Neb. 149, 45 N. W. 245; Wells v. Goffstown, 16 N. H. 53; Great Falls Bank v. Farmington, 41 N. H. 32. Selectmen may contract for a supply of liquor under act of July 14, 1855. Rollins v. Town of Chester, 46 N. H. 411; Van Valkenburg v. City of New York, 43 Barb. (N. Y.) 109; Hall v. Lauderdale, 46 N. Y. 70; Burnett v. Markley, 23 Or. 436, 31 Pac. 1050; Evans v. Hughes County, 3 S. D. 580; Van Antwerp v. Dell Rapids Tp., 5 S. D. 447; La France Fire Engine Co. v. Town of Mt. Vernon, 11 Wash. 203; Albany County Com'rs v. Chaplin, 5 Wyo. 74, 37 Pac. 370. Contract of publication of notice of tax sale.

[375] Gibson v. United States, 75 U. S. (8 Wall.) 274; Bennett v. United States, 6 Ct. Cl. 103; McCollum v. United States, 17 Ct. Cl. 92; Whiteside v. United States, 93 U. S. 247. "Different rules prevail in respect to the acts and declarations of public agents from those which ordinarily govern in the case of mere private agents. Principals, in the latter category, are in many cases bound by the acts and declarations of their agents, even where the act or declaration was done or made without any authority, if it appear that the act was done or declaration was made by the agent in the course of his regular employment; but the government or public authority is not bound in such a case, unless it manifestly appears that the agent was acting within the scope of his authority, or that he had been held out as having authority to do the act, or was employed in his capacity as a public agent to do the act or make the declaration for the government. Story, Agency (6th Ed.) § 307a; Lee v. Monroe, 7 Cranch (U. S.) 366. "Although a private agent, acting in violation of specific instructions, yet within the scope of his general authority, may bind his principal, the rule as to the effect of the like act of a public agent is otherwise, for the reason that it is better that an individual should occasionally suffer from the mistakes of public officers or agents, than to adopt a rule which, through improper combinations or collusion, might be turned to the detriment and injury of the public." See, also, as holding the same, City of Baltimore v. Eschbash, 18 Md. 282; El Dorado County v. Reed, 11 Colo. 130; Scofield Rolling Mill Co. v. State, 54 Ga. 635; Miller v. Smith, 7 Idaho, 204, 61 Pac. 824; La Salle County v. Simmons, 10 Ill. 513; George F. Blake Mfg. Co. v. Sanitary Dist. of Chicago, 77 Ill. App. 287; Dayton Highway Com'rs v. Rutland High-

special powers, parties dealing with them in an official capacity must, at their peril, ascertain the scope of this authority and a public corporation will not be bound by such acts except when coming within the principles as thus strictly applied and interpreted.[376] The doctrine of estoppel based upon admissions will not apply in doubtful cases; the authority of the officer or agent must clearly appear.[377] A doubt will be construed in favor of the corporation and against one claiming an estoppel or an advantage from an admission.[378]

way Com'rs, 84 Ill. 279; Cook County v. Harms, 108 Ill. 151; Buena Vista County v. Iowa Falls & Sioux City R. Co., 46 Iowa, 226; Wells v. Grubb, 58 Iowa, 384; Hanks v. North, 58 Iowa, 396; Mason & Ford Co. v. Com., 18 Ky. L. R. 371, 36 S. W. 570; State v. Bradbury, 40 Me. 154; State v. McKay, 43 Mo. 594; Blanchard v. Inhabitants of Ayer, 148 Mass. 174, 19 N. E. 209; Stoner v. Keith County, 48 Neb. 279, 67 N. W. 311; O'Leary v. Board of Education, 93 N. Y. 1; Greene v. State, 8 Ohio, 310; Sullivan County v. Ruth, 106 Tenn. 85, 59 S. W. 138; City of Tyler v. Adams (Tex. Civ. App.) 62 S. W. 119; Town of Burlington v. Town of Calais, 1 Vt. 391; Boyers v. Crane, 1 W. Va. 176.

[376] Huthsing v. Bosquet, 17 Fed. 54; Barton v. Swepston, 44 Ark. 437; Sutro v. Pettit, 74 Cal. 332; Broadwell v. Chapin, 2 Ill. App. 511; Welker v. Hinge, 16 Ill. App. 326; Tamm v. Lavalle, 92 Ill. 263; Rissing v. City of Ft. Wayne, 137 Ind. 427, 37 N. E. 328; Newman v. Sylvester, 42 Ind. 106; Carpenter v. Union Dist. Tp., 58 Iowa, 335; City of New Orleans v. Tulane Educational Fund's Adm'r, 46 La. Ann. 861, 15 So. 161; City of Baltimore v. Eschbach, 18 Md. 282; City of Baltimore v. Reynolds, 20 Md. 10; Mitchell v. St. Louis County Com'rs, 24 Minn. 459; First Nat. Bank of Detroit v. Becker County Com'rs, 81 Minn. 95, 83 N. W. 468; State v. Bank of State, 45 Mo. 528; State v. Hays, 52 Mo. 578; Sooy v. State, 39 N. J. Law, 135. The city comptroller is not its agent for the purpose of making statements with respect to the moral standing of the city treasurer and it is not, therefore, bound by them. Delafield v. Illinois, 26 Wend. (N. Y.) 192; Micheltree v. Sweezy, 70 Pa. 278; Spafford v. Town of Norwich, 71 Vt. 78, 42 Atl. 970. See, also, authorities cited under §§ 643 et seq., ante. But see State v. Gloyd, 14 Wash. 5, 44 Pac. 103.

[377] La Salle County v. Simmons, 10 Ill. 513; Clark v. City of Des Moines, 19 Iowa, 199; Hardin County v. Louisville & N. R. Co., 92 Ky. 412, 17 S. W. 860; Mitchell v. City of Rockland, 41 Me. 363; Firt Nat. Bank of Sturgis v. Watkins, 21 Mich. 483; Bogart v. Lamotte Tp., 79 Mich. 294, 44 N. W. 612; West Jersey Traction Co. v. Camden Horse R. Co., 53 N. J. Eq. 163; Starin v. Town of Genoa, 23 N. Y. 439; Green v. North Buffalo Tp., 56 Pa. 110; Carolina Nat. Bank v. State, 60 S. C. 465, 38 S. E. 629.

[378] Waters' Case, 4 Ct. Cl. 389; Logan County Sup'rs v. City of Lincon, 81 Ill. 156; Weston v. City of Syracuse, 158 N. Y. 274, 53 N. E. 12, 43 L. R. A. 678.

§ 667. Liability to the government or a public body.

Public officials or employes in many cases are charged with the custody of public moneys which include as a legal duty the caring for its safety,[379] the disbursement of it in accordance with the law,[380] and the keeping of accounts that form a record of their official acts in these respects.[381] The legal disbursement of public moneys include its payment by them during their term of office to those to whom this action is authorized[382] and a surrender of such as may remain in their hands upon the expiration of their term of office to the official succeeding them,[383] and for a failure to perform these duties properly they and their sureties are personally responsible.[384] The loss of public funds may occur, as already stated,[385] through the negligence or dishonest action of the official

[379] People v. Haines, 10 Ill. 528; Trustees of Tp. 13 S. R. 3 W. v. Misenheimer, 78 Ill. 22; Killian v. State, 15 Ind. App. 261, 43 N. E. 955; State v. Powell, 40 La. Ann. 234, 4 So. 46.

[380] United States v. Laub, 12 Pet. (U. S.) 1; Russell v. Tate, 52 Ark. 541, 13 S. W. 130, 7 L. R. A. 180; Avery v. Pima County (Ariz.) 60 Pac. 702; City of East St. Louis v. Flannigen, 34 Ill. App. 596. The payment of public moneys by a city treasurer in a manner not authorized by law cannot be ratified by a city council. State v. Windle, 156 Ind. 648, 59 N. E. 276; Freeman v. Otis, 9 Mass. 272. The disbursing official may be also liable to one from whom he wrongfully withholds money. Kas v. State, 63 Neb. 581, 88 N. W. 776; State v. Bætz, 44 Wis. 624.

[381] See § 698, post.

[382] Spurlock v. State (C. C. A.) 52 Fed. 382. A public officer is liable on his official bond when he refuses to pay an order properly issued or, in the absence of funds, to endorse it as required by law. Barnes v. Hudman, 57 Ala. 504; Wood v. Greene County Com'rs, 60 Ga. 556; Boardman v. Hayne, 29 Iowa, 339.

[383] Taylor County v. Standley, 79 Iowa, 666, 44 N. W. 911; Mason v. Fractional School Dist. No. 1, 34 Mich. 228; Baily v. Com. (Pa.) 10 Atl. 764; Aiken County v. Murray, 35 S. C. 508, 14 S. E. 954; State v. Assmann, 46 S. C. 554, 24 S. E. 673; City of Huron v. Meyers, 13 S. D. 420, 83 N. W. 553. Interest coupons paid in good faith by a city treasurer should be credited to him in his settlement with the city. Sigel School Directors v. Coe, 40 Wis. 103.

[384] United States v. Ripley, 7 Pet. (U. S.) 18; Barnes v. Hudman, 57 Ala. 504; McKee v. Monterey County, 51 Cal. 275; Warren County v. Jeffrey, 18 Ill. 329; Taggart v. State, 49 Ind. 42; Sac County v. Hobbs, 72 Iowa, 69; Snyder v. Board of Education, 16 Kan. 542; Perley v. Muskegon County, 32 Mich. 132; Gerken v. Sibley County, 39 Minn. 433; Town of White Sulphur Springs v. Pierce, 21 Mont. 130; Iredell County Com'rs v. Wasson, 82 N. C. 308. See sections 618–626, ante.

[385] See § 623; State v. Lanier, 31

charged with their keeping or without his default. The weight of authority is to the effect that where no special exemption is made by law, the fact that a loss occurs without their fault does not release them from a liability to the government or the public corporation they represent for the moneys so lost.[386] The care of public property and records may also be entrusted to public officials and employes and the use and control of it is governed by the same principles regulating the use of public money in so far as they may be made applicable.[387]

La. Ann. 423; Cumberland County v. Pennell, 69 Me. 370.

[386] United States v. Prescott, 3 How. (U. S.) 578; Boyden v. United States, 80 U. S. (13 Wall.) 17; Stapp v. United States, 4 Ct. Cl. 219; Holman v. United States, 11 Ct. Cl. 642; State v. Houston, 83 Ala. 361, 3 So. 859; City of Healdsburg v. Mulligan, 113 Cal. 205, 33 L. R. A. 461; Davis v. Dunlevy, 11 Colo. App. 344; Wilson v. People, 19 Colo. 199; Adams v. State, 82 Ill. 132; Halbert v. State, 22 Ind. 125; Morbeck v. State, 28 Ind. 86; Bluff Creek Tp. v. Hardinbrook, 40 Iowa, 130; Lowry v. Polk County, 51 Iowa, 50, 49 N. W. 1049; Board of Control v. Royes, 48 La. Ann. 1061, 20 So. 182; Hennepin County Com'rs v. Jones, 18 Minn. 199 (Gil. 182); Redwood County Com'rs v. Tower, 28 Minn. 45; Perley v. Muskegon County, 32 Mich. 132; Bristol v. Johnson, 34 Mich. 123; Adams v. Lee, 72 Miss. 281, 16 So. 243; Griffin v. Mississippi Levee Com'rs, 71 Miss. 767; Adams v. Lee, 72 Miss. 281; Arnold v. State, 77 Miss. 463, 27 So. 596; School Dist. of Orrick v. Dorton, 145 Mo. 304, 46 S. W. 948; Jefferson County Com'rs v. Lineberger, 3 Mont. 231; City of Great Falls v. Hanks, 21 Mont. 83; State v. Hill, 47 Neb. 456; Bush v. Johnson County, 48 Neb. 1, 66 N. W. 1023, 32 L. R. A. 223; Thomsen v. Hall County, 63 Neb. 777, 89 N. W. 389, 57 L. R. A. 303; Village of Oneida v. Thompson, 92 Hun, 16, 37 N. Y. 889; City of Johnstown v. Rodgers, 20 Misc. 262, 45 N. Y. Supp. 661; Kilby v. First Nat. Bank of Carthage, 32 Misc. 370, 66 N. Y. Supp. 579; Tillinghast v. Merrill, 151 N. Y. 135, 45 N. E. 375, 34 L. R. A. 678; State v. Clarke, 73 N. C. 255; Nason v. Directors of Poor, 126 Pa. 445, 17 Atl. 616; State v. Copeland, 96 Tenn. 296, 31 L. R. A. 844; McKinney v. Robinson, 84 Tex. 489. See authorities cited under §§ 607, 608. See, also, many authorities cited Am. & Eng. Enc. of Law (2d Ed.) p. 374. But see City of Healdsburg v. Mulligan, 113 Cal. 205, 45 Pac. 337, 33 L. R. A. 461; Dreyer v. People, 188 Ill. 40, 58 N. E. 620, 59 N. E. 424, 58 L. R. A. 869; Inhabitants of Cumberland County v. Pennell, 69 Me. 357; City of Livingston v. Woods, 20 Mont. 91, 49 Pac. 437; Albany County Sup'rs v. Dorr, 25 Wend. (N. Y.) 440; York County v. Watson, 15 S. C. 1; Fairchild v. Hedges, 14 Wash. 117, 44 Pac. 125, 31 L. R. A. 851; Roberts v. Laramie County Com'rs, 8 Wyo. 177, 56 Pac. 915.

[387] United States v. Thomas, 82 U. S. (15 Wall.) 337. A public officer is relieved from any liability where property in his charge has been forcibly seized and destroyed

Interest on public moneys. An interesting question may arise relative to the responsibility of a public official to whom is entrusted the care of public moneys for the interest accumulating upon such funds while they are in his possession. Where the law provides in express terms that interest accruing upon deposits of public moneys become and remain a part of the public funds, no doubt as to the duty of an officer can arise in this respect.[388] Where, however, there are no statutory provisions regulating this, the personal use of this may, it has been held in some few cases, create no personal liability to the public corporation,[389] but the better reason as well as the weight of authority is in support of the doctrine that all accruing interest upon public funds becomes a part of them and a failure to account for it in the same manner as the principal will make a public officer or employe and his sureties personally responsible.[390] Where public moneys are wrongfully withheld, interest is clearly chargeable.[391]

§ 668. Personal liability of officers and agents; contracts.

A liability may be created against the individual or his principals ex contractu or as founded upon a tort. In respect to the liability of a public officer or agent on a contract executed by him

by a public enemy. Chambers v. Stringer, 62 Ala. 596; Healdsburg v. Mulligan, 113 Cal. 205, 33 L. R. A. 461; Wilson v. People, 19 Colo. 199, 22 L. R. A. 449; Wooley v. Baldwin, 101 N. Y. 688; Land, Log & Lumber Co. v. McIntyre, 100 Wis. 245, 75 N. W. 964.

[388] United States v. Denvir, 106 U. S. 536; Sheridan v. Van Winkle, 43 N. J. Law, 125; People v. Gasherie, 9 Johns. (N. Y.) 71; State v. Ruth, 9 S. D. 84; People v. Dolan, 5 Wyo. 245, 39 Pac. 752. See, also, 6 Am. Dec. 263.

[389] State v. Walsen, 17 Colo. 170, 28 Pac. 1119, 15 L. R. A. 456; Hughes v. People, 82 Ill. 78; Cooper v. People, 85 Ill. 417; Com. v. Godshaw, 13 Ky. L. R. 572, 17 S. W. 737; Richmond County Sup'rs v. Wandel, 6 Lans. (N. Y.) 33.

[390] United States v. Denvir, 106 U. S. 536; United States v. Mosby, 133 U. S. 273. The treasurer of the United States must account for interest on public moneys deposited in banks. McPhillips v. McGrath, 117 Ala. 549, 23 So. 721; Sheridan v. Van Winkle, 43 N. J. Law, 125; Maloy v. Bernalillo County Com'rs, 10 N. M. 638, 62 Pac. 1106; Richmond County Sup'rs v. Wandel, 6 Lans. (N. Y.) 33; City of New York v. Tradesmen's Nat. Bank, 56 Hun, 649, 11 N. Y. Supp. 95; Clark v. Sheldon, 134 N. Y. 333, 19 L. R. A. 138; Eshelby v. Board of Education, 66 Ohio St. 71, 63 N. E. 586; State v. Ruth, 9 S. D. 84.

[391] United States v. Denvir, 106 U. S. 536; Bullock v. The Governor, 2 Port. (Ala.) 484; Marks v. Purdue University, 56 Ind. 228; Sheri-

on behalf of his principal, the presumption of law exists that no personal liability was intended to be assumed,[392] and this is especially true where public officers or agents in the regular performance of their official duties or functions enter into contract relations with third parties.[393]

Clear intent. Where the intent is clear, however, that the officer or employe is acting for himself and not for the public corporation which officially he represents, the contract will be considered a personal one and not binding upon the corporation, although from its execution a doubt may arise in respect to the parties.[394]

§ 669. Torts.

Officers and employes of public corporations perform their duties under a threefold division of the powers of government, namely, the executive, the legislative and the judicial, and each

dan v. Van Winkle, 43 N. J. Law, 125; Maloy v. Bernalillo County Com'rs, 10 N. M. 638, 62 Pac. 1106; Clark v. Sheldon, 57 Hun, 586, 10 N. S. Supp. 357; Id., 134 N. Y. 333, 19 L. R. A. 138; State v. Ruth, 9 S. D. 84; State v. Allen (Tenn. Ch. App.) 46 S. W. 303.

[392] Parks v. Ross, 11 How. (U. S.) 362; Stone v. Mason, 2 Cranch, 431, Fed. Cas. No. 13,485; Sanborn v. Neal, 4 Minn. 126 (Gil. 83) Town of Hanover v. Eaton, 3 N. H. 38; Gill v. Brown, 12 Johns. (N. Y.) 385; Cook v. Irvine, 5 Serg. & R. (Pa.) 492; McKagen v. Windham, 59 S. C. 434, 38 S. E. 2.

[393] Comer v. Bankhead, 70 Ala. 493; Mann v. Richardson, 66 Ill. 181; Perrin v. Lyman's Adm'r, 32 Ind. 16; Jackson Tp. v. Home Ins. Co., 54 Ind. 184; Pine Civil Tp. v. Huber Mfg. Co., 83 Ind. 121; Lyon v. Adamson, 7 Iowa, 509; Armstrong v. Borland, 35 Iowa, 537; Willett v. Young, 82 Iowa, 292, 11 L. R. A. 115; Cutler v. Inhabitants of Ashland, 121 Mass. 588; Andrews v. Estes, 11 Me. 267; Fowler v. Atkinson, 6 Minn. 578 (Gil. 412); McDonald v. Franklin County, 2 Mo. 217; Hodges v. Runyan, 30 Mo. 491; Woodes v. Dennett, 9 N. H. 55; Delano v. Goodwin, 48 N. H. 203; Knight v. Clark, 48 N. J. Law, 22; Miller v. Board, 15 Misc. 322, 37 N. Y. Supp. 766; Brazee v. Stewart, 59 App. Div. 476, 69 N. Y. Supp. 231; Robinson v. Howard, 84 N. C. 151; West v. Jones, 9 Watts (Pa.) 27; Leet v. Shedd, 42 Vt. 277. But see Sharp v. Smith, 32 Ill. App. 336; Hobbs v. Cowden, 20 Ind. 310; Bayliss v. Pearson, 15 Iowa, 279; Wing v. Glick, 56 Iowa, 473; Mechem, Agency, §§ 426 and 806 et seq.

[394] Hodgson v. Dexter, 1 Cranch (U. S.) 345. "The intent of the officer to bind himself personally must be very apparent indeed, to induce a construction of the contract." White v. Williams, 49 Ala. 130; Samuel's Ex'r v. McDowell, 1 Har. (Del.) 108; McCracken v. Lavalle, 41 Ill. App. 573; Field v. Towle, 34 Me. 405; Hodges v. Runyan, 30 Mo.

department is vested with functions of a different character and each can be performed alone by the respective department to which such powers have been assigned. In determining the personal liability of an officer or employe this division will be followed.

§ 670. Duty; to whom due.

The personal liability of an officer or employe is not only dependent upon the nature of the duties or functions which he performs as based upon the threefold division of governmental powers, but also upon the further condition of to whom is the duty due.[395] The performance of all official duties and functions by public officers and employes is due either to the state, the community or the public as a whole,[396] or to a specific individual.[397] All quasi political and governmental duties are performed solely for the benefit and advantage of the community at large. A public corporation as a governmental agency is organized and maintained for the good of the public and not for the particular advantage of any one of the numerous individuals who may enjoy the benefits of such organization. The president of the United States in the appointment of ambassadors and ministers abroad is performing a duty which he owes not to a particular person but to the people of the United States as a governmental whole. The governor of a state in the appointment of his executive officers and in the performance of his other political and executive duties discharges a duty which he owes to the people of the state at large.

491; Belknap v. Reinhart, 2 Wend. (N. Y.) 375; Fox v. Drake, 8 Cow. (N. Y.) 191; People v. Abbott, 107 N. Y. 225, 13 N. E. 779; Allen v. Sisson, 66 Hun, 140, 20 N. Y. Supp. 971; Olifiers v. Belmont, 12 Misc. 160, 33 N. Y. Supp. 275, affirmed 159 N. Y. 550, 54 N. E. 1093; Mechem, Pub. Off. § 806, and authorities cited. But see Murray v. Kennedy, 15 La. Ann. 385.

[395] People v. Whipple, 47 Cal. 592.

[396] Pritchard v. Keefer, 53 Ill. 117; Union Civil Tp. v. Berryman, 3 Ind. App. 344, 28 N. E. 774; Washington County Com'rs v. Kemp, 14 Ind. App. 604, 43 N. E. 314; Freeman v. City of Chanute, 63 Kan. 573, 66 Pac. 647; Bowden v. City of Rockland, 96 Me. 129, 51 Atl. 815; Chenery v. Inhabitants of Holden, 82 Mass. (16 Gray) 125; Baugh v. Lamb, 40 Miss. 493; School Dist. No. 80 v. Burress, 2 Neb. Unoff. 554, 89 N. W. 609; Felch v. Town of Ware, 69 N. H. 617, 45 Atl. 591; Lorillard v. Town of Monroe, 11 N. Y. (1 Kern.) 392; Chapin v. Ferry, 3 Wash. St. 386, 15 L. R. A. 116; Shipman v. State, 42 Wis. 377.

[397] Adams v. Slater, 8 Ill. App. 72; Sibley v. Smith, 2 Mich. 486.

§ 671. Same subject continued; duties owing an individual.

On the other hand, the proper protest of commercial paper by a notary public is a duty which that official owes to the individual who employs him for that purpose. The service of process by a sheriff or a United States marshal is a duty these officers owe to litigants who desire to employ them for such a purpose, and many other illustrations of duties owing by particular officers to particular individuals might be added.

§ 672. The rule as to personal liability.

For the negligent performance or the nonperformance of a discretionary duty owed to the public there can arise no personal liability on the part of a public officer or employe and this is especially true of those duties and functions which are quasi political.[398] for the proper performance of these duties the official is alone, as has already been suggested, answerable to those who may elect or appoint him and to his conscience.

Where, however, the duty is one not discretionary in its character and due to a particular individual and its performance results in the special and particular advantage or benefit to that individual, he is responsible to the one who employs him for the performance of that specific act, or who may be injured by it, for the proper performance of the duty if a cause of action can arise because of such neglect or failure.[399]

[398] Crow v. Warren County Com'rs, 118 Ind. 51, 20 N. E. 642; Lecourt v. Gaster, 50 La. Ann. 521, 23 So. 463; State v. Harris, 89 Ind. 363; Moss v. Cummings, 44 Mich. 359; School Dist. No. 80 v. Burress, 2 Neb. Unoff. 554, 89 N. W. 609; Gross v. Portsmouth Water Com'rs, 68 N. H. 389, 44 Atl. 529; Doolittle v. Town of Walpole, 67 N. H. 554, 38 Atl. 19; Butler v. Kent, 19 Johns. (N. Y.) 223; Moran v. McClearns, 41 How. Pr. (N. Y.) 289; State v. Buchanan (Tenn. Ch. App.) 62 S. W. 287. See, also, authorities cited under § 74, post.

[399] Gregory v. City of Bridgeport, 41 Conn. 76; Duncan v. Webb, 7 Ga. 187; Porter v. Thomson, 22 Iowa, 391; Weymouth v. City of New Orleans, 40 La. Ann. 344, 4 So. 218; Nowell v. Wright, 85 Mass. (3 Allen) 166; Keith v. Howard, 41 Mass. (24 Pick.) 292; Bishop v. Schneider, 46 Mo. 472; Day v. Reynolds, 23 Hun (N. Y.) 131; Clark v. Miller, 54 N. Y. 528; Van Schaick v. Sigel, 58 How. Pr. (N. Y.) 211; Cooley, Torts (2d Ed.) p. 451. "One conspicuous illustration is that of the recorder of deeds. The office may be said to be created because it is for the general public good that all titles should appear of record, and that all purchasers should have some

§ 673. Liability depending upon character of duties whether imperative or discretionary.

The liability of a corporation as well as the individual officer may depend somewhat, as above suggested, even in the case of duty due the public, upon its character whether imperative or discretionary. There are public duties imposed by laws mandatory or imperative in their character and, therefore, not optional in their performance.[400] In some cases the manner of performance is also prescribed by law.[401] The failure to execute these duties thus made obligatory upon public officials and employes may create the liability suggested if the individual or corporation claiming the right of redress can show not only that the duties negligently or omitted to be performed were of this character but also that he has sustained a special damage in addition or beyond that sustained by the public or the community at large.[402] There are duties even those owing to the individual where a failure to perform them or their negligent performance will result in no cause of action. The legal maxim "damnum absque injuria" will apply.[403]

record upon which they may rely for accurate information. But although a public officer is chosen to keep such a record, the duties imposed upon him are for the most part duties only to the persons who have occasion for his official services. He is simply required to record for those who apply to him their individual conveyances, and to give to them abstracts or copies from the record if they request them and tender the legal fees. All these are duties to individuals, to be performed for a consideration; the state is not expected to enforce the performance, nor does it generally provide for punishing as a breach of the public duty the failure in performance. But the right to a private action on breach of duty follows as of course."

[400] Shaw v. City of Macon, 21 Ga. 280; Newburgh & C. Turnpike Road v. Miller, 5 Johns. Ch. (N. Y.) 101; Standart v. Burtis, 46 Hun (N. Y.) 82; State v. Godwin, 123 N. C. 697, 31 S. E. 221; Springfield Milling Co. v. Lane County, 5 Or. 265; Underwood v. Russell, 4 Tex. 175.

[401] Wells v. Board of Education, 78 Mich. 260, 44 N. W. 267; Atchison County v. De Armond, 60 Mo. 19; School Dist. No. 25 v. Farmer, 23 Tex. Civ. App. 39.

[402] Strickfaden v. Zipprick, 49 Ill. 286; Sells v. Dermody, 114 Iowa, 344, 86 N. W. 325; Ellis v. State, 4 Ind. 1; Simonds v. Heard, 40 Mass. (23 Pick.) 120; Case v. Dean, 16 Mich. 12; Brown v. Lester, 21 Miss. 392; Ripley v. Essex & Hudson County Freeholders, 40 N. J. Law, 45; Jenner v. Joliffe, 9 Johns. (N. Y.) 381; Clark v. Miller, 54 N. Y. 528; Doyle v. Aldermen of Raleigh, 89 N. C. 133.

[403] Transportation Co. v. City of Chicago, 99 U. S. 635, 641; Radcliff's Ex'rs v. City of Brooklyn, 4 N. Y. 195; Bellinger v. New York Cent.

§ 674. No liability in case of discretionary duties.

Discretionary duties due the public can create or involve in no event a liability either of the public corporation or the official performing such duties,[404] the rule applying not only to a negligent performance of such duties but the omission or entire failure to perform them.[405] In some cases the performance of the duty may be imperative but the manner of its performance or of the action

R. Co., 23 N. Y. 42; Atwater v. Trustees of Canandaigua, 124 N. Y. 602, 27 N. E. 385. "It is urged on the part of the plaintiff that the damages were incurred by the direct and physical invasion of his land by the defendants in the construction of the dam. * * * The dam did not, nor did any of the work, encroach upon the plaintiff's premises. The right to construct this dam and thus to obstruct the flow of water in that channel to the prejudice of owners of property affected by it, depended upon its necessity for the purpose of the work of the public improvement according to the plan devised for the structures to be erected. And, assuming as we do, * * * that it was such, and that they properly and expeditiously performed the work, it is not seen * * * how the defendants can be held liable for the consequences resulting from it to others." The principle applicable is the same whether the injury to the use of property resulting in damages is physically upon it or not, provided they are consequential. "Within this rule serious injury to property may be occasioned by the lawful exercise of powers of public character pursuant to law, and if the work is carefully and skillfully performed, the consequences may be damnum absque injuria when the legislature has provided no compensation." Springfield Milling Co. v. Lane County, 5 Or. 265.

[404] Kendall v. Stokes, 3 How. (U. S.) 87; Mister v. Brown, 59 Fed. 909; Craig v. Burnett, 32 Ala. 728; Askew v. Hale County, 54 Ala. 639; Eyman v. People, 6 Ill. 4; Nagle v. Wakey, 161 Ill. 387, 43 N. E. 1079, Phillips and Magruder, JJ., dissenting; Lane v. Boone County Com'rs, 7 Ind. App. 625, 35 N. E. 28; Newman v. Sylvester, 42 Ind. 106; Lincoln v. Hapgood, 11 Mass. 350; Wall v. Trumbull, 16 Mich. 223; Pawlowski v. Jenks, 115 Mich. 275, 73 N. W. 238; Reed v. Conway, 20 Mo. 22; School Dist. No. 2 v. Sabin County Com'rs, 9 Neb. 403; Sanborn v. Town of Deerfield, 2 N. H. 251; Fish v. Dodge, 38 Barb. (N. Y.) 163; Bassett v. Fish, 75 N. Y. 303; Atwater v. Village of Canandaigua, 124 N. Y. 602, 27 N. E. 385; State v. Williams, 34 N. C. (12 Ired.) 172; Chapin v. Ferry, 3 Wash. St. 386, 15 L. R. A. 116.

[405] Pritchard v. Keefer, 53 Ill. 117; Cubit v. O'Dett, 51 Mich. 347. But the performance of such duties is limited by the rights of individuals. Weinberg v. Regents of University, 97 Mich. 246; Baugh v. Lamb, 40 Miss. 493; Schoettgen v. Wilson, 48 Mo. 253; Carle v. City of De Soto, 63 Mo. App. 161; Templeton v. Nipper, 107 Tenn. 548, 64 S. W. 889.

may be discretionary and under these conditions, the performance may be enforced but the exercise of the discretionary element namely, the manner of the performance, will not be coerced.[406]

§ 675. Political and governmental or ministerial duties.

These duties are largely of a discretionary character; they are imposed upon departmental officials for the benefit of the public at large and not for that of any special individual. Their performance as well as its manner cannot be controlled by the judiciary.[407] Their due performance has been confided to the political judgment and sagacity as well as the discretion and ability of the officers selected to perform them.[408] In an early case,

[406] Carr v. Northern Liberties, 35 Pa. 324. "Government is a people's means of doing the best they can to secure harmony among conflicting interests, and to facilitate the free action of legitimate pursuits. They choose governors, and legislators, and judges, and councilmen, and other officers, to carry on their government, and though they make as good selections as they know how to do, yet their officers are sure to make mistakes, and sometimes to cause great damage to individuals; yet the people cannot be made answerable for this before the courts, except only in some special cases. They must suffer for their mistakes in choosing incompetent officers; but this is only a moral responsibility, to which all that is human must submit."

[407] Brown v. United States, 6 Ct. Cl. 171; Bartlett v. Crozier, 17 Johns. (N. Y.) 449.

Cooley, Torts (2d ed.) pp. 443, 444. "While offices are established and filled on public reasons, the incumbents of some are required to perform duties which specially concern individuals, and only indirectly concern the public. The case of the sheriff will furnish us with an apt illustration here. This officer serves criminal process, arrests and confines persons accused of crime, preserves order in court, and is conservator of the public peace, but he serves civil process also. The nature of the duty in any case suggests the remedy in case of neglect. If the duty he has failed to perform is a duty to the state, he is amenable to the state for his fault; while for the neglect of duties to individuals, only the person who is injured may maintain suit."

[408] People v. Knickerbocker, 114 Ill. 539; Com. v. Boone County Court, 82 Ky. 632; State v. Police Jury, 39 La. Ann. 759; People v. Auditor General, 36 Mich. 271; Brown County v. Winona & St. P. Land Co., 38 Minn. 397; State v. Young, 84 Mo. 90; People v. Chapin, 104 N. Y. 96; Com. v. McLaughlin, 120 Pa. 518; State v. Richland County Com'rs, 28 S. C. 258.

Mechem, Pub. Off. § 945. "Where the law imposes upon a public officer the right and duty to exercise judgment or discretion in respect to any matter submitted to him or in reference to which he is called upon to act, it is, of course, his judgment or discretion that is to be

Chief Justice Marshall observed:[409] "By the constitution of the United States, the president is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character and to his own conscience. To aid him in the performance of these duties, he is authorized to appoint certain officers, who act by his authority, and in conformity with his orders.

"In such cases, their acts are his acts; and whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion. The subjects are political. They respect the nation, not individual rights, and being intrusted to the executive, the decision of the executive is conclusive. The application of this remark will be perceived by adverting to the act of congress for establishing the department of foreign affairs. This officer, as his duties were prescribed by that act, is to conform precisely to the will of the president. He is the mere organ by whom that will is communicated. The acts of such an officer, as an officer, can never be examinable by the courts. But when the legislature proceeds to impose on that officer other duties; when he is directed pre-

exercised, and not that of any other officer or court. Courts, therefore, will not attempt by mandamus to compel the officer vested with such discretion to exercise it in any particular way, or to come to any particular decision, or to revise or alter his judgment when he has once exercised it."

[409] Marbury v. Madison, 1 Cranch (U. S.) 137. "It is not by the office of the person to whom the writ is directed, but the nature of the thing to be done, that the propriety or impropriety of issuing a mandamus is to be determined. Where the head of a department acts in a case, in which executive discretion is to be exercised; in which he is the mere organ of executive will; it is again repeated, that any application to a court to control, in any respect, his conduct would be rejected without hesitation.

"But where he is directed by law to do a certain act affecting the absolute rights of individuals, in the performance of which he is not placed under the particular direction of the president, and the performance of which the president cannot lawfuly forbid, and therefore is never presumed to have forbidden; as for example, to record a commission, or a patent for land, which has received all the legal solemnities; or to give a copy of such record; in such cases, it is not perceived on what ground the courts of the country are further excused from the duty of giving judgment that right be done to an injured individual, than if the same services were to be performed by a person not the head of a department."

emptorily to perform certain acts; when the rights of individuals are dependent on the performance of those acts; he is so far the officer of the law; is amenable to the laws for his conduct; and cannot at his discretion sport away the vested rights of others.

"The conclusion from this reasoning is, that where the heads of departments are the political or confidential agents of the executive, merely to execute the will of the president, or rather to act in cases in which the executive possesses a constitutional or legal discretion, nothing can be more perfectly clear than that their acts are only politically examinable. But where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy. * * * Impressions are often received without much reflection or examination, and it is not wonderful that in such a case as this the assertion, by an individual, of his legal claims in a court of justice, to which claims it is the duty of that court to attend, should at first view be considered by some, as an attempt to intrude into the cabinet, and to intermeddle with the perogatives of the executive.

"It is scarcely necessary for the court to disclaim all pretensions to such a jurisdiction. An extravagance, so absurd and excessive, could not have been entertained for a moment. The province of the court is, solely, to decide on the rights of individuals, not to inquire how the executive, or executive officers, perform duties in which they have a discretion. Questions in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court."

It follows, therefore, that there can arise no personal liability for the exercise or nonperformance of such an act and this principle applies not only to the chief executive and administrative officials of the nation or a state but also to the various subordinate officials whether elected by the public or selected in some other manner.[410]

§ 676. Ministerial duties; personal liability of official.

In many cases an officer is required by law to act, the manner and the time being specifically prescribed, the duty thus made

[410] United States v. General Land Office Com'r, 72 U. S. (5 Wall.) 563; Marbury v. Madison, 1 Cranch (U. S.) 137.

obligatory involving no discretion with respect to the circumstances or conditions under which prescribed. Such duties are usually regarded as ministerial[411] duties and in their performance a personal liability of a public officer or employe more frequently arises. It is difficult as in the case of all general principles to give a test for the determination of the character of a duty which is applicable to all circumstances and conditions.[412] Each case must be largely determined upon its own merits. It must be remembered, however, that the character of an act under which a liability may arise is not established by the name of the office or the title of the officer who performs it;[413] by the terminology of the statute that creates the office and prescribes its duties[414] nor by the fact that the official also performs duties clearly judicial and legislative in their character.[415] Legislative and judicial officers may also perform ministerial duties.[416]

[411] People v. Ridgley, 21 Ill. 65; McLean v. Jephson, 123 N. Y. 142, 9 L. R. A. 493.

[412] Halbut v. Forrest City, 34 Ark. 246; Wilson v. City of Shreveport, 29 La. Ann. 673.

[413] State v. Clinton, 28 La. Ann. 47; Reeves v. State, 47 Tenn. (7 Cold.) 96.

[414] Love v. Baehr, 47 Cal. 364.

[415] Bohler v. Verdery, 92 Ga. 715.

[416] Lee v. Lide, 111 Ala. 126, 20 So. 410. A probate judge is liable to a penalty for charging an unlawful fee under Ala. Code, § 3680. Thompson v. Holt, 52 Ala. 491; People v. Bush, 40 Cal. 344; Howe v. Mason, 14 Iowa, 510; McCord v. High, 24 Iowa, 336. "The character of the act itself will usually determine whether it be judicial or ministerial. If it be the execution of a determination, committed by the law to the judgment and discretion of the officer, which could be as well done by another as by the one thus clothed with the power of determination, it is a ministerial act. The fact that it requires skill and involves judgment and discretion, will not give it a judicial character.

The proper performance of grading, ditching and the construction of masonry, though they may require the highest order of engineering and mechanical skill, and demand the exercise of a high order of judgment in the selection of materials, and of discretion in the choice of means, cannot be regarded as the discharge of judicial functions. But the determination, that such work is necessary, and must be accomplished, may properly be said to partake of a judicial character. * * * The defendant, as supervisor of roads, is required, by law, to keep the highways in repair; he determines when and where repairs are necessary, and what work shall be done in order to effect the repairs. The determination may be regarded as of a judicial nature. He also is required to direct the work, to make the repairs he has determined upon; this is simply a ministerial duty."

Briggs v. Wardwell, 10 Mass. 356; Pike v. Megoun, 44 Mo. 491. When

Determination of conditions and circumstances. A public officer or employe may be required to determine the conditions or circumstances under which he is to perform an act and this will not change the character of the original act and make it one requiring the exercise of judgment and discretion and, therefore, not ministerial.[417]

§ 677. Conditions under which ministerial officers incur a liability.

A ministerial officer acting in good faith,[418] within the scope of his actual authority,[419] by a valid law [420] and performing a public

duties which are purely ministerial are cast upon officers whose chief functions are judicial and the ministerial duty is violated, the officer, although they must possess a judge, is still civilly responsible for such misconduct. To render a judge acting in a ministerial capacity liable, it must be shown that his decisions were not merely erroneous, but that he acted from a spirit of wilfulness, corruption or malice. Kerns v. Schoonmaker, 4 Ohio, 331; McTeer v. Lebow, 85 Tenn. 121.

[417] Grider v. Tally, 77 Ala. 422; Crane v. Camp, 12 Conn. 464; Ray v. City of Jeffersonville, 90 Ind. 572; Merchant v. Bothwell, 1 Mo. App. Rep'r, 131.

[418] Tracy v. Swartout, 10 Pet. (U. S.) 80; Butler v. Ashworth, 102 Cal. 663; Gregory v. Brooks, 37 Conn. 365. The presumption of law is that the acts of a public official in the performance of duties required of him are performed in good faith and without malice. Strong evidence is required to overcome this presumption. Plummer v. Harbut, 5 Iowa, 308; State v. Wedge, 24 Minn. 150; Cook v. Hecht, 2 Mo. App. Rep'r, 995; City of St. Joseph v. McCabe, 58 Mo. App. 542; Rowe v. Addison, 34 N. H. 306; Parks v. City Council of Greenville, 44 S. C. 168, 21 S. E. 540.

[419] Wiggins v. United States, 3 Ct. Cl. 412; Huthsing v. Bosquet, 17 Fed. 54; Green v. Swift, 47 Cal. 536; Mock v. City of Santa Rosa, 126 Cal. 330, 58 Pac. 826; Mallory v. Town of Huntington, 64 Conn. 88; City of East St. Louis v. Flannigen, 34 Ill. App. 596; State v. Windle, 156 Ind. 648, 59 N. E. 276; Morrell v. Inhabitants of Dixfield, 30 Me. 157; Plummer v. Sturtevant, 32 Me. 325; City of Blair v. Lantry, 21 Neb. 247, 31 N. W. 790; Orr v. Quimby, 54 N. H. 590; Timken v. Tallmadge, 54 N. J. Law, 117, 22 Atl. 996; City of Camden v. Varney, 63 N. J. Law, 325, 43 Atl. 889; Brown v. Smith, 24 Barb. (N. Y.) 419; Hicks v. Dorne, 42 N. Y. 47; State v. McLean, 121 N. C. 589, 28 S. E. 140, 42 L. R. A. 721; State v. Buchanan (Tenn. Ch. App.) 52 S. W. 480; Clay v. Wright, 44 Vt. 538; Robinson v. Rohr, 73 Wis. 436, 40 N. W. 668, 2 L. R. A. 366. But see Leet v. Shedd, 42 Vt. 277.

[420] Astrom v. Hammond, 3 McLean, 107, Fed. Cas. No. 596; Osborn v. Bank of U. S., 9 Wheat. (U. S.) 738; Poindexter v. Greenhow, 114 U. S. 270; Norton v. Shelby County, 118 U. S. 442. "An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contempla-

and imperative duty [421] which he can lawfully perform [422] can incur no liability whatever may be the result of his acts.[423] The rule in regard to the nonliability under such circumstances has been well stated by an eminent text book writer:[424] "As has been seen, the judicial and the legislative officer acting in good faith within his jurisdiction incurs no liability to private individuals, notwithstanding that they may have erred in judgment or that individuals may have suffered injury. A somewhat similar but more absolute immunity attaches to the ministerial officer. He is by law required to act; the manner, time and circumstances of his action are prescribed; he has no discretion whether to act or not; his action may be compelled by legal process; his duty is to do, not reason why. Such duties and responsibilities demand commensurate protection, and it is well settled that the ministerial officer who performs in the prescribed manner and with due care and diligence an act imposed upon him by law incurs no liability to any individual however much the latter may be injured."

The rule of liability stated. On the contrary, the weight of authority is equally to the effect that where the law imposes upon an officer, whether ministerial or otherwise, the performance of a ministerial duty within the definition of that phrase, which results in the special and peculiar advantage to an individual or in which he may have a special and direct interest, he may be liable [425] to

tion, as inoperative as though it had never been passed."

Henderson v. Collier & C. Lith. Co., 2 Colo. App. 251, 30 Pac. 40; Sumner v. Beeler, 50 Ind. 341. In an action against ministerial officers for damages caused by acts under an unconstitutional law, it is not available as a defense. Com. v. Carter, 21 Ky. L. R. 1509, 55 S. W. 701. Where money is paid a public officer under an unconstitutional act, its character will not permit him from being compelled to refund the money. Fisher v. McGirr, 67 Mass. (1 Gray) 1; Waterloo Woolen Mfg. Co. v. Shanahan, 58 Hun, 50, 11 N. Y. Supp. 829; Allen v. Sisson, 66 Hun, 140, 20 N. Y. Supp. 971.

[421] Carr v. Northern Liberties, 35 Pa. 324.

[422] City of Blair v. Lantry, 21 Neb. 247.

[423] Thompson v. Evans, 49 Ill. App. 289; Newman v. Sylvester, 42 Ind. 106; Rhodes v. Piper, 47 Ind. 457; Bright v. Murphy, 105 La. 795, 30 So. 145. The rule includes de facto officers. Smith v. Stephan, 66 Md. 381; Fitzpatrick v. Slocum, 89 N. Y. 358; First Nat. Bank of Gastonia v. Warlick, 125 N. C. 593, 34 S. E. 687; Yealy v. Fink, 43 Pa. 212; Fenwicke v. Gibbes, 2 Desaus. (S. C.) 629; School Trustees of Dist. No. 25 v. Farmer, 23 Tex. Civ. App. 39.

[424] Mechem, Pub. Off. § 661.

[425] Amy v. Des Moines County Sup'rs, 78 U. S. (11 Wall.) 136. "The rule is well settled, that where the law requires absolutely a min-

that individual for nonfeasance, misfeasance and malfeasance in respect to the performance of the duty.[426]

§ 678. Ministerial duty; definition.

A ministerial duty is one whose performance is imposed and prescribed by law both in respect to its time, mode and occasion and in all respects defined with such certainty that nothing remains for personal judgment or discretion.[427] It has been defined

isterial act to be done by a public officer, and he neglects or refuses to do such act, he may be compelled to respond in damages to the extent of the injury arising from his conduct. There is an unbroken current of authorities to this effect. A mistake as to his duty and honest intentions will not excuse the offender."

Eslava v. Jones, 83 Ala. 139; State v. Harris, 89 Ind. 363. "It is not enough in any case for a plaintiff, who seeks to recover for an injury caused by the negligence of another, to show simply injury and negligence; he must also show that there was a breach of duty owing to him. This general rule applies with peculiar force to persons who sue for injuries caused by official misconduct. It is not every person who sustains an injury from the negligence of a public officer that can maintain an action on the officer's bond.

"In general, a public officer is liable only to the person to whom the particular duty is owing, and the ruling question in all cases of the kind is as to whether the plaintiff shows the breach of a particular duty owing to him. It is not sufficient to show a general public duty, or a duty to some other person directly interested."

Strong v. Campbell, 11 Barb. (N. Y.) 135; Clark v. Miller, 54 N. Y. 528; Vose v. Reed, 54 N. Y. 657. Public officers charged with quasi-public trusts in the execution of which private persons are interested are not answerable for the misconduct of their predecessors. Houseman v. Girard Mut. Bldg. & Loan Ass'n, 81 Pa. 256.

[426] Bell v. Josselyn, 69 Mass. (3 Gray) 309. "Non-feasance is the omission of an act which a person ought to do; misfeasance is the improper doing of an act which a person might lawfully do; and malfeasance is the doing of an act which a person ought not to do at all." Amy v. Des Moines County Sup'rs, 78 U. S. (11 Wall.) 136; Balls v. Woodward, 51 Fed. 646; McCarthy v. Bauer, 3 Kan. 237; Prather v. City of Lexington, 52 Ky. (13 B. Mon.) 559; Rounds v. Mansfield, 38 Me. 586; Owen v. Hill, 67 Mich. 649, 34 N. W. 649; Raynsford v. Phelps, 43 Mich. 342; Merritt v. McNally, 14 Mont. 228, 36 Pac. 44; St. Joseph F. & M. Ins. Co v. Leland, 90 Mo. 177; Bieling v. City of Brooklyn, 120 N. Y. 98, 24 N. E. 389; Clark v. Miller, 54 N. Y. 528; Bennett v. Whitney, 94 N. Y. 302; Sawyer v. Corse, 17 Grat. (Va.) 230. See, also, Mechem, Pub. Off. § 665, and many cases cited.

[427] Flournoy v. City of Jeffersonville, 17 Ind. 169. "A ministerial act may, perhaps, be defined to be one which a person performs in a

as[428] "the duty is ministerial, when the law, exacting its discharge, prescribes and defines the time, mode and occasion of its performance, with such certainty that nothing remains for judgment or discretion. Official action, the result of performing a certain and specific duty arising from fixed and designated facts, is a ministerial act." In the notes will be found reference to cases deciding the question of liability in respect to the ministerial officers named.[429] A ministerial officer may be called upon to determine where and when and the manner in which certain work

given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, without regard to, or the exercise of, his own judgment upon the propriety of the act being done." Grider v. Tally, 77 Ala. 422; Pennington v. Steight, 54 Ind. 376; Ray v. City of Jeffersonville, 90 Ind. 572.

[428] Grider v. Tally, 77 Ala. 422; State v. Johnson, 71 (4 Wall.) 475. "A ministerial duty, the performance of which may, in proper cases, be required of the head of a department, by judicial process, is one in respect to which nothing is left to discretion. It is a simple, definite duty, arising under conditions admitted or proved to exist, and imposed by law." Sullivan v. Shanklin, 63 Cal. 247. "A duty is ministerial when an individual has such a legal interest in its performance that neglect of performance becomes a wrong to such individual." Pennington v. Streight, 54 Ind. 376; Ray v. City of Jeffersonville, 90 Ind. 572; Morton v. Comptroller General, 4 S. C. 430; General Land Office Com'r v. Smith, 5 Tex. 471; Rains v. Simpson, 50 Tex. 495.

[429] *Assessors.* Allen v. Archer, 49 Me. 346.

Canal sup't. Hicks v. Dorn, 42 N. Y. 47.

City officials. Butler v. Ashworth, 102 Cal. 663, 36 Pac. 922; Interstate Transp. Co. v. City of New Orleans, 52 La. Ann. 1859, 28 So. 310; Proctor v. Stone, 158 Mass. 564, 33 N. E. 704; Breen v. Field, 157 Mass. 279; Eichenlaub v. City of St. Joseph, 113 Mo. 395, 18 L. R. A. 590.

Clerks of court. Citizens' Bank v. Ward, 100 U. S. 195; Collins v. McDaniel, 66 Ga. 203; Billings v. Lafferty, 31 Ill. 318; The Governor v. Dodd, 81 Ill. 163; Haverly v. McClelland, 57 Iowa, 182; Smith v. Holmes, 54 Mich. 104; Rosental v. Davenport, 38 Minn. 543, 38 N. W. 618; Clark v. Marshall, 34 Mo. 429; State v. Windley, 99 N. C. 4.

County com'rs. Thomas v. Wilton, 40 Ohio St. 516; Board of Education of Bladen County v. Bladen County Com'rs, 113 N. C. 379, 18 S. E. 661.

County officials. Bridge v. Lincoln, 14 Mass. 367.

County supervisors. Santa Cruz R. Co. v. Santa Clara County, 62 Cal. 180.

Drain com'rs. Thiboaux v. Town of Thiboaux, 46 La. Ann. 1528.

Election officers. Friend v. Hamill, 34 Md. 298; Larned v. Wheeler, 140 Mass. 390; Monroe v. Collins, 17 Ohio St. 665; Fausler v. Parsons, 6 W. Va. 486; Gillespie v. Palmer, 20 Wis. 544.

Firemen. People v. Fire Com'rs

shall be done and also to execute or direct such work when it has been determined upon. The action of the first kind is quasi ju-

of City of New York, 106 N. Y. 257, 12 N. E. 596.

Highway officers. Munson v. Mallory, 36 Conn. 165; Fyman v. People, 6 Ill. 4; Illinois Agricultural Co. v. Cranston, 21 Ill. App. 174; Neinsteil v. Smith, 21 Ill. App. 235; Beyer v. Tanner, 29 Ill. 135; Brown v. Bridges, 31 Iowa, 138; Wheatly v. Mercer, 72 Ky. (9 Bush) 704; Bragg v. City of Bangor, 51 Me. 532; Wellman v. Dickey, 78 Me. 29; Sage v. Laurain, 19 Mich. 137; Callender v. Marsh, 18 Mass. (1 Pick.) 418.

Highway officials. Town of Denver v. Myers, 63 Neb. 107, 88 N. W. 191. A road overseer is charged with the responsibility of a faithful discharge of his duties in respect to the repair and improvement of the public highways under his control. Any excess charges made for services or materials made fraudulently, corruptly or not in good faith and beyond what they are reasonably worth in the market are unauthorized and create personal liability. Rowe v. Addison, 34 N. H. 306. Highway officers in making or repairing the roads in their districts are not liable for incidental damages to landowners, however, if in so doing they act with discretion and in a suitable and proper manner. If their acts are wanting, malicious or improper, however, a personal liability will be created. Waldron v. Berry, 51 N. H. 136; Garlinghouse v. Jacobs, 29 N. Y. 297; Gould v. Booth, 66 N. Y. 62; Dunlap v. Knapp, 14 Ohio St. 64; Rankin v. Buckman, 9 Or. 253; Moore v. State, 27 Tex. App. 439, 11 S. W. 457; Robinson v. Winch, 66 Vt. 110, 28 Atl. 884; Jackson v. Rankin, 67 Wis. 285.

Inspectors. Fath v. Koeppel, 72 Wis. 289.

Notaries public. Oakland Bank of Savings v. Murfey, 68 Cal. 455; McAllister v. Clement, 75 Cal. 182; Chapman v. McCrea, 63 Ind. 360; Reed v. Darlington, 19 Iowa, 349; Scotten v. Fegan, 62 Iowa, 236; Emmerling v. Graham, 14 La. Ann. 389; Hyde v. Planters' Bank, 17 La. 560. People v. Colby, 39 Mich. 456; People v. Butler, 74 Mich. 643, 42 N. W. 273; Bowling v. Arthur, 34 Miss. 41; First Nat. Bank v. Fourth Nat. Bank, 77 N. Y. 320; Henderson v. Smith, 26 W. Va. 829.

Policemen. City of Topeka v. Boutwell, 53 Kan. 20, 35 Pac. 819, 27 L. R. A. 593.

Register of deeds. Randolph v. State, 82 Ala. 527; Boylan v. Warren, 39 Kan. 301; Webber v. Townley, 43 Mich. 534. The duty of a recorder of deeds to permit a stranger to make a complete abstract of the records of his office considered and the recorder sustained in a refusal. Sinclair v. Slawson, 44 Mich. 123; Burton v. Tuite, 78 Mich. 363, 44 N. W. 282, 7 L. R. A. 73; Smith v. Holmes, 54 Mich. 104; Bishop v. Schneider, 46 Mo. 477; Morange v. Mix, 44 N. Y. 315; Davis v. Thompson, 1 Nev. 17; Hanson v. Eichstaedt, 69 Wis. 538; Lyman v. Edgerton, 29 Vt. 305.

State officials. Billings v. State, 27 Wash. 288, 67 Pac. 583.

Sheriffs and other officials. Mechem's Pub. Off. §§ 742–783 et

dicial in its nature and a different rule of liability would apply from that determining the liability of an officer in connection with the execution of work, this being purely ministerial.[430]

§ 679. What protection afforded ministerial officers.

A ministerial officer may be relieved from a liability for a failure to perform or a negligent performance of an imposed duty, first, through the lack of necessary public funds—the reason for an exemption in this case is apparent;[431] second, because of the contributory negligence of the individual to whom the duty negligently or omitted to be performed was due,[432] and third, because

seq.; State v. Nelson, 1 Ind. (Cart.) 522.

School officers. McCormick v. Burt, 95 Ill. 263; Fertich v. Michener, 111 Ind. 472; Donahue v. Richards, 38 Me. 379; School Dist. No. 3 v. Smalley, 58 Mo. App. 658; Gregory v. Small, 39 Ohio St. 346; Dickinson Tp. v. Linn, 36 Pa. 431; Burton v. Fulton, 49 Pa. 151.

Supt. public bld'gs. Connors v. Adams, 13 Hun (N. Y.) 427.

Tax collectors. Amy v. Des Moines County Sup'rs, 78 U. S. (11 Wall.) 136; Dow v. Humbert, 91 U. S. 294; Lott v. Hubbard, 44 Ala. 593; Neth v. Crofut, 30 Conn. 580; Hill v. Figley, 25 Ill. 156; Davis v. Brace, 82 Ill. 542; State v. Harris, 89 Ind. 363; Brainard v. Head, 15 La. Ann. 489; Seekins v. Goodale, 61 Me. 400; Nowell v. Tripp, 61 Me. 426; Underwood v. Robinson, 106 Mass. 296; Bird v. Perkins, 33 Mich. 28; Ranney v. Bader, 67 Mich. 476; Town of Warrensburg v. Miller, 77 Mo. 56; Kelley v. Noyes, 43 N. H. 209; Morange v. Mix, 44 N. Y. 315; Westfall v. Preston, 49 N. Y. 349; Gore v. Mastin, 66 N. C. 371; Cunningham v. Mitchell, 67 Pa. 78; Buzzell v. Johnson, 54 Vt. 90; McLean v. Cook, 23 Wis. 364.

Town officers. Bacheller v. Pinkham, 68 Me. 253; Village of Little Valley v. Ayers, 2 N. Y. Supp. 691.

Township officials. Stockwell v. White Lake Tp. Board, 22 Mich. 341; Yealy v. Fink, 43 Pa. 212; Webster v. White, 8 S. D. 479, 66 N. W. 1145.

[430] Spitznogle v. Ward, 64 Ind. 30; McCord v. High, 24 Iowa, 336; Stone v. City of Augusta, 46 Me. 137; Ashley v. City of Port Huron, 35 Mich. 296; Cubit v. O'Dett, 51 Mich. 347; Eagle Tp. Highway Com'rs v. Ely, 54 Mich. 173; Waldron v. Berry, 51 N. H. 136; Smith v. Gould, 61 Wis. 31.

[431] Studley v. Geyer, 72 Me. 286; Patterson v. Colebrook, 29 N. H. 94; Warren v. Clement, 24 Hun (N. Y.) 472; Garlinghouse v. Jacobs, 29 N. Y. 297; Hover v. Barkhoof, 44 N. Y. 113; People v. Ulster County Sup'rs, 93 N. Y. 397; Clapper v. Town of Waterford, 131 N. Y. 382.

[432] Lick v. Madden, 36 Cal. 208; Schnurr v. Huntington County Com'rs, 22 Ind. App. 188, 53 N. E. 425. For the injuries caused solely by the negligence of an individual contractor, the members of a board of county commissioners are not liable. Boardman v. Hayne, 29 Iowa, 339; Hatcher v. Dunn, 102

the official was acting under the authority of some process or order.[433] The protection afforded by the last reason is based upon the principle that all public officials are bound to obey, respect and execute the orders and processes of the courts or of superior officials. It is necessary, however, in this case, that the order or process be regular on its face, show no apparent defect or jurisdiction over the persons or property affected, and issued by that court or official whose directions and orders should be obeyed by the officer in question.[434]

Iowa, 411, 36 L. R. A. 689; Com. v. Roark, 62 Mass. (8 Cush.) 210; Bishop v. Schneider, 46 Mo. 472.

[433] Erskine v. Hohnbach, 81 U. S. (14 Wall.) 613. "Whatever may have been the conflict at one time, in the adjudged cases, as to the extent of protection afforded to ministerial officers acting in obedience to process, or orders issued to them by tribunals or officers invested by law with authority to pass upon and determine particular facts, and render judgment thereon, it is well settled now that if the officer or tribunal possesses jurisdiction over the subject-matter upon which judgment is passed, with power to issue an order or process for the enforcement of such judgment, and the order or process issued thereon to the ministerial officer is regular on its face, showing no departure from the law, or defect of jurisdiction over the person or property affected, then, and in such cases, the order or process will give full and entire protection to the ministerial officer in its regular enforcement against any prosecution which the party aggreived thereby may institute against him, although serious errors may have been committed by the officer or tribunal in reaching the conclusion or judgment upon which the order or process is issued." Harding v. Woodcock, 137 U. S. 43; Stutsman County v. Wallace, 142 U. S. 293; Duckworth v. Johnston, 7 Ala. 578; Sample v. Broadwell, 87 Ill. 617; Partlow v. Moore, 184 Ill. 119; Crenshaw v. Snyder, 117 Mo. 167, 22 S. W. 1104; Lusk v. Briscoe, 65 Mo. 555; Harman v. Brotherson, 1 Denio (N. Y.) 537; Simmons v. Simmons, 1 Harp. Eq. (S. C.) 256; Brown v. Mason, 40 Vt. 157; Randles v. Waukesha County, 96 Wis. 629, 71 N. W. 1034.

[434] Duckworth v. Johnston, 7 Ala. 578; Dilcher v. Raap, 73 Ill. 266; Housh v. People, 75 Ill. 487; Leachman v. Dougherty, 81 Ill. 324; Prell v. McDonald, 7 Kan. 426. A warrant of arrest in which the christian name of the defendant is omitted is no protection to the officer serving it. McKinney v. Chambliss, 3 La. Ann. 577; Damon v. Bryant, 19 Mass. (2 Pick.) 411; Whipple v. Kent, 68 Mass. (2 Gray) 410; Nichols v. Thomas, 4 Mass. 232; Com. v. Tracy, 46 Mass. (5 Metc.) 536; Pearce v. Atwood, 13 Mass. 324; Underwood v. Robinson, 106 Mass. 296; Paine v. Farr, 118 Mass. 74; Campbell v. Webb, 11 Md. 471; Dunn v. Gilman, 34 Mich. 256; St. Louis, A. & C. R. Co. v. Castello, 30 Mo. 124; Grafton Bank v. Kimball, 20 N. H. 107; Chegary v. Jenkins, 5 N. Y. (1 Seld.) 376; Decker v. Bryant, 7 Barb. (N. Y.) 182; Beach v. Furman, 9 Johns.

§ 680. Judicial officers; personal liability.

A judicial officer is one having the authority to hear and determine the rights of persons or property or the propriety of doing an act;[435] one representing the highest type of public officials to whom has been granted the power to perform duties involving the elements of judgment and discretion. The authorities, without exception, sustain the rule that such an officer, irrespective of motives,[436] is not liable for the results of an official act[437] within his jurisdiction[438] and in respect to which he has jurisdiction,[439] how-

(N. Y.) 229; Parker v. Walrod, 16 Wend. (N. Y.) 514; Imbert v. Hallock, 23 How. Pr. (N. Y.) 456; Frost v. Thomas, 24 Wend. (N. Y.) 418; Shaw v. Davis, 55 Barb. (N. Y.) 389; United Lines Tel. Co. v. Grant, 137 N. Y. 7; State v. Queen, 66 N. C. 615; Champaign County Bank v. Smith, 7 Ohio St. 43; McKinney v. Robinson, 84 Tex. 489; Pierson v. Gale, 8 Vt. 512; Driscoll v. Place, 44 Vt. 252; Sprague v. Birchard, 1 Wis. 457. The rule applies where the officer knows of a want of jurisdiction on the part of the court issuing the process though the writ is regular on its face. Eaton v. White, 2 Wis. 292.

[435] Grider v. Tally, 77 Ala. 422; People v. Bartels, 138 Ill. 322; Hatcher v. Dunn, 102 Iowa, 411, 36 L. R. A. 689; Amperse v. Winslow, 75 Mich. 234; State v. Sneed, 84 N. C. 816.

[436] Bradley v. Fisher, 80 U. S. (13 Wall.) 335; Irion v. Lewis, 56 Ala. 190; Calhoun v. Little, 106 Ga. 336, 32 S. E. 86, 43 L. R. A. 630; Henke v. McCord, 55 Iowa, 378; Pratt v. Gardner, 56 Mass. (2 Cush.) 68; Evans v. Foster, 1 N. H. 377; Barhyte v. Shepherd, 35 N. Y. 242; Rains v. Simpson, 50 Tex. 495; Johnston v. Moorman, 80 Va. 131.

[437] Bradley v. Fisher, 80 U. S. (13 Wall.) 351; Hunt v. Hunt, 72 N. Y. 217; Lange v. Benedict, 73 N. Y. 12, 29 Am. Rep. 80, and cases therein cited. See, also, Hunt v. Hunt, 72 N. Y. 217, 28 Am. Rep. 129.

[438] Bradley v. Fisher, 80 U. S. (13 Wall.) 335. "In the present case we have looked into the authorities and are clear, from them, as well as from the principle on which any exemption is maintained, that the qualifying words used were not necessary to a correct statement of the law, and that judges of courts of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly. A distinction must be here observed between excess of jurisdiction and the clear absence of all jurisdiction over the subject-matter. Where there is clearly no jurisdiction over the subject-matter, any authority exercised is a usurped authority, and for the exercise of such au-

[439] Randall v. Brigham, 74 U. S. (7 Wall.) 523; Stewart v. Cooley, 23 Minn. 347; Rochester White Lead Co. v. City of Rochester, 3 N. Y. 463; Yates v. Lansing, 5 Johns. (N. Y.) 282; Lange v. Benedict, 73 N. Y. 12.

ever injuriously such an act may have resulted to persons or property or however erroneous it may be considered by one thus affected.[440] Such a rule of nonliability is justified not only by public policy but also by the character of the duties performed.[441] It is well considered and stated with reasons and many authorities in a recent text book [442] and it is unnecessary here to further con-

thority, when the want of jurisdiction is known to the judge, no excuse is permissible. But where jurisdiction over the subject-matter is invested by law in the judge, or in the court which he holds, the manner and extent in which the jurisdiction shall be exercised are generally as much questions for his determination as any other questions involved in the case, although upon the correctness of his determination in these particulars the validity of his judgments may depend. Thus, if a probate court, invested only with authority over wills and the settlement of estates of deceased persons, should proceed to try parties for public offenses, jurisdiction over the subject of offenses being entirely wanting in the court, and this being necessarily known to the judge, his commission would afford no protection to him in the exercise of the usurped authority. But if on the other hand a judge of a criminal court, invested with general criminal jurisdiction over offenses committed within a certain district, should hold a particular act to be a public offense, which is not by the law made an offense, and proceed to the arrest and trial of a party charged with such act, or should sentence a party convicted to a greater punishment than that authorized by the law upon its proper construction no personal liability to civil action for such acts would attach to the judge, although those acts would be in excess of his jurisdiction, or of the jurisdiction of the court held by him, for these are particulars for his judicial consideration, whenever his general jurisdiction over the subject-matter is invoked. Indeed some of the most difficult and embarrassing questions which a judicial officer is called upon to consider and determine relate to his jurisdiction, or that of the court held by him, or the manner in which the jurisdiction shall be exercised. And the same principle of exemption from liability which obtains for errors committed in the ordinary prosecution of a suit where there is jurisdiction of both subject and person, applies in cases of this kind, and for the same reasons." Holcomb v. Cornish, 8 Conn. 375; Hitch v. Lambright, 66 Ga. 228; Estopinal v. Peyroux, 37 La. Ann. 477; Wright v. Rouss, 18 Neb. 234; Taylor v. Anderson, 6 Ohio, 144; Truesdell v. Combs, 33 Ohio St. 186; Kibling v. Clark, 53 Vt. 379.

[440] Pratt v. Gardner, 56 Mass. (2 Cush.) 63; Mangold v. Thorpe, 33 N. J. Law, 134; Yates v. Lansing, 5 Johns. (N. Y.) 282; Fausler v. Parsons, 6 W. Va. 486.

[441] Butler v. Bates, 7 Cal. 136; Marshall County Sup'rs v. Cook, 38 Ill. 44, 87 Am. Dec. 282; McCaslin v. State, 99 Ind. 428; State v. Bank of Missouri, 45 Mo. 528.

[442] Cooley, Torts (2d Ed.) p. 444. "For mere neglect in judicial duties no action can lie. A judge can-

sider the question except to quote from a decision of the supreme

not be sued because of delaying his judgments, or because he fails to bring to his duties all the care, prudence, and diligence that he ought to bring, or because he decides on partial views and without sufficient information. His selection for his office implies that he is to be governed in it by his own judgment; and it is always to be assumed that the judgment has been honestly exercised and applied. * * * His doing justice as between particular individuals, when they have a controversy before him, is not the end and object which were in view when his court was created, and he was selected to preside over or sit in it. Courts are created on public grounds; they are to do justice as between suitors, to the end that peace and order may prevail in the political society, and that rights may be protected and preserved. The duty is public, and the end to be accomplished is public: the individual advantage or loss results from the proper and thorough or improper and imperfect performance of a duty for which his controversy is only the occasion. The judge performs his duty to the public by doing justice between individuals, or, if he fails to do justice as between individuals, he may be called to account by the state in such form and before such tribunal as the law may have provided. But as the duty neglected is not a duty to the individual, civil redress, as for an individual injury, is not admissible. This, as we shall see hereafter, is not the sole reason for judicial exemption from individual suits, but it is one reason, and a very conclusive one. * * * If, however, we select the case of any judicial officer and endeavor to satisfy ourselves what would be the practical working of the opposite doctrine, we shall not be long in doubt that reasons abundant exist why the judge should be exempt from individual responsibility to those interested in the discharge of his duties. We shall also be able to perceive that while the upright judge may have reasons for desiring to be shielded against harassing litigation at the suit of those who may be displeased with his action, the general public has interests still more important which demand for him this immunity." * * * Whenever, therefore, the state confers judicial powers upon an individual, it confers them with full immunity for private suits. In effect, the state says to the officer that these duties are confided to his judgment; that he is to exercise his judgment fully, freely, and without favor, and he may exercise it without fear; that the duties concern individuals, but they concern more especially the welfare of the state, and the peace and happiness of society; that if he shall fail in the faithful discharge of them he shall be called to account as a criminal; but that in order that he may not be annoyed, disturbed, and impeded in the performance of these high functions, a dissatisfied individual shall not be suffered to call in question his official action in a suit for damages. This is what the state, speaking by the mouth of the common law, says to the judicial officer."

court of the United States[442a] where it is said: "The truth of this later observation is manifest to all persons having much experience with judicial proceedings in the superior courts. Controversies involving not merely great pecuniary interests, but the liberty and character of the parties, and consequently exciting the deepest feelings, are being constantly determined in those courts, in which there is a great conflict in the evidence and great doubt as to the law which should govern their decision. It is this class of cases which impose upon the judge the severest labor, and often create in his mind a painful sense of responsibility. Yet it is precisely in this class of cases that the losing party feels most keenly the decision against him, and most readily accepts anything but the soundness of the decision in explanation of the action of the judge. Just in proportion to the strength of his convictions of the correctness of his own view of the case he is apt to complain of the judgment against him, and from complaints of the judgment to pass to the ascription of improper motives to the judge. When the controversy involves questions affecting large amounts of property or relates to a matter of general public concern, or touches the interests of numerous parties, the disappointment occasioned by an adverse decision often finds vent in imputations of this character, and from the imperfections of human nature this is hardly a subject of wonder. If civil actions could be maintained in such cases against the judge, because the losing party should see fit to allege in his complaint that the acts of the judge were done with partiality, or maliciously, or corruptly, the protection essential to judicial independence would be entirely swept away. Few persons sufficiently irritated to institute an action against a judge for his official acts would hestitate to ascribe any character to the acts which would be essential to the maintenance of the action.

"If upon such allegations a judge could be compelled to answer in a civil action for his judicial acts, not only would his office be degraded and his usefulness destroyed, but he would be subjected for his protection to the necessity of preserving a complete record of all the evidence produced before him in every litigated case, and of the authorities cited and arguments presented, in order that he might be able to show to the judge before whom he might be summoned by the losing party—and that judge perhaps one of

[442a] Bradley v. Fisher, 80 U. S. (13 Wall.) 335.

an inferior jurisdiction—that he had decided as he did with judicial integrity; and the second judge would be subjected to a similar burden, as he in his turn might also be held amenable by the losing party. * * * The exemption of judges of the superior courts of record from liability to civil suits for their judicial acts existing when there is jurisdiction of the subject-matter, though irregularity and error attend the exercise of the jurisdiction, the exemption cannot be affected by any consideration of the motives with which the acts are done. The allegations of malicious or corrupt motives could always be made, and if the motives could be inquired into judges would be subjected to the same vexatious litigation upon such allegations, whether the motives had or had not any real existence. Against the consequences of their erroneous or irregular action, from whatever motives proceeding, the law has provided for private parties numerous remedies, and to those remedies they must, in such cases, resort. But for malice or corruption in their action whilst exercising their judicial functions within the general scope of their jurisdiction, the judges of these courts can only be reached by public prosecution in the form of impeachment, or in such other form as may be specially prescribed."

§ 681. Jurisdiction.

The principle above stated will not apply where the public official was acting in a private capacity without his jurisdiction or in respect to a matter as to which he did not possess jurisdiction. Jurisdiction has been defined as "the authority of law to act officially in the matter then in hand,"[443] and may include jurisdiction of the person, of the subject-matter or of the thing involved. A judicial officer has jurisdiction of the person when one is before a particular court by reason of the service of legal and appropriate process duly executed or by his voluntary appearance.[444]

Jurisdiction of the subject-matter is the power to adjudge concerning the general question involved and is not dependent upon the state of facts which may appear in a particular case arising or which is claimed to have arisen under that general question. It is the right to exercise judicial power over a particular class

[443] Collier v. State, 2 Stew. (Ala.) 388; Fain v. Garthright, 5 Ga. 12

[444] Cooper v. Reynolds, 77 U. S. (10 Wall.) 308; Lange v. Benedict, 73 N. Y. 12.

of cases and does not depend upon the ultimate existence of a good cause of action in the plaintiff in a particular case.[445] As accurately stated by Judge Sanborn, of the Federal bench: "Jurisdiction of the subject-matter is the power to deal with the general abstract question, to hear the particular facts in any case relating to this question, and to determine whether or not they are sufficient to invoke the exercise of that power. It is not confined to cases in which the particular facts constitute a good cause of action, but it includes every issue within the scope of the general power vested in the court, by the law of its organization, to deal with the abstract question. Nor is this jurisdiction limited to making correct decisions. It empowers the court to determine every issue within the scope of its authority according to its own view of the law and the evidence, whether its decision is right or wrong, and every judgment or decision so rendered is final and conclusive upon the parties to it, unless reversed by writ of error or repeal, or impeached for fraud." [446]

§ 682. Distinction between superior and inferior judicial officers with respect to liability.

In respect to the liability of judicial officers for the results of their official and judicial acts, a distinction must be observed between judges of courts of superior and inferior jurisdiction. The rule of nonliability only applies, it will be remembered, when the judicial officer is acting officially within his jurisdiction and in respect to a matter over which he has jurisdiction.[447] In judicial systems as they exist in the states and the United States, are to be found courts of superior or general jurisdiction and those of inferior or of special and limited jurisdiction. The presumption of law with respect to acts of a judicial officer of a superior court is that he is acting within his powers and within the powers of the court.[448]

No such presumption exists with reference to the judicial action of an officer of an inferior or subordinate court. The jurisdiction

[445] Cooper v. Reynolds, 77 U. S. (10 Wall.) 308; Hunt v. Hunt, 72 N. Y. 217.

[446] Foltz v. St. Louis & S. F. Ry. Co., 60 Fed. 316.

[447] Beckham v. Nacke, 56 Mo. 546; Fausler v. Parsons, 6 W. Va. 486.

[448] Haynes v. Butler, 30 Ark. 69; Huey v. Richardson, 2 Har. (Del.) 206.

of the latter must appear;[449] that of the former is presumed and the burden of proof is upon the one attacking the jurisdiction.[450] The results of this distinction when considering the question of liability are apparent. A judge of a superior court possesses greater freedom of action, not only in passing upon matters clearly within his jurisdiction but also in determining whether he has the jurisdiction to try particular cases and a wrong decision in this respect will not render him civilly liable.[451] On the other hand, a judge of an inferior or subordinate court of limited jurisdiction is restricted in his action, and, in cases of doubtful jurisdiction, the doubt should be resolved against a retention of jurisdiction rather than in favor of it. A wrong decision, therefore, in regard to the jurisdiction of the court in a particular case may lead to a personal liability when this would not be the case in considering the responsibility of the judge of a superior court.[452]

§ 683. Quasi judicial officers.

The rule of nonliability attaches to quasi judicial or ministerial offices performing judicial or quasi judicial duties under substantially the same conditions and circumstances as applying to a strictly judicial officer.[453] Some authorities go to the extent of

[449] Levy v. Shurman, 6 Ark. 182; Tucker v. Harris, 13 Ga. 1; Kenney v. Greer, 13 Ill. 432; Lowry v. Erwin, 6 Rob. (La.) 192; Rossiter v. Peck, 69 Mass. (3 Gray) 538; Palmer v. Oakley, 2 Dough. (Mich.) 433; Reynolds v. Stansbury, 20 Ohio, 344.

[450] See authorities cited in preceding note.

[451] Randall v. Brigham, 74 U. S. (7 Wall.) 523; Bradley v. Fisher, 80 U. S. (13 Wall.) 335; McCall v. Cohen, 16 S. C. 445.

[452] Craig v. Burnett, 32 Ala. 728; Kelly v. Moore, 51 Ala. 366; Inos v. Winspear, 18 Cal. 397; Lanpher c. Dewell, 56 Iowa, 153; Piper v. Pearson, 68 Mass. (2 Gray) 121; Kelly v. Bemis, 70 Mass. (4 Gray) 83; Hendrick v. Whittemore, 105 Mass. 28; Palmer v. Town of Carroll, 24 N. H. 314; Yates v. Lansing, 5 Johns. (N. Y.) 282; Morrill v. Thurston, 46 Vt. 732; Vaughn v. Congdon, 56 Vt. 111; Cooley, Torts (2d Ed.) p. 491. But see Maguire v. Hughes, 13 La. Ann. 281; Jordan v. Hanson, 49 N. H. 199; Grove v. Van Duyn, 44 N. J. Law, 654; Bocock v. Cochran, 32 Hun (N. Y.) 521; Clark v. Holdridge, 58 Barb. (N. Y.) 61, and McCall v. Cohen, 16 S. C. 445.

[453] Downer v. Lent, 6 Cal. 94; McConoughey v. Jackson, 101 Cal. 265, 35 Pac. 863; Porter v. Haight, 45 Cal. 631; Green v. Swift, 47 Cal. 536; Campbell v. Polk County, 3 Iowa, 467; Wasson v. Mitchell, 18 Iowa, 153; Green v. Talbot, 36 Iowa, 499; State v. Hastings, 37 Neb. 96, 55 N. W. 774; Inhabitants of Morris Tp. v. Carey, 27 N. J. Law (3

holding that there can be no liability under the conditions noted in the preceding sections,[454] but the true rule undoubtedly is that quasi judicial officers are personally liable for the results of their official action when actuated by corrupt or malicious motives.[455] The same rule of nonliability will apply to executive officers for acts done in a judicial or quasi judicial capacity.[456]

§ 684. Legislative and quasi legislative duties.

The power of making laws for the government of separate communities is vested in the legislative or law-making branch of the government. It is a discretionary duty; one which cannot be

Dutch.) 377; Wilson v. City of New York, 1 Denio (N. Y.) 595; Seaman v. Patten, 2 Caine (N. Y.) 312; Weaver v. Devendorf, 3 Denio (N. Y.) 117. "The act complained of in this case was, therefore, a judicial determination. The assessors were judges acting clearly within the scope and limit of their authority. They were not volunteers, but the duty was imperative and compulsory; and acting, as they did. in the performance of a public duty, in its nature judicial, they were not liable to an action, however erroneous or wrongful their determination may have been. This case might be disposed of on narrow ground, for there was no evidence to justify the conclusion that the defendants acted maliciously in fixing the value of the property of the plaintiff or of any one else; and surely it will not be pretended they were liable for a mere error of judgment. But I prefer to place the decision on the broad ground that no public officer is responsible in a civil suit, for a judicial determination, however erroneous it may be, and however malicious the motive which produced it. Such acts, when corrupt, may be punished criminally, but the law will not allow malice and corruption to be charged in a civil suit against such an officer, for what he does in the performance of a judicial duty. The rule extends to judges from the highest to the lowest; to jurors, and to all public officers, whatever name they may bear, in the exercise of judicial power." People v. Stocking, 50 Barb. (N. Y.) 573; Rail v. Potts, 27 Tenn. (8 Humph.) 225; Grant v. Lindsay, 58 Tenn. (11 Heisk.) 651; State v. Kinsbury, 37 Tex. 159; Steele v. Dunham, 26 Wis. 393.

[454] Green v. Swift, 47 Cal. 536; Turpen v. Booth, 56 Cal. 65; Walker v. Hallock, 32 Ind. 239; Jones v. Brown, 54 Iowa, 74; Wall v. Trumball, 16 Mich. 228; Amperse v. Winslow, 75 Mich. 234, 42 N. W. 823; Waldron v. Berry, 51 N. H. 136; Barhyte v. Shepherd, 35 N. Y. 238; East River Gaslight Co. v. Donnelly, 93 N. Y. 557; Gregory v. Small, 39 Ohio St. 346; Burton v. Fulton, 49 Pa. 151; Wilson v. Marsh, 34 Vt. 352; Steele v. Dunham, 26 Wis. 393.

[455] Walker v. Hallock, 32 Ind. 239; Elmore v. Overton, 104 Ind. 548; Lilienthal v. Campbell, 22 La. Ann. 600; Lincoln v. Hapgood, 11 Mass. 350; Larned v. Wheeler, 140 Mass. 390; Monroe v. Collins, 17 Ohio St. 665.

[456] Elliott v. City of Chicago, 48

coerced [457] and for a failure to perform which or for the passage of unjust and oppressive laws there can be no personal or civil liability to any individual member of the community or of the community at large for the damages which may have been suffered because of such legislation.[458] The weight of authority is to the effect that the motives influencing legislators in the passage of laws cannot be inquired into and cannot be made the basis of civil action for damages, whether such motives be corrupt, dishonest or malicious.[459] The principle, however, applies that these officers must act within their authority and this is especially true of members of subordinate legislative or quasi legislative bodies like city councils, boards of town or village trustees.[460]

Freedom from arrest. To protect the members of law-making bodies in the performance of their duties and to avoid all semblance of coercion or undue influence, not only is the rule of non-

Ill. 293; Muscatine Western R. Co. v. Horton, 38 Iowa, 33; Merchant v. Bothwell, 1 Mo. App. Rep'r, 131.

[457] Wells v. City of Atlanta, 43 Ga. 67; Baker v. State, 27 Ind. 485; Ann Arundel County Com'rs v. Duckett, 20 Md. 469; Jones v. Loving, 55 Miss. 109; Borough of Freeport v. Marks, 59 Pa. 253; Cooley, Torts (2d Ed.) p. 443. "If we take the case of legislative officers, their rightful exemption from liability is very plain. Let it be supposed that an individual has a just claim against the state which the legislature ought to allow, but neglects or refuses to allow. In such a case there may be a moral wrong, but there can be no legal wrong. The legislature has full discretionary authority in all matters of legislation, and it is not consistent with this that the members should be called to account at the suit of individuals for their acts and neglects. Discretionary power is, in its nature, independent; to make those who wield it liable to be called to account by some other authority is to take away discretion and destroy independence. This remark is not true, exclusively, of legislative bodies proper, but it applies also to inferior legislative bodies, such as boards of supervisors, county commissioners, city councils and the like. When such bodies neglect and refuse to proceed to the discharge of their duties, the courts may interpose to set them in motion; but they cannot require them to reach particular conclusions, nor, for their failure to do so, impose the payment of damages upon them, or upon the municipality they represent."

[458] Wimbish v. Hamilton, 47 La. Ann. 246, 16 So. 856; Jones v. Loying, 55 Miss. 109.

[459] Coverdale v. Edwards, 155 Ind. 374, 58 N. E. 495; Amperse v. Winslow, 75 Mich. 234; Jones v. Loving, 55 Miss. 109. See, also, § 508, ante. But see Baker v. State 27 Ind. 485.

[460] Pine Bluff Water Co. v. Sewer Dist., 56 Ark. 205, 19 S. W. 576; Larned v. Briscoe, 62 Mich. 393, 29 N. W. 22; Barger v. City of Hickory, 130 N. C. 550, 41 S. E. 708.

liability above stated applied and maintained, but constitutional provisions usually exist exempting members of legislative bodies from arrest [461] or the service of process in civil actions [462] while they are engaged in the actual performance of their duties; this including not only the actual length of a legislative session, but also a reasonable time for assembling and the return of members to and from the place of meeting,[463] the exemption applying as a rule in all cases except for crimes of the gravest character such as treason or felony.[464]

§ 685. Rights of a public official.

The relation which exists between a public official and the corporation is one created by law and not partaking in the least of the nature of a contract.[465] A public official is regarded in respect to the performance of his public and official duties as a trustee for the corporation which he represents and for its interests whatever may be their character.[466] The duties of a public official are those attached by law to a particular office; they are fixed and prescribed by law and the question of compensation is dependent upon the terms of the law which creates the office and prescribes its duties.[467] If there is no compensation provided, the services must be performed gratuituously.[468] If one is not willing to enter

[461] United States Const. art. 1, § 6; Kilbourn v. Thompson, 103 U. S. 168; Chase v. Fish, 16 Me. 136; Washburn v. Phelps, 24 Vt. 506; Prentis v. Com., 5 Rand. (Va.) 697.

[462] Chase v. Fish, 16 Me. 136; Coffin v. Coffin, 4 Mass. 1; Prentis v. Com., 5 Rand. (Va.) 697.

[463] Kilbourn v. Thompson, 103 U. S. 168.

[464] Little Rock & Ft. S. R. Co. v. Worthen, 46 Ark. 312; Lynn v. Polk, 76 Tenn. (8 Lea) 121.

[465] See §§ 596 et seq, ante.

[466] Andrews v. Pratt, 44 Cal. 309. County supervisors are regarded as trustees for the property interests of their counties and the same good faith towards the county is required of them as of an ordinary trustee to his cestui que trust.

[467] Yates v. National Home, 103 U. S. 674; Dunwoody v. United States, 143 U. S. 578; Merwin v. Boulder County Com'rs, 29 Colo. 169, 67 Pac. 285; Gross v. Whitley County Com'rs, 158 Ind. 531, 64 N. E. 25, 58 L. R. A. 394.

[468] Dunwoody v. United States, 23 Ct. Cl. 82; Kinney v. United States, 60 Fed. 883. "Plaintiff claims, irrespective of said deficiency acts, that she is entitled to payment for said services as part of the miscellaneous expenses of courts. I think that such was not the intention of congress, as evidenced by subsequent deficiency acts, appropriating money specifically to pay jury commissioners. Furthermore, this was a new office, without any specified emoluments. In the absence of a

upon or continue in public office and discharge its duties for the compensation as fixed by statutes regulating the amount, he is at perfect liberty to decline the office or tender his resignation.[469] The performance of a service attached to a public office carries with it no contract right of compensation.[470] The claims of a public official of this character are dependent upon the terms of a particular law.[471]

special provision to that effect, I do not think that the right to compensation, and the right of appropriation from a particular fund hitherto devoted to other purposes, can be maintained under such circumstances. Where a service of this character is imposed upon an individual, while it is his duty to perform it, no obligation is implied on the part of the government to grant any compensation therefor, except where specific provision is made for the payment of such compensation." State v. Brewer, 59 Ala. 130; Locke v. Central City, 4 Colo. 65. Garfield County Com'rs v. Leonard, 26 Colo. 145, 57 Pac. 693; City of Durango v. Hampson, 29 Colo. 77, 66 Pac. 883; Coleman v. City of Elgin, 45 Ill. App. 64; Ellis v. Steuben County, 153 Ind. 91, 54 N. E. 382; Vandercook v. Williams, 106 Ind. 345; Morgantown Deposit Bank v. Johnson, 108 Ky. 507, 56 S. W. 825; Barton v. City of New Orleans, 16 La. Ann. 317; People v. Calhoun County Sup'rs, 36 Mich. 10; Gardner v. Newago County Sup'rs, 110 Mich. 94, 67 N. W. 1091; Wayne County v. Reynolds, 126 Mich. 231, 85 N. W. 574; Alberts v. Torrent, 98 Mich. 512, 57 N. W. 569; State v. Meserve, 58 Neb. 451, 78 N. W. 721; Sampson v. Town of Rochester, 60 N. H. 477; McEwan v. Town of West Hoboken, 58 N. J. Law, 512, 34 Atl. 130; Troth v. Chosen Freeholders of Camden County, 60 N. J. Law, 190, 37 Atl. 1017; Snyder v. Board of Education of Albuquerque, 10 N. M. 446, 62 Pac. 190; Howland v. Wright County, 82 Iowa, 164, 47 N. W. 1086; Hope v. Hamilton County, 101 Tenn. 325, 47 S. W. 487; Nash v. City of Knoxville, 108 Tenn. 68, 64 S. W. 1062; McCumber v. Waukesha County, 91 Wis. 442, 65 N. W. 51.

[469] Coyne v. Rennie, 97 Cal. 590, 32 Pac. 578; Hobbs v. City of Yonkers, 32 Hun (N. Y.) 454.

[470] Lewis v. City of Denver, 9 Colo. App. 328, 48 Pac. 317; Gross v. Whitley County Com'rs, 158 Ind. 531, 64 N. E. 25, 58 L. R. A. 394; Merzbach v. City of New York, 10 Misc. 131, 30 N. Y. Supp. 908; Collingsworth County v. Myers (Tex. Civ. App.) 35 S. W. 414; Hall v. State, 39 Wis. 79.

[471] Knox v. Los Angeles County Sup'rs, 58 Cal. 59; Village of La Grange v. Benze, 33 Ill. App. 56; Town of Carlyle v. Sharp, 51 Ill. 71; Sprout v. Kelly, 37 Iowa, 44; Stephens v. Allen, 19 Ky. L. R. 1707, 44 S. W. 386; Talbot v. Inhabitants of East Machias, 76 Me. 415; Banks v. State, 60 Md. 305; Brophy v. Marble, 118 Mass. 548; Browne v. Livingston County Sup'rs, 126 Mich. 276, 85 N. W. 745; Beaumont v. Ramsey County, 32 Minn. 108; Swann v. Josselyn, 22 Miss. (14 Smedes & M.) 106; State v. Wright 17 Mont. 565, 44 Pac. 89; McGrath v. Grout, 171 N. Y. 7; Wiles v. Mc-

§ 686. Compensation; amount.

From the principles as stated in the preceding section it follows that the amount of compensation is determined by and not from the extent or value of the services rendered.[472]

Where the duties of an office are prescribed and its compensation, the fact that a greater length of time was necessary for their performance than anticipated, that one is obliged to work more than an ordinary working day [473] or even on Sundays,[474] that additional duties are imposed by subsequent legislation [475] or through

Intosh County, 10 N. D. 594, 88 N. W. 710; Blackburn v. Oklahoma City, 1 Okl. 292, 31 Pac. 782, 33 Pac. 708; State v. Baldwin, 14 S. C. 135; City of Huron v. Campbell, 3 S. D. 309, 53 N. W. 182; Herron v. Lyman County, 11 S. D. 414, 78 N. W. 996; Bardsley v. Sternberg, 17 Wash. 243, 49 Pac. 499. Where a city charter provides no compensation, it controlling the subject, an ordinance is invalid that gives a salary to councilmen.

In regard to the liability for the services of an attorney appointed by the court to defend a prisoner indicted on a criminal charge, see the following cases deciding that no compensation can be recovered: Rowe v. Yuba County, 17 Cal. 61; Lamont v. Solano County, 49 Cal. 158; Vise v. County of Hamilton, 19 Ill. 78; Davis v. Linn County, 24 Iowa, 508; Case v. Shawnee County Com'rs, 4 Kan. 511; Bacon v. County of Wayne, 1 Mich. 641; Kelley v. Andrew County, 43 Mo. 338.

See the following cases to the contrary: Hall v. Washington County, 2 G. Greene (Iowa) 473; Carpenter v. Dane County, 9 Wis. 274; Dane County v. Smith, 13 Wis. 585.

[472] Yates v. National Home, 103 U. S. 674; Moren v. Blue, 47 Ala. 709. Members of the legislature are not entitled to their per diem compensation during the period of adjournment. Rowe v. County of Kern, 72 Cal. 353, 14 Pac. 11; Marquis v. City of Santa Ana, 103 Cal. 661, 37 Pac. 650; Cunningham v. Moody, 3 Idaho, 125, 28 Pac. 395; Fawcett v. Woodbury County, 55 Iowa, 154; City of Des Moines v. Polk County, 107 Iowa, 525, 78 N. W. 249; Getchell v. Inhabitants of Wells, 55 Me. 433; Farnsworth v. Inhabitants of Melrose, 122 Mass. 268; People v. Miller, 24 Mich. 458; City of Iron Mountain v. Uddenberg, 127 Mich. 189, 86 N. W. 434; Baker v. City of Utica, 19 N. Y. 326; Gibson v. Roach, 2 App. Div. 86, 37 N. Y. Supp. 567; Haswell v. City of New York, 81 N. Y. 255; Barnes v. Town of Bakersfield, 57 Vt. 375.

[473] Lemoine v. City of St. Louis, 120 Mo. 419, 25 S. W. 537; Id., 72 Mo. 404; Vogt v. City of Milwaukee, 99 Wis. 258, 74 N. W. 789.

[474] Pray v. United States, 106 U. S. 594. But see Robinson v. Dunn, 77 Cal. 473, 19 Pac. 878; Tyrrel v. City of New York, 159 N. Y. 239, 53 N. E. 1111, reversing 84 App. Div. 334, 54 N. Y. Supp. 372.

[475] Stansbury v. United States, 75 U. S. (8 Wall.) 33; United States v. Smith, 1 Bond, 68, Fed. Cas. No. 16,321; Turpen v. Tipton County

orders given by superior officers,[476] and that extra compensation has been allowed or promised,[477] does not give him any legal claim for extra pay for the performance of these services. Based upon the same reason, another familiar principle of law can be stated, namely, that which prohibits or prevents a public officer from receiving a reward or compensation for the rendition of services which pertain to his official position and which by law he is required to do.[478] The fact that there is inadequate[479] or no com-

Com'rs, 7 Ind. 172; Miami County Com'rs v. Blake, 21 Ind. 32; City of Covington v. Mayberry, 72 Ky. (9 Bush) 304; People v. N. Y. City & County Sup'rs, 1 Hill (N. Y.) 362; People v. Devlin, 33 N. Y. 269; Haynes v. State, 22 Tenn. (3 Humph.) 480.

[476] Folger v. United States, 103 U. S. 30.

[477] Stansbury v. United States, 1 Ct. Cl. 123, affirmed 75 U. S. (8 Wall.) 33; United States v. Cadwalader, Gilp. 563, Fed. Cas. No. 14,706; Marshall County Com'rs v. Johnson, 127 Ind. 238, 26 N. E. 821.

[478] United States v. Smith, 1 Bond. 68, Fed. Cas. No. 16,321; Prairie County v. Vaughan, 64 Ark. 203; Garvie v. City of Hartford, 54 Conn. 440, 7 Atl. 723; In re Russell, 51 Conn. 577; Madison County v. Bruner, 13 Ill. App. 599; Hughes v. People, 82 Ill. 78; Bruner v. Madison County, 111 Ill. 11; United States v. Chassell, 6 Blatchf. 421, Fed. Cas. No. 14,789. But the rule does not debar one from claiming as an informer a share of the fine imposed. Jay County Com'rs v. Templar, 34 Ind. 322; Oren v. St. Joseph County Com'rs, 157 Ind. 158, 60 N. E. 1019; Legler v. Paine, 147 Ind. 181; City of Council Bluffs v. Waterman, 86 Iowa, 688, 53 N. W. 289; State v. Olinger (Iowa) 72 N. W. 441; State v. Corning, 44 Kan. 442, 24 Pac. 966; Lacey v. Waples, 28 La. Ann. 158; Beauregard v. Parish of East Baton Rouge, 28 La. Ann. 306; O'Sullivan v. City of New Orleans, 49 La. Ann. 616, 21 So. 854; Goud v. City of Portland, 96 Me. 125, 51 Atl. 820; Briggs v. City of Taunton, 110 Mass. 423; Andrews v. Wilcoxson, 66 Mich. 331, 33 N. W. 533; Libby v. Anoka County Com'rs, 38 Minn. 448, 38 N. W. 205; Carroll v. City of St. Louis, 12 Mo. 444; Chamberlain v. Kansas City, 125 Mo. 430, 28 S. W. 745; Fernald v. City of Dover, 70 N. H. 42, 47 Atl. 258; Clark v. City of Portsmouth, 68 N. H. 263, 44 Atl. 388; Evans v. City of Trenton, 24 N. J. Law, (4 Zab.) 764; Bayha v. Webster County, 18 Neb. 131; Hazelet v. Holt County, 51 Neb. 716.

Hatch v. Mann, 15 Wend. (N. Y.) 44. "That a public officer whose fees are prescribed by law may maintain an action to recover an additional sum promised him by a party for doing his official duty is a monstrous proposition fraught with every kind of mischief. The pretense that it is for extra services would cover any conceivable corruption or extortion." Wendell v. City of Brooklyn, 29 Barb. (N. Y.) 204;

[479] Independence County v. Young, 66 Ark. 30, 48 S. W. 676; Rindge v. Lamb, 58 N. H. 278; Billings v. City of New York, 68 N. Y. 413; Doolan v. City of Manitowoc, 43 Wis. 312.

pensation [480] provided does not operate to suspend the application of the rule. Public policy as well forbids that the performance of official duties prescribed by statute should not be made dependent upon the amount of reward or extra compensation that a public officer through influence, favoritism or blackmail can secure.[481]

(a) When claim for extra compensation allowed. But where an officer or employe performs extra services outside of official duties and with which they have no affinity or connection, extra compensation can be secured based usually upon the reasonable value of such services or their value as measured by the amount paid other officials performing similar duties.[482]

Reynolds v. City of Mt. Vernon, 26 App. Div. 581, 50 N. Y. Supp. 473. Richmond County Sup'rs v. Ellis, 59 N. Y. 620; Pearson v. Stephens, 56 Ohio St. 126; Jones v. Lucas County Com'rs, 57 Ohio St. 189, 48 N. E. 882; Hays v. City of Oil City (Pa.) 11 Atl. 63; City of Scranton School Dist. v. Simpson, 138 Pa. 202, 19 Atl. 359; Albright v. Bedford County, 106 Pa. 582; Hope v. Hamilton County, 101 Tenn. 325, 47 S. W. 487; Christopherson v. Stanton, 13 Utah, 85; City of Decatur v. Vermillion, 77 Vt. 315; City of Tacoma v. Lillis, 4 Wash. 797, 31 Pac. 321, 18 L. R. A. 372; Massing v. State, 14 Wis. 502; Kewaunee County Sup'rs v. Knipfer, 37 Wis. 496; Ring v. Devlin, 68 Wis. 384; Quaw v. Path, 98 Wis. 586, 74 N. W. 369; Anderson v. City of Milwaukee, 113 Wis. 1, 88 N. W. 905. But see Murphy v. City of New Orleans, 11 La. Ann. 323. A police officer is not excluded from the benefit of a reward where one is offered for the apprehension of a felon. The exception is usually the rule in the case of sheriffs or officers of a similar character who are not required or permitted to perform their public duties outside the limits of their jurisdiction or are not required to arrest fugitives from justice from another state. Morrell v. Quarels, 35 Ala. 544; Harris v. Moore, 70 Cal. 502; Bronenberg v. Coburn, 110 Ind. 169; Pilie v. City of New Orleans, 19 La. 274; Gregg v. Pierce, 53 Barb. (N. Y.) 387; Brown v. Godfrey, 33 Vt. 120.

[480] White v. Inhabitants of Levant, 78 Me. 568; Perry v. Village of Cheboygan, 55 Mich. 250; State v. Eskew, 64 Neb. 600, 90 N. W. 629.

[481] Ryce v. City of Osage, 88 Iowa. 41 Pa. 335; State v. Cheetham, 21 558, 55 N. W. 532; Smith v. Com., Wash. 437, 58 Pac. 771. A resolution granting extra pay to the officers and clerks of a legislative body is void where no services in addition to their regular duties were rendered. Construing Wash. Const., art 2, § 25.

[482] Converse v. United States, 21 How. (U. S.) 463; United States v. Brindle, 110 U. S. 688; United States v. Austin, 2 Cliff. 325, Fed. Cas. No. 14,480; Long v. United States, 8 Ct. Cl. 398; Collier v. United States, 22 Ct. Cl. 125; Bartlett v. United States 25 Ct. Cl. 389; United States v. Duval, Gilp. 356, Fed. Cas. No. 15,015; Dysart v. Graham County (Ariz.) 48 Pac. 213; Love v. Baehr, 47 Cal.

(b) Two offices with one incumbent. Where legislation is positive and provides salaries or compensation for separate offices, one lawfully filling and performing the duties of two or more is usually entitled to collect and retain the salaries or the compensation attached to each and all the offices.[483] The right of an official in such a case will largely depend upon the phraseology of the legislation under which he maintains his claim.[484]

§ 687. Form of compensation; salary.

The payment of official compensation is usually made in the form of a salary which has been defined as a fixed and definite amount prescribed by law for the payment of the services required in the performance of designated official duties.[485] Where

364; Madison County v. Halliburton, 64 Ill. App. 99; Lang v. Perry County Com'rs, 121 Ind. 133, 22 N. E. 667; Tippecanoe County v. Mitchell, 131 Ind. 379, 30 N. E. 409, 15 L. R. A. 520; Com'rs v. Brewer, 9 Kan. 307; Blair v. City of Middlesborough, 23 Ky. L. R. 2253, 67 S. W. 16; Preble v. City of Bangor, 64 Me. 115; City of Calais v. Whidden, 64 Me. 249; City of Detroit v. Redfield, 19 Mich. 376; McBride v. City of Grand Rapids, 47 Mich. 236; Village of St. Johns v. Clinton County Sup'rs, 111 Mich. 609, 70 N. W. 131; McKillop v. Cheboygan County Sup'rs, 116 Mich. 614, 74 N. W. 1050; Metropolitan Police of Detroit v. Board of Auditors, 93 Mich. 306, 53 N. W. 390; Raymond v. Madison County Com'rs, 5 Mont. 103; Boggs v. Caldwell County, 28 Mo. 586; Wood v. Kansas City, 162 Mo. 303, 62 S. W. 433; Cloonan v. City of Kingston, 37 Misc. 322, 75 N. Y. Supp. 425; Kehn v. State, 93 N. Y. 291; Merzbach v. City of New York, 163 N. Y. 16, 57 N. E. 96; Grant County Com'rs v. McKinley, 8 Okl. 128, 56 Pac. 1044; State v. Maloney, 92 Tenn. 62, 20 S. W. 419. The question of extra compensation cannot be adjudicated in a proceeding to determine title to office. Allen v. DeKalb County (Tenn. Ch. App.) 61 S. W. 291; Stone v. Caldwell, 99 Va. 492, 39 S. E. 121; City of Tacoma v. Lillis, 4 Wash. 797, 31 Pac. 321, 118 L. R. A. 372; Powers v. City of Oshkosh, 56 Wis. 660.

[483] Collins v. United States, 15 Ct. Cl. 22; Ter. v. Wingfield, 2 Ariz. 305, 15 Pac. 139; State v. Walker, 97 Mo. 162, 10 S. W. 473; People v. Fire Com'rs of Saratoga Springs, 76 Hun, 146, 27 N. Y. Supp. 548. But see Broadwell v. People, 76 Ill. 554, and Montgomery County Com'rs v. Bromley, 108 Ind. 158.

[484] Kinsey v. Kellogg, 65 Cal. 111; Mason County v. Mason & Tazewell Special Drainage Dist. Com'rs, 140 Ill. 539, 30 N. E. 676; Gardner v. Newaygo County Sup'rs, 110 Mich. 94, 67 N. W. 1091; Callaway County v. Henderson, 119 Mo. 32, 24 S. W. 437; State v. Holladay, 67 Mo. 64.

[485] Reynolds v. Taylor, 43 Ala. 420; Woodruff v. State, 3 Ark. 285; Davis v. Post, 125 Cal. 210, 57 Pac. 901; Ellis v. Jefferds, 130 Cal. 478, 62 Pac. 734; Irelan v. Colgan, 96 Cal. 413, 31 Pac. 294; Lewis v. Widber, 99 Cal. 412, 33 Pac. 1128; Peo-

the amount has been prescribed by law, it cannot be changed except in the manner in which originally determined or fixed [486] and it is not within the power of either the public corporation or the individual official to increase or decrease the compensation legally established; [487] agreements to such an effect being contrary to

ple v. Goodykoontz, 22 Colo. 507, 45 Pac. 414; Castle v. Lawlor, 47 Conn. 340; Coughlin v. McElroy, 74 Conn. 397, 50 Atl. 1025; Merwin v. Boulder County Com'rs, 29 Colo. 169, 67 Pac. 285; State v. Bloxham, 26 Fla. 407, 7 So. 873; Stookey v. Nez Perces County Com'rs, 6 Idaho, 542, 57 Pac. 312; Dunbar v. Canyon County, 6 Idaho, 725, 59 Pac. 536; Taylor v. Canyon County, 7 Idaho, 171, 61 Pac. 521; Windmiller v. People, 78 Ill. App. 273; Cook County v. Hartney, 169 Ill. 566, 48 N. E. 458; Legler v. Paine, 147 Ind. 181, 45 N. E. 604; Harmon v. Madison County Com'rs, 153 Ind. 68, 54 N. E. 105; Sudbury v. Monroe County Com'rs, 157 Ind. 446, 62 N. E. 45; Holmes v. Lucas County, 53 Iowa, 211; Daniels v. City of Des Moines, 108 Iowa, 484, 79 N. W. 269; Darby v. Washington County Com'rs, 7 Kan. App. 235, 52 Pac. 902; City of Mayfield v. Elmore, 100 Ky. 417, 38 S. W. 849; Winston v. Stone, 102 Ky. 423, 43 S. W. 397; Barrett v. City of Falmouth, 109 Ky. 151, 58 S. W. 520; State v. Brittin, 52 La. Ann. 94, 26 So. 753; Edgecomb v. City of Lewiston, 71 Me. 343; Prince v. City of Boston, 148 Mass. 285, 19 N. E. 218; Warner v. Auditor General, 129 Mich. 648, 89 N. W. 591; Bates v. City of St. Louis, 153 Mo. 18, 54 S. W. 439. Under St. Louis charter, art. 4, § 17, no deduction is to be made from the mayor's salary for personal or private absences from duty.

State v. Weston, 6 Neb. 16. An officer whose salary is prescribed by the constitution may be paid without legislative appropriation. Weston v. Herdman, 64 Neb. 24 89 N. W. 384; Powell v. Chosen Freeholders of Camden County, 59 N. J. Law, 117, 35 Atl. 755; People v. Hopkins, 55 N. Y. 74. Where by law a deputy officer is authorized in case of a vacancy to exercise the powers and perform the duties of an office, he is entitled to the salary of that office while acting in such capacity.

Landis v. Lincoln County, 31 Or. 424, 50 Pac. 530; Lewis v. Lackawanna County, 200 Pa. 590, 50 Atl. 162; Finley v. Laurens County, 58 S. C. 273, 36 S. E. 588; Chandler v. Town of Johnson City, 105 Tenn. 633, 59 S. W. 142; State v. McFetridge, 84 Wis. 473, 54 N. W. 1, 20 L. R. A. 223, 998. Where an officer is given a salary "in full for all services rendered by him in his official capacity," he cannot retain fees incidental to the office.

[486] Brissenden v. Clay County, 161 Ill. 216, 43 N. E. 977. The authority for fixing compensation may be vested in the county board of supervisors. Pease v. Common Council of Saginaw, 126 Mich. 436, 85 N. W. 1082; Hillman v. Hennepin County Com'rs, 84 Minn. 130, 86 N. W. 890.

[487] Rice v. National City, 132 Cal. 354, 64 Pac. 580; Vail v. San Diego County, 126 Cal. 35, 58 Pac. 392; Power v. May, 114 Cal. 207, 46 Pac. 6; State v. Bloxham, 26 Fla. 407, 7 So. 873; City of Joliet v. Petty, 96 Ill. App. 450; Tracy v. Jackson

public policy will not be enforced or given effect as an estoppel.[488] The payment of a salary provided by law for the rendition of official services becomes a right which can be exercised against a delinquent corporation through proper remedies.[489]

§ 688. Commissions.

In many cases, public officials, especially those having charge of the collection and disbursement of public moneys, receive their compensation through the payment of commissions fixed by law upon the amounts which they may either collect [490] or disburse [491]

County, 115 Iowa, 254, 88 N. W. 362; Behan v. City of New Orleans, 34 La. Ann. 128; State v. Sullivan, 72 Minn. 126, 75 N. W. 8; State v. Nichols, 83 Minn. 3, 85 N. W. 717; Hayes County v. Christner, 61 Neb. 272, 85 N. W. 73; State v. Elko County Com'rs, 21 Nev. 19, 23 Pac. 935; State v. La Grave, 23 Nev. 120, 43 Pac. 470; State v. King (Tenn. Ch. App.) 62 S. W. 314. A salary which has been tentatively fixed may be subsequently diminished.

Staples v. Llano County, 9 Tex. Civ. App. 201, 28 S. W. 569. When the amount of compensation is fixed at a maximum, an agreement or order is valid designating a less amount.

Taylor v. City of Tacoma, 8 Wash. 174, 35 Pac. 584. Where a maximum compensation as salary is fixed by law, a less sum may be prescribed by ordinance as the full compensation or salary to be paid municipal officers.

[488] United States v. Langston, 118 U. S. 389; Whiting v. United States, 35 Ct. Cl. 291; Miller v. United States, 103 Fed. 413; Tappan v. Brown, 9 Wend. (N. Y.) 175; Kehn v. State, 93 N. Y. 291; Clark v. State, 142 N. Y. 101, 36 N. E. 817. But a number of cases hold that the acceptance of compensation less than that fixed by law estops the officer from claiming the difference. See the following: Tice v. City of New Brunswick, 64 N. J. Law, 399, 45 Atl. 781; Hobbs v. City of Yonkers, 102 N. Y. 13, 5 N. E. 778; O'Hara v. Town of Park River, 1 N. D. 279, 47 N. W. 380; De Boest v. Gambell, 35 Or. 368, 58 Pac. 72, 353.

[489] State v. Daggett, 28 Wash. 1, 68 Pac. 340.

[490] Morgan County Com'rs v. Gregory, 74 Ind. 218; Bramlage v. Com., 24 Ky. L. R. 213, 68 S. W. 406; City of Hagerstown v. Startzman, 93 Md. 606, 49 Atl. 838. A collector is entitled to ordinary commissions on all assessments for street paving collected by him where his compensation is a certain percentage "of all taxes collected by him." Stone v. Casper (Miss.) 2 So. 74; Harrisson v. Police of Wilkinson County, 35 Miss. 74; Yazo & M. V. R. Co. v. Love, 69 Miss. 109, 12 So. 266; Adams v. Watt, 76 Miss. 667, 26 So. 364; State v. Ewing, 116 Mo. 129, 22 S. W. 476. The compensation provided for a collector of taxes is a commisson upon the total amount levied; not the amount actually col-

[491] Morris v. Ocean Tp. 61 N. J. Law, 12, 38 Atl. 760; Merwine v. Monroe County, 141 Pa. 162, 21 Atl. 509.

or the total amount handled.[492] Their claim for compensation in

lected. Otsego County Com'rs v. Hendryx, 58 Barb. (N. Y.) 279; Koonce v. Jones County Com'rs, 106 N. C. 192, 10 S. E. 1038; Centre County v. Gramley, 155 Pa. 325, 26 Atl. 654. A county treasurer paid by commissions on taxes "collected" is not entitled to commissions on sums collected by his predecessor and delivered to him upon his assuming office.

[492] Shaver v. Sharp County, 62 Ark. 76, 34 S. W. 261; Lawrence County v. Hudson, 41 Ark. 494; Gray v. Matheny, 66 Ark. 36, 48 S. W. 678; City of Baxley v. Holton, 114 Ga. 724, 40 S. E. 728. An official charged by law with the responsibility of handling certain public moneys is entitled to the legal commissions thereon although such sums may have been actually disbursed by other officers.

People v. Long, 13 Ill. 629; Mason County v. Special Drainage Dist. Com'rs, 140 Ill. 539, 30 N. E. 676; Hunsaker v. Alexander County, 42 Ill. 389; Lagrange County Com'rs v. Newman, 35 Ind. 10; Pulaski County Com'rs v. Vurpillat, 22 Ind. App. 422, 53 N. E. 1049; Purdy v. City of Independence, 75 Iowa, 356, 39 N. W. 641. A city treasurer who receives for his compensation a commission on disbursements and collections made by him, is entitled to recover the prescribed percentage on funds handled by him arising from the sale of municipal bonds issued for the erection of a system of waterworks. See, however, Stoner v. Keith County, 48 Neb. 279, 67 N. W. 311, holding to the contrary, based upon Nebraska Comp. St. 1889, c. 28, § 20.

Hughston v. Carroll County Sup'rs, 68 Miss. 660, 10 So. 51; City of Austin v. Walton, 68 Tex. 507, 5 S. W. 70; Farmer v. Aransas County, 21 Tex. Civ. App. 549, 53 S. W. 607. The exchange of old bonds for a new issue is not the disbursement of money entitling a county treasurer to the commissions authorized by law for moneys handled.

Baylor County v. Taylor, 3 Tex. Civ. App. 523, 22 S. W. 982, following McKinney v. Robinson, 84 Tex. 489. A county treasurer receiving his compensation through the payment of commissions on public moneys handled by him is not entitled to such commissions on an issue of bonds delivered directly to contractors in payment for the building of a bridge.

Waller County v. Rankin (Tex. Civ App.) 35 S. W. 876; Davenport v. Eastland County, 94 Tex. 277, 60 S. W. 243; Beard v. City of Decatur, 64 Tex. 7. The city treasurer is entitled to compensations for the disbursement of municipal funds and he cannot be deprived of this right through the placing of them in the hands of the mayor for payment.

Presidio County v. Walker, 29 Tex. Civ. App. 609, 69 S. W. 97; Llano County v. Moore, 77 Tex. 515, 14 S. W. 152. The legality of bonds upon which a commission is claimed is not a question in issue in a proceeding brought to determine the right of the official to collect his commissions upon their proceeds. School Dist. No. 81 v. Cole, 4 Wash. 395, 30 Pac. 448; Pease v. Ter., 1 Wyo. 392. A county treasurer cannot collect his legal commission on the sum paid over by his successor; the statutory provision applies only to payments made by him in ordinary transactions of business in connection with the office.

such a case is based upon the terms of the law,[493] and though the established commission may be entirely inadequate for the payment of the services rendered, yet they are not entitled to extra compensation even though the inadequacy may arise because of a legal change in conditions which affect the volume of business transacted. The fact that the limits of a public corporation may have been diminished or other offices established which assume the performance of a portion of their duties will not affect the application of the rule.

§ 689. Fees.

Still another method for the payment of the compensation of public officials by the establishment of a system of fees[494] or per

[493] Ter. v. Cavanaugh, 3 Dak. 325, 19 N. W. 413; Sandager v. Walsh County, 6 Dak. 31, 50 N. W. 196; Guheen v. Curtis, 3 Idaho, 443, 31 Pac. 805, construing Rev. St. §§ 1679, 2158. Cunningham v. Moody, 3 Idaho, 125, 28 Pac. 395, construing Idaho Const. art. 7, § 7. Saint v. Henry County Com'rs, 19 Ind. App. 281, 49 N. E. 384; Com. v. Norman, 20 Ky. L. R. 1893, 50 S. W. 225; Boltz v. City of Newport, 22 Ky. L. R. 961, 59 S. W. 503; Gerken v. Sibley County, 39 Minn. 433, 40 N. W. 508. Where a county treasurer has an annual salary which is intended as full compensation for his official services, he is not permitted to retain certain fees and percentages allowed for handling the proceeds of state revenues. Stoner v. Keith County, 48 Neb. 279, 67 N. W. 311; McKinney v. Robinson, 84 Tex. 489, 19 S. W. 699.

[494] The Antonio Zambrana, 88 Fed. 546; Tillman v. Wood, 58 Ala. 578. "Fees are compensation paid officers for services rendered to individuals while costs are an allowance to a party incidental to a judgment." Leonard v. Garfield County Com'rs, 8 Colo. App. 338, 46 Pac. 216; Arapahoe County Com'rs v. Hall, 9 Colo. App. 538, 49 Pac. 370; Wulff v. Aldrich, 124 Ill. 591, 16 N. E. 886, construing and holding unconstitutional Rev. St. Ill. c. 53, § 39, as violating Ill. Const. art. 10, § 10; City of Des Moines v. Polk County, 107 Iowa, 525, 78 N. W. 249; Lowe v. Bourbon County Com'rs, 6 Kan. App. 603, 51 Pac. 579; State v. Obert, 53 Kan. 106, 36 Pac. 64; Kenefick v. City of St. Louis, 127 Mo. 1, 29 S. W. 838; Kemp v. City of Monett, 95 Mo. App. 452, 69 S. W. 31; Wight v. Meagher County Com'rs, 16 Mont. 479, 41 Pac. 271. Under Comp. St. 1887, Div. 5, § 900, providing a per diem for the county surveyor, he is not entitled to an allowance for expenses, none being provided by the statute. Ghiglione v. Marsh, 23 App. Div. 61, 48 N. Y. Supp. 604; People v. Town Auditors of Queensbury, 24 App. Div. 579, 49 N. Y. Supp. 525; Willis v. Angell, 19 R. I. 617; Nance v. Anderson County, 60 S. C. 501, 39 S. E. 5; Ellis County v. Thompson, 95 Tex. 22, 64 S. W. 927, modified by rehearing in 66 S. W. 48. Henry v. Tilson, 17 Vt. 479. Public officers

diem charges [495] the law prescribing the payment of a specific amount for the performance of a designated service, the fee thus provided being paid as may be directed either by the public cor-

performing services for which no fee is especially allowed by statute are entitled to charge for such a proportionate sum based upon the fees established by law.

Population as basis of classification. Darcy v. City of San Jose, 104 Cal. 642, 38 Pac. 500. Construing act March 23, 1893, and holding it unconstitutional as violating constitution, art. 4, § 25, subd. 29, prohibiting the passage of local legislation affecting the salaries of public officials.

Dwyer v. Parker, 115 Cal. 544, 47 Pac. 372; Rauer v. Williams, 118 Cal. 401, 50 Pac. 691. Cal. St. 1893, p. 127, relative to the manner of receiving and paying fees for official services in cities and counties having a population of over 100,000 inhabitants is unconstitutional, being special legislation. Davis v. Post, 125 Cal. 210; Hall v. Beveridge, 81 Ill. 128; Legler v. Paine, 147 Ind. 181, 45 N. E. 604; Parker v. Wayne County Com'rs, 84 Ind. 340; Stout v. Grant County Com'rs, 107 Ind. 343; Bamble v. Marion County, 85 Iowa, 675, 52 N. W. 556, following Harris v. Chickasaw County, 77 Iowa, 345.

Jefferson County Com'rs v. McCleary, 13 Kan. 149; Turner v. Neosho County Com'rs, 27 Kan. 639; Stone v. Wilson, 19 Ky. L. R. 126, 39 S. W. 49; City of Lexington v. Rennick, 20 Ky. L. R. 1924, 50 S. W. 1106; White v. Manistee County, 105 Mich. 608; Bowe v. City of St. Paul, 70 Minn. 341, 73 N. W. 184; King v. Texas County, 146 Mo. 60, 47 S. W. 920; Henderson v. Koenig, 168 Mo. 356, 68 S. W. 72, 57 L. R. A. 659; Bedwell v. Custer County, 51 Neb. 387, 70 N. W. 945; State v. Frank, 60 Neb. 327, 83 N. W. 74; Martin v. Ivins, 59 N. J. Law, 364, 36 Atl. 93; State v. Storey County Com'rs, 16 Nev. 92; Stack v. City of Brooklyn, 150 N. Y. 335; Hart v. Murray, 48 Ohio St. 605, 29 N. E. 576; City of Philadelphia v. Martin, 125 Pa. 583, 17 Atl. 507; Com. v. Comrey, 149 Pa. 216, 24 Atl. 172; Bell v. Allegheny County, 149 Pa. 381, 24 Atl. 209; Com. v. Mann, 168 Pa. 290, 31 Atl. 1003; Schuylkill County v. Pepper, 182 Pa. 13, 37 Atl. 835; City of Pittsburg v. Anderson, 194 Pa. 172, 44 Atl. 1092; Minnehaha County v. Thorne, 6 S. D. 449, 61 N. W. 688; Clark v. Finley, 93 Tex. 171, 54 S. W. 343; State v. Neal, 25 Wash. 264, 65 Pac. 188, 68 Pac. 1135; O'Herrin v. Milwaukee County, 67 Wis. 142.

Volume of business. Lemoine v. City of St. Louis, 72 Mo. 404; Allen v. Com., 83 Va. 94, 1 S. E. 607.

Value of property. City of Denver v. Hart, 10 Colo. App. 452, 51 Pac. 533; Hiner v. Miami County Com'rs, 9 Kan. App. 542; Mower County v. Williams, 27 Minn. 25; Doe v. Washington County, 30 Minn. 392; Cook County Com'rs v. Fisher, 79 Minn. 380, 82 N. W. 652; Bunn v. Kingsbury County, 3 S. D. 87, 52 N. W. 673; Wilbarger County Com'rs v. Perkins, 86 Tex. 348, 24 S. W. 794; Converse County Com'rs v. Burns, 3 Wyo. 691, 29 Pac. 894, 30 Pac. 415.

[495] Ellis v. Tulare County (Cal.) 44 Pac. 575; Chapin v. Wilcox, 114 Cal. 498, 46 Pac. 457. Where a maximum compensation is provided,

poration [496] or by the individual [497] for whom the service is rendered. The cases passing upon the payment of fees involve the construction of special and local statutes and form no basis for the establishment of a general rule or principle which controls. It might be said, however, that all laws relating to the compensation of public officers whether it is paid by salary, through commissions or fees are construed strictly and the right of the official to payment in a specific instance should clearly appear.[498] The pay-

the aggregate of the per diem charges and mileage cannot exceed this maximum. Henderson v. Pueblo County Com'rs, 4 Colo. App. 301, 35 Pac. 880; Kane County Sup'rs v. Pierce, 60 Ill. 481; Bourke v. Sanitary Dist. of Chicago, 92 Ill. App. 333; Vigo County Com'rs v. Fischer, 86 Ind. 139; Kerlin v. Reynolds, 142 Ind. 460, 36 N. E. 693, 41 N. E. 827; Howegler v. Greiner, 89 Iowa, 476, 56 N. W. 655; Fournier v. West Bay City, 94 Mich. 463, 54 N. W. 277; In re Town of Hempstead, 36 App. Div. 321, 55 N. Y. Supp. 345; State v. Beman, 15 Wash. 24, 45 Pac. 652.

[496] City of Chicago v. O'Hara, 60 Ill. 413; Taylor v. Kearney County, 35 Neb. 381, 53 N. W. 211.

[497] Baldwin v. Kouns, 81 Ala. 272, 2 So. 638; Ex parte Ashley, 3 Ark. 63; Prairie County v. Vaughan, 64 Ark. 203, 41 S. W. 420; Kitchell v. County of Madison, 5 Ill. (4 Scam.) 163; State v. Cripe, 5 Blackf. (Ind.) 6; Bartholomew County Com'rs v. Bryan, 22 Ind. 397; Stiffler v. Delaware County Com'rs, 1 Ind. App. 368, 27 N. E. 641; Peters v. City of Davenport, 104 Iowa, 625, 74 N. W. 6; State v. Allen, 23 Neb. 451, 36 N. W. 756. A public officer is entitled to reasonable fees for services rendered where none are fixed by statute. Pomeroy v. Mills, 35 N. J. Eq. 442. Where the question of fees to be allowed for auditing is left to the discretion of the court, a fair and just compensation for work done should be given. Baker County v. Benson, 40 Or. 207, 66 Pac. 815.

[498] Wailes v. Smith, 157 U. S. 271; United States v. Clough (C. C. A.) 55 Fed. 373, disapproving 40 Fed. 813. "We do not concurr in the opinion of the court in McKinstry v. United States, 40 Fed. 813, as to the principle to be followed in the construction of the fee bill. We do not know any rule of public policy or of practical experience which requires that where a statute allowing an officer's compensation 'admits of two interpretations, the words should be construed liberally in favor of the officer, and not strictly in favor of the United States.' The well known abuses under the fee system, by which the government has been defrauded of large amounts through unconscionable charges, and the lax administration of the law in this respect, would seem to require a strict interpretation in favor of the United States rather than in favor of the officer."

Troup v. Morgan County, 109 Ala. 162, 19 So. 503; Crittenden County v. Crump, 25 Ark. 235. An official is entitled only to such fees as are prescribed by statute. Cole v. White County, 32 Ark. 45; Leonard v. Garfield County Com'rs, 8 Colo. App. 338, 46 Pac. 216; Alex-

ment of an excessive commission through a mistake of law is usually binding where the amount has been ascertained by an official or an official body charged with this as a discretionary duty.[499]

§ 690. Fees; itemized statements of services rendered.

It is customary when public officials receive fees or commissions as compensation from the corporation to regard them as a claim against it and to require their presentment to the proper officials in an itemized form;[500] to be passed upon in the manner provided by law for the determination of all claims.[501] Where this legal requirement exists, it is scarcely necessary to add that a compliance with it is necessary in order that there can be a recovery of the fees claimed.[502] The collection of excessive charges or fees is

ander County v. Myers, 64 Ill. 37; City of New Albany v. Smith, 16 Ind. 215; Hilton v. Saline County Com'rs, 5 Kan. App. 429, 49 Pac. 323; State v. Wofford, 116 Mo. 220, 22 S. W. 486; In re Brown, 15 Neb. 688; State v. Trousdale, 16 Nev. 357; State v. Boyd, 19 Nev. 356, 11 Pac. 36; People v. Trustees of Haverstraw, 11 App. Div. 108, 43 N. Y. Supp. 135. The acceptance of an official position where no appropriation has been made at the time does not preclude the appointee from claiming compensation under a statute authorizing it. Erie County Sup'rs v. Jones, 119 N. Y. 339, construing N. Y. Laws 1880, c. 580; Laws 1881, cc. 441 and 557; Tyrrell v. City of New York, 159 N. Y. 239, 53 N. E. 1111; Taylor v. Umatilla County, 6 Or. 401; McGuire v. Baker City, 27 Or. 340, 41 Pac. 669; Morrison v. Fayette County, 127 Pa. 110, 17 Atl. 755; State v. Allen (Tenn. Ch. App.) 46 S. W. 303.

[499] Harrison County Com'rs v. Benson, 83 Ind. 469. The rule also holds that a county official collecting less than the legal commission is entitled to recover the full amount. State v. Shipman, 125 Mo. 436, 28 S. W. 842.

[500] Irwin v. Yuba County, 119 Cal. 686, 52 Pac. 35; White v. Hayden, 126 Cal. 621, 59 Pac. 118; State v. Roderick, 25 Neb. 629, 41 N. W. 404; Smith v. Portage County Com'rs, 9 Ohio, 25.

[501] Yuma County v. Pendleton, 17 Colo. App. 159, 67 Pac. 911; Otero County Com'rs v. Wood, 11 Colo. App. 19, 52 Pac. 214; Merwin v. Boulder County Com'rs, 29 Colo. 169, 67 Pac. 285; Outagamie County v. Town of Greenville, 77 Wis. 165, 45 N. W. 1090. An allowance is not warranted by a board of audit for claim itemized as "hotel expenses, railroad fare, etc."

[502] McFarland v. McCowen, 98 Cal. 329, 33 Pac. 113. Where a constable's claim for fees has been examined and allowed by the county board of supervisors, the auditor cannot refuse to draw a warrant for the payment on the ground that the services for which the fees were charged were never rendered.

Burks v. Dougherty County Com'rs, 99 Ga. 181, 25 S. E. 270. Where periodical statements of business transacted are required to

usually made an offense and one for which a public official may, upon conviction, be punished by fine, imprisonment or both.[503] Restitution can also be compelled.[504] It might be said, however, that the collection of an illegal fee does not render invalid the act or services for the performance of which the fee is charged.

§ 691. Actual rendition of services.

The rendition of services authorized or in the manner authorized, is necessary to the payment of compensation [505] and where officials are paid a per diem this can only be recovered for the days actually employed in public business,[506] and in some instances

be made, the commission on the balances shown by these statements cannot be charged nor included in the succeeding statement. Sheibley v. Dixon County, 61 Neb. 409, 85 N. W. 399. A county clerk should account for all fees earned by him whether collected or not.

[503] Gray v. Matheny, 66 Ark. 36, 48 S. W. 678; Marcotte v. Allen, 91 Me. 74, 40 L. R. A. 185. Excessive fees may be recovered by the one paying them. Cobbey v. Burks, 11 Neb. 157. Mistake or ignorance without corrupt intent is no defense in an action on statutory penalty for an officer taking excessive fees. Garber v. Conner, 98 Pa. 551; Hamer v. Weber County, 11 Utah, 1, 37 Pac. 741. Where the question of illegal fees is at issue the presumption exists that the charge is valid.

[504] Ingram v. Wilson, 19 Ky. L. R. 1797, 44 S. W. 420; American Steamship Co. v. Young, 89 Pac. 186.

[505] San Bernardino County v. Davidson, 112 Cal. 503, 44 Pac. 659; Fremont County v. Brandon, 6 Idaho, 482, 56 Pac. 264; Miller v. Smith, 7 Idaho, 204, 61 Pac. 824; Eley v. Miller, 7 Ind. App. 529, 34 N. E. 836; Stropes v. Greene County Com'rs, 84 Ind. 560; Pickett v. Adams, 12 Ky. L. R. 957, 15 S. W. 865, 16 S. W. 132; Pistorius v. Saginaw County Sup'rs, 51 Mich. 125; Nordin v. Kandiyohi County Com'rs, 23 Minn. 171; Wade v. Lewis & Clarke County, 24 Mont. 335, 61 Pac. 879. A county surveyor in order to recover mileage under laws 1897 must have actually traveled the distance. State v. Boyd, 49 Neb. 303, 68 N. W. 510; Hazelet v. Holt County, 51 Neb. 716, 71 N. W. 717; State v. Russell, 51 Neb. 774, 71 N. W. 785; Martin v. Ivins, 59 N. J. Law, 364; Richmond County Sup'rs v. Ellis, 59 N. Y. 620; Brown v. Com., 2 Rawle (Pa.) 40; Shepherd v. Keagle (Cal.) 53 Pac. 702.

[506] Smith v. County Com'rs of Jefferson, 10 Colo. 17, 13 Pac. 917. The law recognizes no fraction of a day and under Gen. St. Colo. § 3015, a county superintendent of schools is entitled to a per diem allowance for every day in which he necessarily renders any substantial official services without regard to the time occupied in its performance. Rankin v. Jauman, 4 Idaho, 394, 39 Pac. 111; Fisher v. Bannock County Com'rs, 4 Idaho, 381, 39 Pac. 552; McCollom v. Shaw, 21 Ind. App. 63, 51 N. E. 488; Mont-

it has been held necessary to show affirmatively in a statement of account that public business was transacted on the days charged.[507] The payment of mileage, commissions, or fees in doubtful cases or where the charges are based upon constructive services, is usually discountenanced[508] as against public policy,

gomery County Com'rs v. Bromley, 108 Ind. 158. Where a per diem charge is allowed, an official cannot claim pay from two different sources for one day's services.

White v. Dallas County, 87 Iowa, 563, 54 N. W. 368. It is not necessary in order to recover a per diem compensation that services should have been performed during the entire day. Officers are entitled to the full per diem compensation whenever they perform services on a given day irrespective of the number of hours spent in such employment.

Sumner County Com'rs v. Simmons, 51 Kan. 304, 33 Pac. 13. A county surveyor cannot recover a per diem in the absence of a showing that public business was transacted merely by testifying himself that it was necessary for the convenience of the public that his office should be kept open on those days.

Ewing v. Ainger, 96 Mich. 587, 55 N. W. 996; State v. Thompson, 37 Mo. 176. A member of the legislature receiving a per diem cannot recover pay for the time during which the legislature adjourns over holidays. In re Town of Hempstead, 36 App. Div. 321, 55 N. Y. Supp. 345; State v. Merry, 34 Ohio St. 137; Corr v. Lackawanna County, 163 Pa. 57, 29 Atl. 745; Mansel v. Nicely, 175 Pa. 367, 34 Atl. 793. A showing that work alleged to have been performed by a county commissioner could have been done in much less time than that for which compensation is claimed does not preclude such an officer from collecting for the time claimed if he was in attendance at his office and ostensibly performing public business on such days.

State v. Hastings, 16 Wis. 337. Members of a legislature are not in attendance on legislative duties and are not entitled to the usual per diem when there is an adjournment for such a period of time as to forbid a reasonable inference that it was not to facilitate the business of the session but to operate as a cessation of it for a given period in order to give the members an opportunity to return temporarily to their homes.

[507] Reilly v. Cochise County (Ariz.) 53 Pac. 205.

[508] Hamilton County Com'rs v. Sherwood (C. C. A.) 64 Fed. 103. A county commissioner can recover compensation at the legal rate for special services authorized and the fact that they were rendered outside of the county is immaterial. Howes v. Abbott, 78 Cal. 270, 20 Pac. 572, construing Cal. St. 1883, p. 299, relative to mileage.

Vannatta v. Brewer, 85 Ill. 114; Graham County Com'rs v. Van Slyck, 52 Kan. 622, 35 Pac. 299; Wortham v. Grayson County Ct., 76 Ky. (13 Bush) 53. The right must be expressly conferred by statute to enable an officer to charge a public corporation with fees or compensation; an authority by implication to do this does not exist. Gilbert v. Justices of Marshall County, 57 Ky.

and this rule is uniformly applied for the principle holds that the interests of an individual should at all times, be subordinated to the public advantage or welfare.[509]

§ 692. Change of compensation during term of office.

Public officials are entitled to protection in the exercise of their duties against an arbitrary or illegal exercise of legislative power. To effect this, constitutional and statutory provisions are found throughout the United States prohibiting a change in the compensation of a public officer during his term of office.[510] In some, a

(18 B. Mon.) 427; Cook v. Auditor General, 129 Mich. 48, 87 N. W. 1037; State v. Norris, 111 N. C. 652, 16 S. E. 2; Higgins v. Logan County Com'rs, 62 Ohio St. 621, 57 N. E. 504.

[509] United States v. Clough (C. C. A.) 55 Fed. 373, disapproving McKinstry v. United States, 40 Fed. 813; Cole v. White County, 32 Ark. 45.

[510] Weeks v. Texarkana, 50 Ark. 81; Gross v. Kenfield, 57 Cal. 626; Larew v. Newman, 81 Cal. 588, 23 Pac. 227. The provision applies to one appointed to fill a vacancy as he is subject to "all liabilities, duties and obligations of the officer whose vacancy he fills."

Kirkwood v. Soto, 87 Cal. 394, 25 Pac. 488. Cal. Const. art. 11, § 9, relative to change of compensation does not apply to traveling and other incidental expenses attached to his office. Marquis v. City of Santa Ana, 103 Cal. 661, 37 Pac. 650; Carlile v. Henderson, 17 Colo. 532, 31 Pac. 117; Smith v. City of Waterbury, 54 Conn. 174; Garvie v. City of Hartford, 54 Conn. 440; Polk v. Minnehaha County, 5 Dak. 129; Purcell v. Parks, 82 Ill. 346; Stadler v. Fahey, 87 Ill. App. 411.

Briscoe v. Clark County, 95 Ill. 309. Art. 10, § 10, of Ill. Const., providing against a change of compensation of a county officer during his term of office is merely a limitation in this respect in the performance of his personal and official duties and does not apply to necessary clerk hire or other current expenses which may vary from time to time as necessities require.

Ryce v. City of Osage, 88 Iowa, 558; Com. v. Addams, 95 Ky. 588, 26 S. W. 581; City of Paris v. Webb, 17 Ky. L. R. 1006, 33 S. W. 87; Com. v. Carter, 21 Ky. L. R. 1509, 55 S. W. 701; State v. Hickman, 9 Mont. 370, 23 Pac. 740, 8 L. R. A. 403; Douglas County v. Timme, 32 Neb. 272, 49 N. W. 266; State v. Moores, 61 Neb. 9, 84 N. W. 399, construing Neb. Const. art. 3, § 16, and holding that a police judge of an incorporated city is included within its terms. State v. Kelsey, 44 N. J. Law, 1; Greene v. Chosen Freeholders of Hudson County, 44 N. J. Law, 388; Torrez v. Socorro County Com'rs, 10 N. M. 670, 65 Pac. 181; Swift v. State, 89 N. Y. 52, reversing 26 Hun, 508; Lancaster County v. Fulton, 128 Pa. 48, 18 Atl. 384, 5 L. R. A. 436; Collins v. State, 3 S. D. 18, 51 N. W. 776; Neal v. Allen, 76 Va. 437; City of Tacoma v. Lillis, 4 Wash. 797, 31 Pac. 321, 18 L. R. A. 372; Bogue v. City of Seattle, 19 Wash. 396; Mud-

provision is found forbidding a decrease only. The independence of the judiciary especially is established and preserved by these provisions.[511]

Constitutional provisions may also be found which create certain official positions, commonly called constitutional offices, and fix the compensation to be paid the person filling them.[512] Where no constitutional or statutory provisions exist of the character of those suggested above in this section, the rule of law universally obtains that the legislature has complete and absolute power not only over public offices and officials but also over the compensation attached to the office and the manner and character of its duties and their performance.[513] Where legislation is assailed as unconstitutional or invalid because in violation of such provisions, the spirit and purpose of the latter is considered and carried out rather than the letter.[514] The question frequently arises as to

gett v. Liebes, 14 Wash. 482, 45 Pac. 19; Rucker v. Pocahontas County Sup'rs, 7 W. Va. 661; Converse County Com'rs v. Burns, 3 Wyo. 691, 29 Pac. 894, 30 Pac. 415; Davis v. Sweetwater County Com'rs, 4 Wyo. 477; Guthrie v. Converse County Com'rs, 7 Wyo. 95, 50 Pac. 229; Reals v. Smith, 8 Wyo. 159, 56 Pac. 690. But see Baldwin v. City of Philadelphia, 99 Pa. 164. This provision of the Pa. Const. held not to apply to an ordinance enacted by a city. Crawford County v. Nash, 99 Pa. 253.

[511] Chancellor's Case, 1 Bland (Md.) 595.

[512] State v. Hickman, 9 Mont. 370, 23 Pac. 740, 8 L. R. A. 403. Where the salary of a constitutional officer is fixed by the constitution, no appropriation is necessary by the legislature.

[513] Belknap v. United States, 150 U. S. 588, distinguishing United States v. Langston, 118 U. S. 389; Gilbert v. Grant County Com'rs, 8 Blackf. (Ind.) 81; Farwell v. City of Rockland, 62 Me. 296; City of Wyandotte v. Drennan, 46 Mich. 478; De Soto County Sup'rs v. Westbrook, 64 Miss. 312, 1 So. 352. General legislation cannot be nullified by fixing the salary of a public officer in a particular county at such a low figure that no competent person will accept the office. Wilson v. City of New York, 31 Misc. 693, 65 N. Y. Supp. 328; Pryor v. City of Rochester, 166 N. Y. 548, 60 N. E. 252; Field v. Auditor, 83 Va. 882, 3 S. E. 707; Castle v. Uinta County Com'rs, 2 Wyo. 126.

[514] Bugg v. Sebastian County, 64 Ark. 515, 43 S. W. 506; Dougherty v. Austin, 94 Cal. 601, 28 Pac. 834, 29 Pac. 1092. An order allowing a county clerk a deputy, his salary to be paid by the county is no increase of the compensation of the county clerk within the meaning of the constitutional provision, art. 11, § 5. Buck v. City of Eureka, 109 Cal. 504, 42 Pac. 243, 30 L. R. A. 409. A constitutional provision cannot be evaded by a contract for the payment of services when these are included within the duties, the per-

whether a certain official position comes within the meaning of such provisions [515] or whether particular legislation has such an

formance of which the officer is by law charged.

Power v. May, 114 Cal. 207, 46 Pac. 6; People v. Howland, 17 App. Div. 165, 45 N. Y. Supp. 347. A constitutional provision cannot be evaded by legislation relieving a constitutional officer from the performance of the duties of his office. Lancaster County v. Fulton, 128 Pa. 48, 18 Atl. 384, 5 L. R. A. 436. A constitutional provision cannot be evaded by making a contract with a public officer for compensation in the rendition of services which, by law, are attached to his office.

Nelson v. Troy, 11 Wash. 435, 39 Pac. 974. The allowance of a deputy at a stated sum per annum is not a violation of constitution, art. 11, § 8, forbidding a change in the compensation of any county or municipal officer during his term of office. But see Olds v. State Land Office Com'rs, 134 Mich. 442, 86 N. W. 956, 96 N. W. 508.

[515] Wright v. City of Hartford, 50 Conn. 546. The provisions of the Conn. Const., relative to the increase of compensation of "any public officer or employee" applies to a fireman employed in the city fire department. Auditor v. Cochran, 72 Ky. (9 Bush) 7. The chancellor of the Louisville Chancery Court is included within the prohibition in Ky. Const. art. 8, § 13, against a reduction of salaries of public officials.

City of Louisville v. Wilson, 18 Ky. L. R. 427, 36 S. W. 944. The assistant bailiff of a police court and members of a board of public safety and public rules with their secretaries are municipal "officers" within the meaning of Ky. Const. § 161, and an ordinance reducing their salaries during their term of office is, therefore, unconstitutional.

State v. Johnson, 123 Mo. 43, 27 S. W. 399. A chief engineer of the city fire department is not an officer within the meaning of Mo. Const. art. 14, § 8, prohibiting a change in the salary of any officer during his term of office. State v. Moores, 61 Neb. 9, 84 N. W. 399; In re City of New York, 158 N. Y. 668, 52 N. E. 1125, affirming 33 App. Div. 365, 53 N. Y. Supp. 875; Ricketts v. City of New York, 67 How. Pr. (N. Y.) 320. A court crier is a public officer and protected by the constitutional provision relative to a reduction of salary.

Rowland v. City of New York, 83 N. Y. 372. An attendant of the supreme court held to be "in office" within the provisions of the N. Y. laws, 1870, c. 382, § 3, relative to increase of compensation for public officials while in office. Thompson v. Phillips, 12 Ohio St. 617; Gobrecht v. City of Cincinnati, 51 Ohio St. 68, 36 N. E. 782, 23 L. R. A. 609. A member of a board of legislation receiving a per diem is not within the Ohio Const. art. 2, § 20, prohibiting a change in the compensation of any public officer during his term of office.

Bigley v. Borough of Bellevue, 158 Pa. 495, 28 Atl. 23; Somers v. State, 5 S. D. 582, 59 N. W. 962. The constitutional provision does not apply to a deputy superintendent of public instruction appointed during the pleasure of his principal. City of Ballard v. Keane, 13 Wash. 201, 43 Pac. 27. Wash. Const. art 11, § 8, includes a city treasurer.

effect as will make it in violation of them.[516] The rule holding in respect to a change of compensation, it follows that where the official or employe takes for a time the reduced compensation this does not estop him from claiming the residue.[517] The principle also obtains that where compensation is fixed by a body having authority, it can only be changed in the same manner and by the body which originally established it.[518]

[516] Coyne v. Rennie, 97 Cal. 590, 32 Pac. 578; Welsh v. Bramlet, 98 Cal. 219, 33 Pac. 66; Storke v. Goux, 129 Cal. 526, 62 Pac. 68; Milner v. Reibenstein, 85 Cal. 593, 24 Pac. 935, construing Cal. St. 1889, p. 578 et seq. relative to salary of municipal judge. San Luis Obispo County v. Felts, 104 Cal. 60, 37 Pac. 780; City of Louisville v. Wilson, 18 Ky. L. R. 427, 36 S. W. 944; Purnell v. Mann, 20 Ky. L. R. 1146, 48 S. W. 407; Id., 20 Ky. L. R. 1196, 49 S. W. 346; Id., 21 Ky. L. R. 1129, 50 S. W. 264; Stone v. Mayo, 21 Ky. L. R. 1559, 55 S. W. 700. A constitutional provision which prohibits any change in the compensation of an officer during his term will not prevent the passage of legislation making such change where it takes effect after the expiration of this particular term of office.

Marion County Fiscal Court v. Kelly, 22 Ky. L. R. 174, 56 S. W. 815; People v. Common Council of Detroit, 38 Mich. 636; Wesch v. Common Council of Detroit, 107 Mich. 149, 64 N. W. 1051; Maynard v. City of Detroit, 113 Mich. 494, 71 N. W. 870; People v. Reigel, 120 Mich. 78, 78 N. W. 1017, construing How. Ann. St. §§ 508, 527; State v. Granite County Sup'rs, 23 Mont. 250, 58 Pac. 439, construing Mont. Act, March 3, 1899, relative to the office and duties of county road supervisors or county surveyors considered and held not unconstitutional as violating Mont. Const., art. 5, § 31, relative to the change of compensation of a public officer after his election or appointment. Hamilton v. St. Louis County Court, 15 Mo. 3; Wheelock v. McDowell, 20 Neb. 160; People v. Fitch, 145 N. Y. 261; Id., 11 Misc. 257, 32 N. Y. Supp. 218; Collins v. State, 3 S. D. 18, 51 N. W. 776; State v. Tingey, 24 Utah, 225, 67 Pac. 33; Heilig v. City Council of Puyallup, 7 Wash. 29, 34 Pac. 164; State v. Carson, 6 Wash. 250, 33 Pac. 428.

[517] Purdy v. City of Independence, 75 Iowa, 356, 39 N. W. 641; Bowe v. City of St. Paul, 70 Minn. 341, 73 N. W. 184; Kehn v. State, 93 N. Y. 291; Montague's Adm'r v. Massey, 76 Va. 307; Neal v. Allen, 76 Va. 437.

[518] Goldsborough v. United States, Taney, 80, Fed. Cas. No. 5,519; Weeks v. Town of Texarkana, 50 Ark. 81, 6 S. W. 504; Barnes v. Williams, 53 Ark. 205, 13 S. W. 845, construing Mansf. Dig. Ark. § 926; Cox v. City of Burlington, 43 Iowa, 612; Goetzman v. Whitaker, 81 Iowa, 527, 46 N. W. 1058; Bryan v. City of Des Moines, 51 Iowa, 590; People v. Wayne County Auditors, 41 Mich. 4; Pease v. Common Council of Saginaw, 126 Mich. 436, 85 N. W. 1082; Rundlett v. City of St. Paul, 64 Minn. 223, 66 N. W. 967; Hanauer v. City of Utica, 75 Hun, 524, 27 N. Y. Supp. 663; Ter. v. King, 1 Or. 106; State v. City Council of Nashville, 83 Tenn. (15 Lea)

§ 693. Time and manner of payment.

The relation which exists between the public official and the public corporation is not a contract one and, therefore, in the strict sense of the word, the public official has no right to recover his compensation as provided by law basing the recovery upon those principles resting upon the law of contracts. The best that can be said perhaps of his claim is that he is entitled to the compensation which may, by law, be allowed him from time to time. The payment both in respect to its time and manner is usually designated by statute or usage having the force of law and these control. Neither the corporation nor the official should be permitted to hasten or delay the payment of compensation or make it in any other manner than that thus provided.

§ 694. Compensation; to whom payable.

Strictly considered, an official de jure alone is entitled to the pay attached to his office.[519] In many instances where contests to the title of an office arise, it is filled by an officer de facto who may be subsequently ousted or by one whose title to the office is later considered as paramount. In these cases the public corporation is authorized and warranted in paying the regular compensation to the de facto officer [520] and no liability arises against it in favor of

697; McInery v. City of Galveston, 58 Tex. 334; Meissner v. Boyle, 20 Utah, 317, 58 Pac. 1110.

[519] Baxter v. Brooks, 29 Ark. 173; Lee v. City of Wilmington, 1 Marv. (Del.) 40 Atl. 663; Home Ins. Co. v. Tierney, 47 Ill. App. 600; State v. Carr, 129 Ind. 44, 28 N. E. 88, 13 L. R. A. 177; Hemphill v. Coulter, 23 Ky. L. R. 2387, 67 S. W. 3; City of Vicksburg v. Groome (Miss.) 24 So. 306; Matthews v. Copiah County Sup'rs, 53 Miss. 715; State v. Milne, 36 Neb. 301, 19 L. R. A. 689; Meehan v. Freeholders of Hudson County, 46 N. J. Law, 276; Darby v. City of Wilmington, 76 N. C. 133; In re Moore, 4 Wyo. 98, 31 Pac. 980.

[520] Sleigh v. United States, 9 Ct. Cl. 369; Weeks v. United States, 21 Ct. Cl. 124. An appointment unauthorized by law gives the appointee no claim for compensation. Behan v. Davis Board of Prison Com'rs, 3 Ariz. 399, 31 Pac. 521; Adams v. Directors of Insane Asylum, 4 Ariz. 327, 40 Pac. 185. One neither a de facto nor a de jure officer has no right to compensation.

Carroll v. Siebenthaler, 37 Cal. 193. The fact that an office is filled by an intruder does not impair the right of the true incumbent to recover compensation. The salary is incident to the title of the office, not to the possession and exercise of it. Henderson v. Glynn, 2 Colo. App. 303, 30 Pac. 265; Coughlin v. McElroy, 74 Conn. 397, 50 Atl. 1025; Saline County Com'rs v. Anderson,

the de jure officer who, it may subsequently be decided, is entitled to the office.[521] The de facto officer is liable, however, to the one having good title to the office.[522] Whatever may be the character

20 Kan. 298; City of Ellsworth v. Rossiter, 46 Kan. 237; Atchison, T. & S. F. R. Co. v. Kearney County Com'rs, 58 Kan. 19, 48 Pac. 583. One must at least be a de facto officer in order to claim compensation for services rendered. State v. Clark, 52 Mo. 508; State v. Milne, 36 Neb. 301, 54 N. W. 521, 19 L. R. A. 689; Erwin v. City of Jersey City, 60 N. J. Law, 141, 37 Atl. 732; McManus v. City of Brooklyn, 5 N. Y. Supp. 424.

McVeany v. City of New York, 80 N. Y. 185, 36 Am. Rep. 600. "The rule protecting a municipal corporation from a second payment of compensation once paid to one actually discharging the duties of an office with color of title applies whether the compensation is by fixed fees payable on the municipal treasury or of specific services rendered or by an annual salary payable at recurring periods, or whether the office is held by appointment or election."

Blackburn v. Ohlahoma City, 1 Okl. 292, 31 Pac. 782, 33 Pac. 708; Selby v. City of Portland, 14 Or. 243, 12 Pac. 377; Luzerne County v. Trimmer, 95 Pa. 97; Devers v. City of New York, 150 Pa. 208, 24 Atl. 668; Warden v. Bayfield County, 87 Wis. 181, 58 N. W. 248. Payment by public officials to an intruder in office will not, however, deprive the person entitled to it and wrongfully dispossessed by such an intruder from claiming and collecting his compensation.. Brauns v. City of Green Bay, 78 Wis. 81. But see People v. Potter, 63 Cal. 127, and State v. Schram, 82 Minn. 420, 85 N. W. 155.

Before a suit for compensation can be maintained by claimant to office he must first establish his right to it in direct proceedings. See the following: Meredith v. Supervisors, 50 Cal. 433; Lee v. Wilmington, 1 Marv. (Del.) 65, 40 Atl. 663; Gorley v. City of Louisville, 20 Ky. L. R. 602, 47 S. W. 263; Hagan v. City of Brooklyn, 126 N. Y. 643, 27 N. E. 265, and Selby v. City of Portland, 14 Or. 243.

[521] Shaw v. Pima County, 2 Ariz. 399, 18 Pac. 273; Kreitz v. Behrensmeyer, 149 Ill. 496, 36 N. E. 983, 24 L. R. A. 59; Scott v. Crump, 106 Mich. 288, 64 N. W. 1; Parker v. Dakota County Sup'rs, 4 Minn. 59 (Gil. 30); McDonald v. City of Newark, 58 N. J. Law, 12, 32 Atl. 384; People v. Sutphin, 53 App. Div. 613, 66 N. Y. Supp. 49. In an action for fees, title to office cannot be collaterally attacked. Demarest v. City of New York, 147 N. Y. 203, 41 N. E. 405, affirming 74 Hun, 517, 26 N. Y. Supp. 585; Fuller v. Roberts County, 9 S. D. 216, 68 N. W. 308. But see Kendall v. Raybould, 13 Utah, 226, 44 Pac. 1034.

[522] Merritt v. Hinton, 55 Ark. 12, 17 S. W. 270; Stoddard v. Williams, 65 Cal. 472; Mayfield v. Moore, 53 Ill. 428; Fenn v. Beeler, 64 Kan. 67, 67 Pac. 461; Michel v. City of New Orleans, 32 La. Ann. 1094; State v. Holmes, 43 La. Ann. 1185, 10 So. 172; State v. Clark, 52 Mo. 508; Nichols v. MacLean, 101 N. Y. 526; Kessel v. Zeiser, 102 N. Y. 114; Wenner v. Smith, 4 Utah, 238, 9 Pac. 293; Bier v. Gorrell, 30 W. Va. 95, 3 S. E. 30. But see Stuhr v. Curran, 44 N. J. Law 181. See decisions on the right of a public offi-

of the incumbent of a public office, whether an officer de jure or de facto, he is entitled to the compensation as fixed and determined by law only for the actual time he serves; the payment of compensation presupposes the rendition of actual service.[523] The converse of the rule also is true that an official is entitled to compensation only from the time when he assumes and can legally perform the duties of the office.[524] Where a legislative body has the power to create an office and fix the compensation for its incumbent, its legal abolition will destroy any right of compensation.[525]

§ 695. Payment in case of sickness, suspension or absence from Office.

The payment of compensation to public officers for the performance of duties or the rendition of services with which they are legally charged is commonly based upon the actual rendition of the services rendered.[526] One who, therefore, is absent from his office either on business or personal reasons or because of sickness, cannot collect compensation for such time as he may have been disabled by such absence, whatever the cause, for performing the duties of his office.[527] Statutory provisions are usually found covering emergencies and establishing the principle that in case

cer de jure to compensation in note 10, Am. St. Rep. 284.

[523] Dillon v. Bicknell, 116 Cal. 111, 47 Pac. 937; Albaugh v. State, 145 Ind. 356, 44 N. E. 355; Fassey v. City of New Orleans, 17 La. Ann. 299; Wayne County Auditors v. Benoit, 20 Mich. 176; Howard v. City of St. Louis, 88 Mo. 656; Stanfield v. Bexar County (Tex. Civ. App.) 28 S. W. 114.

[524] United States v. Flanders, 112 U. S. 88; Shelley v. United States, 19 Ct. Cl. 653; Ball v. Kenfield, 55 Cal. 320; Speed v. Common Council of Detroit, 100 Mich. 92, 58 N. W. 638; City of San Antonio v. Micklejohn, 89 Tex. 79, 33 S. W. 735.

[525] Board of Councilmen of Frankfort v. Brawner, 100 Ky. 166, 37 S. W. 950, 38 S. W. 497; Bryon v. Jumel, 32 La. Ann. 442; Robinson v. City of Baltimore, 93 Md. 208, 49 Atl. 4; Wittmer v. City of New York, 50 App. Div. 482, 64 N. Y. Supp. 170; Debolt v. Trustees of Cincinnati Tp., 7 Ohio St. 237; Jones v. Shaw, 15 Tex. 577; City of San Antonio v. Micklejohn, 89 Tex. 79, 33 S. W. 735. But see Kimball v. City of Salem, 111 Mass. 87, and Silvey v. Boyle, 20 Utah, 205, 57 Pac. 880.

[526] State v. McAllister (Tex. Civ. App.) 31 S. W. 679.

[527] Hurlburt v. United States, 30 Ct. Cl. 16. But see Bryan v. Cattell, 15 Iowa, 538, which holds that where a public officer of the state is absent from his duties he is entitled to his salary during such absence where he has not legally vacated his office.

of unavoidable sickness, the right to compensation is not lost[528] though the official may be required to remunerate the deputy or official actually performing his duties so far as they can be performed. In case of an official charged with the exercise of discretionary duties, an ordinary sickness does not deprive him of a right to compensation. The suspension of an officer for cause will destroy a claim of this nature.[529]

Unlawful removal or suspension. If, however, the official has been illegally removed or suspended from office or prevented from performing its duties, the greater weight of authority is to the effect that no right of compensation is lost and that he can recover subsequently full pay for the time which he may have lost because of the suspension or removal.[530]

§ 696. Right to reimbursement and indemnity.

The proper performance of official duties may require in addition to the services of the official at the head of the department, deputies, clerks and other employes and the necessary expenses which accompany the carrying on of the work of the office. In

[528] Woodward v. Idaho County Com'rs, 5 Idaho, 524, 51 Pac. 143; O'Leary v. New York Board of Education, 93 N. Y. 1.

[529] Loper v. State, 48 Kan. 540, 29 Pac. 687.

[530] Ward v. Marshall, 96 Cal. 155, 30 Pac. 1113. The official illegally removed is entitled to his salary during the period of removal though another has filled the vancancy and has been paid. City of Leadville v. Bishop, 14 Colo. App. 517, 61 Pac. 58; City of Chicago v. Luthardt, 91 Ill. App. 324; State v. Carr, 129 Ind. 44, 28 N. E. 88, 13 L. R. A. 177; Stone v. Caufield, 21 Ky. L. R. 1641, 55 S. W. 924. An action for a salary by one claiming to have been wrongfully removed cannot be successful until the right to the office shall have first been established.

Andrews v. City of Portland, 79 Me. 484, 10 Atl. 458. The rule stated in the text will not apply where an officer has been precluded from performing the duties of his office by a legal suspension or removal by municipal authorities. Larsen v. City of St. Paul, 83 Minn. 473, 86 N. W. 459; Comstock v. City of Grand Rapids, 40 Mich. 397; Westberg v. City of Kansas, 64 Mo. 493; Morley v. City of New York, 58 Hun, 610, 12 N. Y. Supp. 609; Smith v. City of Brooklyn, 6 App. Div. 134, 39 N. Y. Supp. 990; Fitzsimmons v. City of Brooklyn, 102 N. Y. 536; Fylpaa v. Brown County, 6 S. D. 634, 62 N. W. 962; City of Memphis v. Woodward, 59 Tenn. (12 Heisk.) 499; Savage v. Pickard, 82 Tenn. (14 Lea) 46. The fact that the performance of certain duties has been enjoined does not suspend the right of compensation. But see Phelan v. City of New York, 14 N. Y. Supp. 785. Any rights belonging

some instances, a public official is given a salary, commission, or fees from which he is required to meet all necessary expenses connected with the proper rendition of the service.[531] Under these conditions, a public officer has no right to reimbursement or indemnity for any salaries or disbursements which he may have made and which may have become necessary by reason of the business in the office.[532] In the greater number of instances, however, a public officer is paid compensation for his personal services, and the necessary expenses of the office including salaries or wages of deputies,[533] clerks and other employes,[534] rent, fuel, light, heat and other incidentals,[535] are a charge upon the public corporation and if the officer expends moneys in payment of any of these when authorized by law, he is entitled to reimbursement.

to an official on account of his suspension may be waived by him. Smith v. City of New York, 37 N. Y. 518.

[531] State v. King, 136 Mo. 309, 36 S. W. 681, 38 S. W. 80.

[532] Hamilton County Com'rs v. Sherwood (C. C. A.) 64 Fed. 103. Construing Kan. Gen. St. 1889, c. 39, § 12. Ellis v. Tulare Co. (Cal.) 44 Pac. 575; State v. Mills, 142 Ind. 569, 41 N. E. 1026. Under Ind. Rev. St. 1894, § 8083, a township trustee receiving a per diem for his compensation is not entitled to reimbursement for money paid for office rental. Callaway County v. Henderson, 119 Mo. 32; State v. Hazelet, 41 Neb. 257; Gage County v. Wilson, 38 Neb. 168, 56 N. W. 880; State v. Cappeller, 39 Ohio St. 207.

[533] Schuyler v. Bogue, 38 Ill. App. 3; Bradley v. Jefferson County, 4 Greene (Iowa) 300; State v. Van Auken, 98 Iowa, 674, 68 N. W. 454; Harris v. Chickasaw County, 77 Iowa, 345, 42 N. W. 313.

[534] Roberts v. People, 9 Colo. 458, 13 Pac. 630.

[535] United States v. Reed, 13 C. C. A. 682, 69 Fed. 841; Gorman v. Tidholm, 94 Ill. App. 371; Marion County Com'rs v. Reissner, 58 Ind. 260; Williams v. Henry County Com'rs, 27 Ind. App. 207, 60 N. E. 1099; Hill v. City of Clarinda, 103 Iowa, 409, 72 N. W. 542; Boone County v. Todd, 3 Mo. 140; People v. New York City Sup'rs, 32 N. Y. 473. Public funds are "necessarily expended" within the meaning of the statute when the expenditure it not only needful and proper as distinguished from needless and improvident disbursements but also reasonable, appropriate and customary in the execution of the particular official duty. Walsh v. Albany County Sup'rs, 20 App. Div. 489, 47 N. Y. Supp. 35; People v. Ulster County Sup'rs, 91 N. Y. 672; Dauphin County v. Bridenhart, 16 Pa. 458; Harris County v. Clark, 14 Tex. Civ. App. 56, 37 S. W. 22. But see Yost v. Scott County Com'rs, 25 Minn. 366; State v. Smith, 84 Minn. 295, 87 N. W. 775. County surveyors are not entitled to receive pay for the use of horses used by them while engaged in the performance of their public and official duties and the fact that such a claim may have been paid at one time does

§ 697. Miscellaneous disbursements.

A public official in performing the duties of his office may incur miscellaneous expenses which are a proper charge upon public funds and this is especially true where the expense was one incurred in the performance of a duty in which the public corporation has a direct and beneficial interest or one which rests upon it as a duty or as an agency of the sovereign. For such disbursements a public officer is clearly entitled as a matter of right to a reimbursement.[536] If the expenses, however, are incurred in

not make subsequent claims a legal demand against the county.

[536] Glenn's Case, 4 Ct. Cl. 501. The judicious expenditure of moneys for the recovery of funds stolen from a paymaster without his fault should be paid by the government. Gregory v. City of Bridgeport, 41 Conn. 76; Scott County v. Drake, 71 Ill. App. 280; Philips v. Christian County, 87 Ill. App. 481; Christian County v. Merrigan, 92 Ill. App. 428; Zartman v. State, 109 Ind. 360, 10 N. E. 94; Clark Civil Tp. v. Brookshire, 114 Ind. 437, 16 N. E. 132; State v. Parker, 33 Ind. 285; Kiefer v. Troy School Tp., 102 Ind. 299; Wapello County v. Monroe County, 39 Iowa, 349; Miller v. Dickinson County, 68 Iowa, 102; Moon v. Butler County Com'rs, 30 Kan. 458. An officer in searching in another state for a fugitive from justice is entitled to reimbursement for expenses necessarily incurred though unsuccessful.

Parker v. City of New Orleans, 15 La. Ann. 43; Inhabitants of Kennebunk v. Alfred, 19 Me. 221; Brown v. Inhabitants of Orland, 36 Me. 376; City of Baltimore v. Howard County Com'rs, 61 Me. 326; Emerson v. Inhabitants of Newbury, 30 Mass. (13 Pick.) 377; Bancroft v. Inhabitants of Lynnfield, 35 Mass. (18 Pick.) 566; Cochrane v. Inhabitants of Melrose, 121 Mass. 562; Barker v. Vernon Tp., 63 Mich. 517, 30 N. W. 175; Jenney v. Mussey Tp., 121 Mich. 229, 80 N. W. 2; Ranson v. Gentry County, 48 Mo. 341; James v. Lincoln County Com'rs, 5 Neb. 38. Expenses incurred in behalf of several counties must be properly apportioned between them. Rider v. City of Portsmouth, 67 N. H. 298, 38 Atl. 385; Lewis v. Freeholders of Hudson County, 37 N. J. Law, 254. A board of freeholders may reimburse reasonable expenses incurred in good faith by a public officer in the arrest and prosecution of public offenders where such are justified by the hands of justice and the exegencies of the particular case.

Macon County Com'rs v. Jackson County Com'rs, 75 N. C. 240; Tucker v. Trustees of Rochester, 7 Wend. (N. Y.) 254; People v. Columbia County Sup'rs, 67 N. Y. 330. The cost of keeping prisoners is a county charge and the sheriff should be reimbursed for this item. State v. Hamilton County Com'rs, 26 Ohio St. 364; Kelly v. Multnomah County, 18 Or. 356, 22 Pac. 1110; Mogel v. Berks County, 154 Pa. 14, 26 Atl. 227; Mansel v. Nicely, 175 Pa. 367, 34 Atl. 793. A county commissioner where traveling expenses are allowed by law is not entitled to expenses incurred each day in going from his home to his office and re-

connection with services not authorized by law or in the performance of duties in excess of corporate powers, no right of indemnity or reimbursement exists.[537]

Where the expense is incurred in a service which properly belongs to the public corporation as a governmental agent or as the sovereign itself, or is one in which it is directly and beneficially interested, the authorities are all agreed that while a public official may not as a matter of right be entitled to reimbursement for the necessary expenditures, yet, the corporation has the unquestioned power to provide for a reimbursement.[538] Where, however, the disbursement was made in the rendition of a service in which the officer or individual alone is directly and beneficially interested and which cannot be considered as a duty resting upon the corporation to perform, the right or power of reimbursement does not exist for this would be equivalent to the appropriation or

turning. Civic Federation v. Salt Lake County, 22 Utah, 6, 61 Pac. 222; Ladd v. Town of Waterbury, 34 Vt. 426; State v. Atkinson, 25 Wash. 283, 65 Pac. 531; McCumber v. Waukesha County, 91 Wis. 442, 65 N. W. 51. A town marshal cannot recover for use of his own vehicle in conveying prisoners. But see Bristol County v. Gray, 140 Mass. 59.

[537] Heney v. County of Pima, 2 Ariz. 257, 14 Pac. 299; Reilly v. Cochise County (Ariz.) 53 Pac. 205; Irwin v. Yuba County, 119 Cal. 686, 52 Pac. 35; Carlile v. Hurd, 3 Colo. App. 11, 31 Pac. 952. The expenses of a deputy insurance commissioner in attending to an insurance conviction without the state and investigating the condition of the insurance company in another state are not a proper charge upon public funds.

Clyne v. Bingham County, 7 Idaho, 75, 60 Pac. 76; McCracken v. Soucy, 29 Ill. App. 619. The fact that moneys were expended for a useful purpose, if not authorized, creates no claim for reimbursement. McGregor v. City of Logansport, 79 Ind. 166; Vincent v. Inhabitants of Nantucket, 66 Mass. (22 Cush.) 103; Rasmusson v. Clay County, 41 Minn. 283, 43 N. W. 3; Garnier v. City of St. Louis, 37 Mo. 554; State v. Bourn, 75 Mo. 473; Inhabitants of Princeton v. Mount, 29 N. J. Law (5 Dutch.) 299; Lewis v. Chosen Freeholders of Hudson, 37 N. J. Law, 254; Mogel v. Berks County, 154 Pa. 14; James v. City of Seattle, 22 Wash. 654, 62 Pac. 84. The expenses of a committee appointed by an ordinance in visiting and investigating other municipalities in order to secure information on municipal waterworks, street paving and street lighting, are not a proper charge upon the public funds and an appropriation cannot be made for the reimbursement of such expenses although they may be reasonable and necessary. Townsley v. Ozaukee County, 60 Wis. 251.

[538] French v. City of Auburn, 62 Me. 452; Sherman v. Carr, 8 R. I. 431.

use of public moneys for private purposes.[539] This is true even where, in some cases, the expense was incurred by the officer in the defense of actions brought against him on account of official services performed by him.[540]

§ 698. Accounts of public officers.

Public officials are charged with the care of public funds or of public property and the obvious duty rests upon them to account for these from time to time and upon the termination of their official service. Officers disbursing public moneys especially are, or should be, required to keep accounts in detail of their receipts and disbursements;[541] these accounts are generally examined and audited under statutory provisions by boards of audit for the purpose of determining their accuracy.[542] The manner of this examination, audit and settlement is controlled by statute,[543] and is regarded as a discretionary duty or act which in the absence of

[539] Frost v. Inhabitants of Belmont, 88 Mass. (6 Allen) 152. Expenses incurred by individuals in procuring the passage of the town charter cannot be recovered. People v. Bingham Tp. Board, 32 Mich. 492; Hooper v. Ely, 46 Mo. 505.

[540] Spaulding v. City of Jefferson, 27 La. Ann. 159; Gove v. Epping, 41 N. H. 539; Merrill v. Town of Plainfield, 45 N. H. 126. But see Fuller v. Inhabitants of Groton, 77 Mass. (11 Gray) 340, and Lawrence v. McAlvin, 109 Mass. 311.

[541] Perry v. Otay Irr. Dist., 127 Cal. 565, 60 Pac. 40; Town of Chatham v. Niles, 36 Conn. 403; Dreyer v. People, 176 Ill. 590, 52 N. E. 372; Miller v. State, 106 Ind. 415; City of Muskegon v. Soderberg, 111 Mich. 559, 69 N. W. 1116; Cole County v. Dallmeyer, 101 Mo. 57, 13 S. W. 687; State v. King, 136 Mo. 309, 36 S. W. 681, 38 S. W. 80; Clark County v. Hayman, 142 Mo. 430, 44 S. W. 237; Woodward v. State, 58 Neb. 598, 79 N. W. 164; Town of Guilford v. Cooley, 58 N. Y. 116; People v. Barnes, 114 N. Y. 317; State v. Washington County Com'rs, 56 Ohio St. 631, 47 N. E. 565; State v. Town of Brattleboro, 68 Vt. 520, 35 Atl. 472.

[542] Pickett v. Harrod, 86 Ky. 485, 5 S. W. 473; Parish School Board v. Packwood, 42 La. Ann. 468, 7 So. 537; People v. Onondaga Tp. Sup'rs, 16 Mich. 254; Clegg v. Wayne County Auditors, 96 Mich. 188, 55 N. W. 621; Owens v. Andrew County, 49 Mo. 372.

[543] Jackson v. Dinkins, 46 Ala. 69; Dale County v. Gunter, 46 Ala. 118; Reynolds v. McWilliams, 49 Ala. 552. An officer de facto whose official duty is to audit the accounts of other officials cannot refuse on the ground that he is not one de jure and simply one de facto. English v. Chicot County, 26 Ark. 454; Barnes v. Marion County, 54 Iowa, 482; State v. Kenney, 9 Mont. 223, 23 Pac. 733; Kearney County v. Tuttle, 16 Neb. 34; Springer v. Inhabitants of Logan, 58 N. J. Law, 588, 33 Atl. 952; In re Tinsley, 90

fraud or gross mistake is conclusive.[544] The report of an official when questions are raised with respect to its correctness is generally considered as conclusive and the official is estopped to claim facts or conditions other than as so represented or stated.[545]

§ 699. Agents and employes; authority to hire.

A public corporation may legally employ in its service, special agents and employes not considered as public officers in the legal sense of the term, the relation being a contract one and the rights and obligations of the parties being measured by the particular contract of employment,[546] and in this respect totally different from the relation existing between a public corporation and a pub-

N. Y. 231; Godshalk v. Northampton County, 71 Pa. 324; Luzerne County v. Whitaker, 100 Pa. 296.

[544] United States v. Patrick, 73 Fed. 800, 20 C. C. A. 11; People v. Lattimore, 19 Cal. 365; Springer v. Green, 46 Cal. 73; Harms v. Fitzgerald, 1 Ill. App. 325; District Tp. of Viola v. Bickelhaupt, 99 Iowa, 659, 68 N. W. 914; Parish School Board v. Packwood, 42 La. Ann. 468, 7 So. 537; Union Parish School Board v. Trimble, 33 La. Ann. 1073; State v. Ewing, 116 Mo. 129, 22 S. W. 476; Scott County v. Leftwich, 145 Mo. 26, 46 S. W. 963; State v. Shipman, 125 Mo. 436; Bush v. Johnson County, 48 Neb. 1, 66 N. W. 1023, 32 L. R. A. 223; Godshalk v. Northampton County, 71 Pa. 324; Shartzer v. Washington School Dist., 90 Pa. 192; County of West Moreland v. Fisher, 172 Pa. 317, 33 Atl. 571; Ferry v. King County, 2 Wash. St. 337, 26 Pac. 537; Town of Cady v. Bailey, 95 Wis. 370, 70 N. W. 285. But see Hazelet v. Holt County, 51 Neb. 716, 71 N. W. 717, and Shepard v. Easterling, 61 Neb. 882, 86 N. W. 941.

[545] San Juan County Com'rs v. Oliver, 7 Colo. App. 515, 44 Pac. 362; Oeltjen v. People, 61 Ill. App. 54; State v. Mock, 21 Ind. App. 629, 52 N. E. 998; Montmorency County v. Putnam, 122 Mich. 581, 81 N. W. 573. Under Comp. Laws 1897, § 2479, settlements with the county treasurer are prima facie evidence only of the state of his account and either party is at liberty to show fraud, mistake or omission. Whitney v. State, 53 Neb. 287, 73 N. W. 696. But see Shaver v. Sharp County, 62 Ark. 76, 34 S. W. 261; State v. Ewing, 116 Mo. 129, 22 S. W. 476.

[546] White v. City of Alameda, 124 Cal. 95, 56 Pac. 795; Gillett v. Logan County Sup'rs, 67 Ill. 256; Wilt v. Town of Redkey, 29 Ind. App. 199, 64 N. E. 228. Such a contract relation may arise by implication or through ratification of acts done. It is not necessary that the employment be made by formal ordinance, by-law or resolution nor it is even essential that the contract be in writing. Webster County v. Taylor, 19 Iowa, 117; Call v. Hamilton County, 62 Iowa, 448; Henderson County v. Dixon, 23 Ky. L. R. 1204, 63 S. W. 756; State v. Lancaster County Com'rs, 20 Neb. 419; Failing v. City of Syracuse, 4 Misc. 50, 24 N. Y. Supp. 705.

lic officer. The legality of the contract as usual depends upon the authority or power of the parties to enter into it.[547] One of these is necessarily a public corporation and its legal right to hire agents and employes is limited by the nature of the corporation and by the fact that it is a public corporation restricted in its legal capacity to undertake commercial or business enterprises or engage in ordinary work.[548] In some instances a public corporation may be limited in these directions not only by the general limitation above suggested but also by special constitutional or statutory provisions which restrict its power to engage in particular work.[549] The authority of a public corporation to employ an agent, a clerk, or a laborer, therefore, is limited by its general character and also by such special restrictions as those suggested. The discussion relative to the exercise of the express and implied powers of a public corporation is appropriate in this connection.[550] The general rule obtains, as will be remembered, that a public corporation possesses but few implied powers and where the question of the legality of the employment arises or may arise, the safer assumption is that the right must be expressly given.[551] There certainly is no implied power in a public corporation to employ persons to do work outside of duties germane to public government.[552] Not only should the contract of employment be one within the power of the public corporation to make, but it must be made by one authorized to represent the corporation.[553] The difference in the char-

[547] Cramer v. Water Com'rs of New Brunswick, 57 N. J. Law, 478, 31 Atl. 384.

[548] Potts v. City of Cape May, 66 N. J. Law, 544, 49 Atl. 584. A municipality has no power to employ an agent to represent it in an advertising or general way as a popular summer resort.

[549] Randolph County Com'rs v. Henry County Com'rs, 27 Ind. App. 378, 61 N. E. 612; Potts v. City of Cape May, 66 N. J. Law, 544, 49 Atl. 584.

[550] See §§ 108 et seq., ante.

[551] City of Ft. Wayne v. Rosenthal, 75 Ind. 156; Copp v. St. Louis County, 34 Mo. 383; People v. Town Auditors of Smithville, 85 Hun, 114, 32 N. Y. Supp. 668.

[552] Potts v. City of Cape May, 66 N. J. Law, 544, 49 Atl. 584.

[553] Ventura County v. Clay, 112 Cal. 65, 44 Pac. 488; Roberts v. People, 9 Colo. 458. A county assessor has the legal authority to employ necessary clerks. Town of Madison v. Newsome, 39 Fla. 149, 22 So. 270; Garrigus v. Howard County Com'rs, 157 Ind. 103, 60 N. E. 948; Dickinson v. Jersey City, 68 N. J. Law, 99, 52 Atl. 278. A board of fire commissioners cannot appoint men to office whose terms will begin after a new board will come into office. Walsh v. City of Albany, 32 App. Div. 128, 52 N. Y. Supp. 836.

acter of an agency as representing a public corporation and one acting for a private person, whether natural or artificial, has already been discussed in a previous section.[554] Bearing in mind these general principles, the question of the legality of an employment in a particular instance may easily be determined.

§ 700. Fire department; power to organize.

There seems no doubt but that it is a proper exercise of governmental power to guard the lives and property of those within its protection. Under this principle, fire departments within the limits of municipal corporations or elsewhere are organized and managed, supplies are purchased and firemen employed to carry on this particular function.[555] A public corporation having a fire department may control the retirement[556] and the employment of firemen and prescribe qualifications or tests, both physical and mental, as necessary for such employment.[557] Their pay may be fixed and funds set aside for the benefit of disabled or aged firemen or their families.[558] Civil service rules may also be adopted bearing upon and controlling their conduct while employed[559] and providing for their removal or suspension for cause[560] by an

[554] See §§ 651, 663, ante.

[555] People v. Auburn Fire Com'rs, 27 App. Div. 530, 50 N. Y. Supp. 506.

[556] People v. Trustees of Firemans' Pension Fund, 95 Ill. App. 300; People v. Bryant, 28 App. Div. 480, 51 N. Y. Supp. 119; People v. Scannel, 34 Misc. 709, 70 N. Y. Supp. 1042.

[557] Higgins v. Cole, 100 Cal. 260, 34 Pac. 678; Williams v. City of Newport, 75 Ky. (12 Bush) 438. The chief of a fire department may be removed through the abolition of the office. Gilbert v. Salt Lake City Police & Fire Com'rs, 11 Utah, 378, 40 Pac. 264.

[558] Tobin v. Scannell, 64 App. Div. 375, 72 N. Y. Supp. 184; Peterson v. City of Wilmington, 130 N. C. 76, 40 S. E. 853, 56 L. R. A. 959. Firemen cannot recover for injuries sustained while in service; the duties performed by a fire department in respect to the extinguishment of fires is a public and governmental one; not private or municipal. Price v. Farley, 22 Ohio Circuit Ct. Rep. 48; Karb v. State, 54 Ohio St. 383, 43 N. E. 920.

[559] Lyon v. Newark Fire Com'rs, 53 N. J. Law, 92, 20 Atl. 757; Newark Fire Com'rs v. Lyon, 53 N. J. Law, 632, 23 Atl. 274, reversing 53 N. J. Law, 92, 20 Atl. 757.

[560] Norton v. Inhabitants of Brookline, 181 Mass. 360, 63 N. E. 930; People v. Wurster, 89 Hun, 7, 35 N. Y. Supp. 86. A surgeon appointed by a board of fire commissioners to attend members of the department is a fireman within the protection of the statute prohibiting their removal without a charge and trial; a laborer employed by the depart-

appropriate tribunal[561] after notice and hearing,[562] and upon charges made in an appropriate and prescribed manner.[563] Causes for removal or suspension may be established and these may consist of a neglect of duty,[564] of conduct unbecoming to their position,[565] of disobedience and insubordination or wilful violation of rules and regulations provided generally for the management of such a department.[566] Contrary to the usual rule where charges are made against an employe of the fire department resulting in suspension or removal, the burden of proof is upon the party charged with the offense to bring his conduct within the rules

ment and a coal passer not considered firemen.

In re Delaney, 90 Hun, 515, 35 N. Y. Supp. 964. Lack of appropriated funds is no cause for the discharge of firemen. People v. New York Fire Com'rs, 43 Hun (N. Y.) 554; People v. Tracy, 35 App. Div. 265, 54 N. Y. Supp. 1070; People v. York, 53 App. Div. 429, 65 N. Y. Supp. 1074. The usual rule that in order to make a removal or discharge effectual, notice must be given and a hearing had does not apply where an office is legally abolished in good faith. People v. Brooklyn Fire Dept. Com'rs, 103 N. Y. 370; People v. Coler, 159 N. Y. 569. In order to take advantage of the privileges afforded by N. Y. Laws, 1892, c. 577, § 1, it must be alleged that the person has served the time required by law in a volunteer fire department or was a member at the time of its disbandment.

[561] People v. Coyle, 31 Misc. 827, 64 N. Y. Supp. 894, affirmed 55 App. Div. 223, 66 N. Y. Supp. 827.

[562] Duerr v. Newark Fire Com'rs, 55 N. J. Law, 272, 26 Atl. 144; People v. Broklyn Fire Dept. Com'rs, 106 N. Y. 64, 12 N. E. 641; People v. Purroy, 59 Hun, 622, 13 N. Y. Supp. 119. Insufficient notice may be waived by appearance and hearing without objection. People v. Auburn Fire Com'rs, 27 App. Div. 530, 50 N. Y. Supp. 506; People v. Scannell, 27 Misc. 734, 59 N. Y. Supp. 480. An assistant secretary of the fire department is entitled to a notice and a hearing before he can be discharged. People v. Brooklyn Fire Dept. Com'rs, 103 N. Y. 370.

[563] People v. New York Fire Com'rs, 72 N. Y. 445, Id., 77 N. Y. 153.

[564] O'Neill v. Register, 75 Md. 425, 23 Atl. 960; State v. Register, 59 Md. 283; People v. Ennis, 65 Hun, 621, 19 N. Y. Supp. 946; People v. Sandford, 89 Hun, 605, 35 N. Y. Supp. 29; People v. Wurster, 91 Hun, 233, 36 N. Y. Supp. 160. Absence without leave when caused by sickness does not constitute a neglect of duty. People v. La Grange, 1 App. Div. 338, 37 N. Y. Supp. 297.

[565] People v. Coyle, 31 Misc. 593, 64 N. Y. Supp. 894, affirmed 55 App. Div. 223, 66 N. Y. Supp. 827; People v. Scannell, 56 App. Div. 51, 67 N. Y. Supp. 433; State v. Hyman, 22 Ohio Circ. R. 213.

[566] Norton v. Inhabitants of Brookline, 181 Mass. 360, 63 N. E. 930.

provided for the regulation of the department.[567] This rule has been adopted as a means of maintaining discipline.

Pay upon suspension or removal. A suspension or removal may be either regular and lawful or irregular and illegal. The right of a fireman or a member of the fire department to pay while suspended or after removal will depend upon its character in this respect and the rule usually obtains that if the suspension or removal be unlawful and irregular that the person affected is entitled to compensation during the time of the suspension or removal,[568] and where the charge is one which affects his character, damages may be recovered for the injury where the right of action in this respect is given by law. If the suspension or removal is regular, and is sustained after investigation or appeal, the right of compensation is lost.[569]

§ 701. Police department; organization.

The preservation of order is considered a public and governmental duty and is attained most efficiently through the organization of a department for this special purpose or the employment of individuals to perform this particular work.[570] It is regarded as a state or governmental function; not one belonging to a community in its municipal or private capacity, although it may be vested secondarily with the right to maintain order. Viewed in this light, the legislature retains a great degree of control over the organization and the creation of police departments, districts or boards even in cases where special charters may have been already granted. The only limitations upon the legislative power in this respect are those usually found in constitutions restricting the power of the legislature to pass laws either in respect to the object of the law or the manner and form of its adoption.

The ordinary method in large towns and cities provided for the maintenance of order is through the creation of police departments or boards of police commissioners to whom is entrusted this duty, perhaps with others.[571] The power of such a board or the

[567] State v. Moores, 63 Neb. 301, 88 N. W. 490; Ackerly v. Jersey City, 54 N. J. Law, 310, 23 Atl. 666.

[568] See § 695, ante.

[569] Norton v. Inhabitants of Brookline, 181 Mass. 360, 63 N. E. 930.

[570] Doering v. State, 49 Ind. 56.

[571] City of Huntington v. Cast, 149 Ind. 255, 48 N. E. 1025. The creation of a board of police commissioners is dependent upon the population of a city under Acts 1897, p. 90, § 1; State v. Hunter, 38

officials of such a department is measured by the terms creating them.[572] The maintenance of discipline among those employed to enforce public regulations or public law is absolutely essential and large powers are generally given to police commissioners over the employment of men, the adoption of regulations and the enforcement of their orders.[573] The disbursement of public moneys for this purpose is considered a public one and, therefore, authorized by law, and proper expenditures would include the ordinary and necessary expenses of such a department, the wages or salaries of officials and clerks, the purchase and maintenance of supplies and equipment and incidental expenses connected with its operation.

Kan. 578, 17 Pac. 177; State v. Shearman, 51 Kan. 686, 35 Pac. 455. Police commissioners of a city how removable. Joyce v. Parkhurst, 150 Mass. 243, 22 N. E. 899; Parish v. City of St. Paul, 84 Minn. 426, 87 N. W. 1124.

[572] City of Maysville v. Purnell, 20 Ky. L. R. 94, 45 S. W. 101; City of Lexington v. Rennick, 20 Ky. L. R. 1609, 49 S. W. 787. Where policemen are removable by a body of police commissioners, the reduction of salaries is not unconstitutional as violating constitution, § 161 providing that "the compensation of any city * * * officer shall not be changed after his election or appointment, or during his term of office." Neumeyer v. Krakel, 110 Ky. 624, 62 S. W. 518, construing Ky. Act of March 23, 1894, amendatory of the charter of cities of the first class. Andrews v. Police Board of Biddeford, 94 Me. 68, 46 Atl. 801; State v. Vallins, 140 Mo. 523, 41 S. W. 887; State v. Mason, 153 Mo. 23, 54 S. W. 524; State v. Smith, 35 Neb. 13, 16 L. R. A. 791; People v. York, 163 N. Y. 604, 57 N. E. 1120, affirming 48 App. Div. 611, 63 N. Y. Supp. 156, which construes greater New York charter, § 281, relative to the right of the police board of greater New York, to "fix and asign the rank, title, duties, powers and place of service" of the transferred members of the police force. People v. York, 43 App. Div. 444, 60 N. Y. Supp. 208; 53 App. Div. 429, 65 N. Y. Supp. 1074; State v. Holmes, 118 N. C. 1201, 24 S. E. 119; Jones v. Doherty (Tex. Civ App.) 56 S. W. 596. The "board of police" of the City of Galveston is a body separate and independent of the city council with certain prescribed powers and duties in respect to which it cannot be controlled by that body.

[573] Mitchell v. City of Topeka (Kan. App.) 54 Pac. 292; Fitzpatrick v. Gaster, 45 La. 1477, 14 So. 304; Keyser v. Upshur, 92 Md. 726, 48 Atl. 399; Malcom v. City of Boston, 173 Mass. 312, 53 N. E. 812; Wood v. City of Haverhill, 174 Mass. 578, 55 N. E. 381. Vacations for policemen are authorized under Mass. St. 1894, c. 480, authorizing a city to make such regulations for the government of the police department not inconsistent with the law as the mayor and aldermen may deem proper. Skillman v. Trenton Police Com'rs, 64 N. J. Law, 489, 45 Atl. 803; People v. York, 43 App. Div. 444, 60 N. Y. Supp. 208; People v. Knox, 48 App. Div. 477, 62 N. Y. Supp. 940.

§ 702. Qualifications of members.

In the organization of such a department, the power is usually given to officials in charge, of prescribing qualifications necessary for this service.[574] The necessity exists, because of the character of the work to be performed, for the employment of men physically able-bodied,[575] mentally sound and possessing other characteristics necessary for the proper performance of such work.[576] These tests or qualifications, so long as they are reasonable and do not violate constitutional provisions, are held valid and those not possessing them cannot complain because of their rejection. In the absence of fraud, police commissioners or examiners passing upon applicants are protected in the discharge of their duties and their action is regarded as conclusive, not reviewable by the courts,[577] their duty in this respect being considered of a discretionary character.

§ 703. Suspension or removal of police officers and men.

To maintain the discipline of a police department, it is necessary that it should be placed upon what may be termed a civil service basis.[578] A high state of efficiency cannot be attained where pro-

[574] Larson v. City of St. Paul, 83 Minn. 473, 86 N. W. 459. Where a city charter provides for qualifications of policemen, patrolmen or other police officers, it is not necessary that an appointee to the office of sergeant of police shall possess the requirements fixed. State v. Williams, 99 Mo. 291, 12 S. W. 905. The payment of taxes made a qualification and held reasonable.

[575] Enright v. Duff, 102 Mich. 446, 60 N. W. 975; People v. Ham, 59 App. Div. 314, 69 N. Y. Supp. 283.

[576] People v. Robb, 126 N. Y. 180, 27 N. E. 267, affirming 58 Hun, 604, 11 N. Y. Supp. 383; Steinback v. City of Galveston (Tex. Civ. App.) 41 S. W. 822. The inability of a policeman to read or write the English language is ground for removal within the meaning of the terms incompetency or insufficiency as used in special laws 1891, p. 70, creating for the city of Galveston a police commission.

[577] Keyser v. Upshur, 92 Md. 726, 48 Atl. 399; Murray v. Welles, 18 App. Div. 337, 46 N. Y. Supp. 172.

[578] Kipley v. Luthardt, 178 Ill. 525, 53 N. E. 74; Upshur v. Ward, 94 Md. 778, 51 Atl. 828; Tucker v. Common Council of Grand Rapids, 104 Mich. 621; Boylan v. Newark Police Com'rs, 58 N. J. Law, 133; People v. Village of Sing Sing, 54 App. Div. 555, 66 N. Y. Supp. 1094. New York Laws, 1899, c. 370, providing for civil service does not relate in terms to the tenure of office of policemen in the village as at the pleasure of the board of trustees. Const. art. 5 § 9 provides only for payment and promotion in civil service and does not refer to removals. State v. Kizer, 14 Wash. 185, 44 Pac. 156.

motions,[579] appointments and removals are made for political, racial or religious reasons, and not based upon the physical and mental qualifications of the individual.[580] Laws organizing police departments and authorizing the employment of policemen usually provide, therefore, that removals or suspensions cannot be made without cause,[581] an arbitrary power of removal or suspension operating generally to disorganize the force. In some cities the power of appointment, suspension or removal is vested in the

[579] Malcom v. City of Boston, 173 Mass. 312; People v. Knox, 62 N. Y. Supp. 940; 57 App. Div. 155, 68 N. Y. Supp. 267; People v. Knox, 166 N. Y. 444; 60 N. E. 17, 54 L. R. A. 597, reversing 54 App. Div. 634, 67 N. Y. Supp. 1142.

[580] Moores v. State, 54 Neb. 486, 74 N. W. 823; People v. Diehl, 53 App. Div. 645, 65 N. Y. Supp. 801. A removal will be reversed where made ostensibly for cause but in fact made to give the place to one of the same political faith as a majority of the members of the removing board. Venable v. Portland Police Com'rs, 40 Or. 458, 67 Pac. 203.

[581] City of Chicago v. Luthardt, 191 Ill. 516, 61 N. E. 410. Affirming 91 Ill. App. 324; Roth v. State, 158 Ind. 242, 63 N. E. 460; Andrews v. Police Board of Biddeford, 94 Me. 68; McAuliffe v. City of New Bedford, 155 Mass. 216, 29 N. E. 517; Enright v. Duff, 102 Mich. 446, 60 N. W. 975. A provision that "no policeman shall be removed until charges have been preferred against him" does not prevent the body charged with control of the police department from removing policemen for physical disability without the preferment of charges against him.

McNab v. Common Council of Bay City, 125 Mich. 51, 83 N. W. 1022; State v. Walbridge, 153 Mo. 194, 54 S. W. 447; Moores v. State, 54 Neb. 486, 74 N. W. 823; Clark v. City of Cape May, 50 N. J. Law, 558, 14 Atl. 581; Leary v. City of Orange, 59 N. J. Law, 350, 35 Atl. 786. A reduction in rank prohibited except for nonresidence, incapacity or disobedience under New Jersey Laws, Feb. 23, 1886. Bohan v. Weehawken Tp., 65 N. J. Law, 490, 47 Atl. 446; Bakely v. Nowrey, 68 N. J. Law, 95, 52 Atl. 286. A substitute policeman is under the protection of a provision prohibiting a removal except for cause and after hearing.

People v. Dillon, 161 N. Y. 646, 57 N. E. 1122, affirming 46 App. Div. 187, 61 N. Y. Supp. 537, construing New Rochelle City charter, N. Y. Laws, 1899, c. 128, §§ 114, 119, 256; People v. Hayden, 133 N. Y. 198, 30 N. E. 970, affirming 57 Hun, 590, 10 N. Y. Supp. 794. A boiler inspector appointed by the commissioner of police is entitled to the same protection as a policeman. Proctor v. Blackburn, 28 Tex. Civ. App. 351, 67 S. W. 548; People v. McAllister, 10 Utah, 357; Pratt v. Board of Police & Fire Com'rs, 15 Utah, 1, 49 Pac. 747; Pratt v. Swan, 16 Utah, 483, 52 Pac. 1092; Bringgold v. City of Spokane, 27 Wash. 202, 67 Pac. 612; State v. Superior Common Council, 90 Wis. 612, 64 U. W. 304. But see Smith v. Bryan, 100 Va. 199, 40 S. E. 652

mayor either with [582] or without the consent and advice of a confirming or assenting board. It necessarily follows that where the power to appoint, remove or suspend a policeman is vested in the chief executive of a city or some official body, that such action can be taken arbitrarily and without cause and that the person so suspended or removed has no right of redress for what he may consider improper or unjust treatment.[583]

§ 704. Tribunal and hearing.

Where the protection exists, as suggested in the preceding section, in order to legally remove or suspend police officers, it is necessary that notice [584] be given the person charged with the commission of an offense, that a hearing be had [585] and that an im-

[582] State v. Kennedy, 69 Conn. 220, 37 Atl. 503; Attorney General v. Cain, 84 Mich. 223, 47 N. W. 484; Larsen v. City of St. Paul, 83 Minn. 473, 86 N. W. 459; Parish v. City of St. Paul, 84 Minn. 426, 87 N. W. 1124; State v. Thomas, 102 Mo. 85, 14 S. W. 108; Westberg v. City of Kansas, 64 Mo. 493; People v. Crissey, 91 N. Y. 616; Selby v. City of Portland, 14 Or. 243, 12 Pac. 377; Com. v. Black, 201 Pa. 433, 50 Atl. 1008; Lowrey v. City of Central Falls, 23 R. I. 354, 50 Atl. 639. The dismissal of a patrolman by a joint action of the mayor and board of aldermen is not invalid because of tne failure of the mayor to preside at the meeting. State v. Kizer, 14 Wash. 185, 44 Pac. 156.

[583] Smith v. Brown, 59 Cal. 672; City of Leadville v. Bishop, 14 Colo. App. 517, 61 Pac. 58; Oliver v. Americus City Council, 69 Ga. 165; City of Chicago v. Edwards, 58 Ill. 252; City of Lexington v. Rennick, 20 Ky. L. R. A. 1609, 49 S. W. 787; State v. City of St. Paul, 81 Minn. 391, 84 N. W. 127, 1116; City of Lincoln v. Yeomans, 34 Neb. 329, 51 N. W. 844; Quinn v. City of Portsmouth, 64 N. H. 324, 10 Atl. 677. The power of removal of police officers and watchmen by municipal authorities co-exists with the power of appointment. Trowbridge v. City of Newark, 46 N. J. Law, 140; Venable v. Police Com'rs of Portland, 40 Or. 458, 67 Pac. 203.

[584] Gorley v. City of Louisville, 23 Ky. L. R. 1782, 65 S. W. 844; People v. Albany Police Com'rs, 108 N. Y. 475, 15 N. E. 692; People v. Common Council of Hudson, 77 Hun, 548, 28 N. Y. Supp. 940; People v. Martin, 1 App. Div. 420, 37 N. Y. Supp. 274; People v. Ham, 59 App. Div. 314, 69 N. Y. Supp. 283; People v. Martin, 152 N. Y. 311, 46 N. E. 484, reversing 10 App. Div. 625, 41 N. Y. Supp. 1128. People v. York, 166 N. Y. 582, 60 N. E. 258, reversing 58 App. Div. 624, 69 N. Y. Supp. 1142; Pratt v. Swan, 16 Utah, 483.

[585] State v. Rusling, 64 Conn. 517; Streeter v. City of Worcester, 177 Mass. 29, 58 N. E. 277. Where the proceedings for removal are not strictly regular, such informality may be waived by the policeman removed or may be estopped after-

partial and disinterested tribunal hear and determine the case.[586] A hearing includes, as a rule, not only the opportunity for the person charged to be present and hear the evidence presented

wards to the advantage of them by acquiescence in the result of the hearing for several years.

Murphy v. Webster, 131 Mass. 482; Ham v. Boston Police, 142 Mass. 90; Wilkinson v. Police Com'rs of Saginaw, 107 Mich. 394, 65 N. W. 668. A hearing and dismissal must be based upon the charges of which the accused had notice. Wellman v. Metropolitan Police of Detroit, 84 Mich. 558. Where charges have been made and a hearing had, the finding cannot be one based upon a charge different than the one upon which the hearing was had.

Moores v. State, 54 Neb. 486, 74 N. W. 823; Devault v. City of Camden, 48 N. J. Law, 433. The same formalities are not necessary in the proceedings under New Jersey act, March 25, 1885, for the removal of a police officer as those provided or prescribed for inferior criminal prosecutions. Bowlby v. City of Dover, 68 N. J. Law, 97, 52 Atl. 289; People v. McClave, 57 Hun, 587, 10 N. Y. Supp. 764. The action of police commissioners cannot be reviewed where the evidence is conflicting.

People v. Howell, 62 Hun, 621, 16 N. Y. Supp. 775; People v. Martin, 13 Misc. 21, 33 N. Y. Supp. 1000. Where a policeman was too ill to attend a hearing the refusal of a board of police commissioners to adjourn his trial is ground for setting aside the finding against him. People v. Elmendorf, 42 App. Div. 306, 59 N. Y. Supp. 115. The charge should be specific in pointing out the particular cause of misconduct. People v. York, 59 N. Y. Supp. 333. It is not necessary that proceedings before police commissioners should have the same formality or the same requirements as the practice and procedure in actions in civil courts. People v. New York Police Com'rs, 98 N. Y. 332. The strict rule governing trials do not apply to investigations by police commissioners in the charge of neglect of duty on the part of the patrolman. People v. Humphrey, 156 N. Y. 231, 50 N. E. 860; Proctor v. Blackburn, 28 Tex. Civ. App. 351, 67 S. W. 548.

[586] Asbell v. City of Brunswick, 80 Ga. 503, 5 S. E. 500; City of Savannah v. Brown, 64 Ga. 229; McAuliffe v. City of New Bedford, 155 Mass. 216, 29 N. E. 517; Carey v. Police of City of Plainfield, 53 N. J. Law, 311, 21 Atl. 492; Taylor v. City of Bayonne, 56 N. J. Law, 265, 28 Atl. 380; Dodd v. Foster, 64 N. J. Law, 370, 45 Atl. 802; People v. New York Police Com'rs, 84 Hun, 64, 32 N. Y. Supp. 18; People v. Roosevelt, 23 App. 533, 48 N. Y. Supp. 578. One who has a personal grievance against the accused inseparably connected with the charge under consideration is rendered incompetent to consider or determine the case.

People v. York, 53 App. Div. 336, 65 N. Y. Supp. 696. An altercation with one of a board of commissioners does not disqualify him from sitting in a case. People v. Elmendorf, 57 App. Div. 340, 68 N. Y. Supp. 54; Lowrey v. City of Central Falls, 23 R. I. 354, 50 Atl. 639. Members of a tribunal authorized by law to remove policemen after

against him,[587] but also the right to produce evidence on his own behalf,[588] to cross-examine witnesses produced against him, and the further right to employ counsel to act in his defense.[589] Where a removal or suspension can only be made for cause, this must exist before the action can be taken. The right of appeal or removal by the proper procedure to a regularly constituted judicial tribunal must be specially authorized; it does not exist as a matter of course.[590] The granting of new trials or rehearings is discre-

a hearing on written charges need not be sworn before sitting to consider such charges. Doherty v. City of Galveston, 19 Tex. Civ. App. 708, 48 S. W. 804. A city council as the proper tribunal for hearing charges against a police officer need not be sworn before considering a particular case.

[587] People v. Roosevelt, 2 App. Div. 1083, 37 N. Y. Supp. 1083. The testimony of regular detectives need not be corroborated to be competent. People v. Roosevelt, 6 App. Div. 382, 39 N. Y. Supp. 640. The evidence introduced on a hearing against a policeman should be competent, not hearsay. Testimony not under oath is insufficient to sustain the charge.

People v. Roosevelt, 16 App. Div. 364, 44 N. Y. Supp. 1003. In a proceeding before a police board, it is not necessary that rulings on evidence charged should legally be as close and accurate as in a trial before a regularly constituted judicial tribunal. People v. Moss, 38 App. Div. 630, 56 N. Y. Supp. 1032. On rehearing, 34 App. Div. 475, 54 N. Y. Supp. 262. A police officer is not prejudiced by the mere failure to have the witnesses produced against him on a hearing sworn. People v. York, 45 App. Div. 503, 61 N. Y. Supp. 400. Witnesses should be sworn. People v. York, 53 App. Div. 336, 65 N. Y. Supp. 696. Where a policeman pleads guilty to the charge, no evidence is necessary to support a judgment of dismissal. People v. York, 73 App. Div. 445, 77 N. Y. Supp. 43. Witnesses should be sworn. People v. Board of Police Com'rs, 155 N. Y. 40, 49 N. E. 527, reversing 12 App. Div. 628, 42 N. Y. Supp. 1131. Witnesses should be sworn, otherwise, the proceedings are void and the officer is entitled to be reinstated.

[588] Todd v. Dunlap, 99 Ky. 449; People v. Voorhis, 66 Hun, 88, 20 N. Y. Supp. 941; Pratt v. Swan, 16 Utah, 483, 52 Pac. 1092.

[589] People v. Flood, 64 App. Div. 209, 71 N. Y. Supp. 1067.

[590] McAuliffe v. City of New Bedford, 155 Mass. 216, 29 N. E. 517; Cavanagh v. Board of City of Hoboken Police Com'rs, 59 N. J. Law, 412, 35 Atl. 793. The evidence on which a board of police commissioners act in removing a police officer for alleged misconduct will not be considered by the supreme court on appeal.

Reilly v. Jersey City, 64 N. J. Law, 508, 45 Atl. 778; People v. Hayden, 75 Hun, 540, 27 N. Y. Supp. 487. The finding of dismissal will not be disturbed in certiorari except in a plain case of erroneous determination.

People v. Welles, 88 Hun, 190, 34 N. Y. Supp. 412. A finding of dismissal will be reversed where the

tionary and regulated by rules which may have been adopted relative to the subject.[591]

§ 705. Causes for removal.

Conduct unbecoming an officer or a violation of law is a cause for suspension or removal.[592] A police officer has duties to perform in maintaining order other than the arrest and detention of those who violate the law; an association with and protection of the innocent and helpless classes of society is required and demanded. It is highly proper, therefore, that the right should exist of removing or suspending a police officer for conduct unbecoming one who is regarded as the protector of society[593] or who violates the laws it is his duty to enforce.

evidence is insufficient to sustain it. People v. Roosevelt, 22 App. Div. 627, 47 N. Y. Supp. 776; People v. Moss, 34 App. Div. 475, 54 N. Y. Supp. 262. The presumption is that witnesses were sworn. People v. Peck, 73 App. Div. 89, 76 N. Y. Supp. 328; People v. Martin, 142 N. Y. 352, 37 N. E. 117. Where the evidence is against the finding of dismissal, it will be reversed in the court of appeals on certiorari. Doherty v. City of Galveston, 19 Tex. Civ. App. 708, 48 S. W. 804; Johnson v. Barham, 99 Va. 305, 38 S .E. 136.

[591] State v. Police Board of New Orleans, 51 La. Ann. 747, 25 So. 637.

[592] Wellman v. Metropolitan Police of Detroit, 91 Mich. 427, 51 N. W. 1070; Alcutt v. Trenton Police Com'rs, 66 N. J. Law, 173, 48 Atl. 1006. The rule relative to conduct unbecoming to an officer and a gentleman is violated when a policeman states that a police commissioner "is a liar and you cannot believe him under oath." People v. French, 49 Hun, 608, 1 N. Y. Supp. 878. When punishment for conduct unbecoming an officer is too severe, the decision should be reversed.

People v. Robb, 61 Hun, 625, 16 N. Y. Supp. 124; People v. Manning, 62 Hun, 619, 16 N. Y. Supp. 604. Where policemen have been convicted of a crime under Albany City Charter they are no longer members of the police force of that city and there is no necessity for a hearing by the board of police commissioners. People v. McLean, 63 Hun, 633, 18 N. Y. Supp. 397, 133 N. Y. 527, 30 N. E. 1148. Where there is insufficient evidence of intoxication or a breach of discipline, the order of the commissioners dismissing the policeman should be reversed. People v. French, 63 Hun, 633, 18 N. Y. Supp. 550; People v. Roosevelt, 23 App. Div. 533, 48 N. Y. Supp. 578; People v. Moss, 38 App. Div. 633, 56 N. Y. Supp. 951. Considering the evidence relative to an alleged case of intoxication and holding it insufficient to warrant a discharge. People v. Moss, 165 N. Y. 606, 58 N. E. 1090. Affirming 50 App. Div. 308, 63 N. Y. Supp. 912. A policeman is guilty of conduct unbecoming to a officer and merits dismissal for telling a falsehood.

[593] People v. Jourdan, 90 N. Y. 53.

Neglect of duty. Neglect of duty is another cause for removal or suspension, the obvious necessity of which appears.[594] That discipline and an efficient department be maintained at all times, it is necessary that the right exist to remove or suspend police officers for a disobedience of orders or insubordination,[595] and to effect the same results, it is also necessary that they should be subservient to the general rules and regulations designated and adopted for the general management of a department,[596] including

[594] Com. v. McPeek, 14 Ky. L. R. 215, 20 S. W. 220; People v. New York Police Com'rs, 110 N. Y. 495, 18 N. E. 133. A finding of dismissal for neglect of duty by commissioners is sustained where the patrolman was found drunk in a room on his beat and unable to walk or stand. People v. Roosevelt, 7 App. Div. 181, 39 N. Y. Supp, 1101, 7 App. Div. 610, 40 N. Y. Supp. 119. Acts not prohibited or required by the rules and regulations cannot be made the basis of a charge against a policeman for neglect of duty. Evidence of intoxication insufficient to sustain a charge. People v. Herlihy, 66 App. Div. 534, 73 N. Y. Supp. 236, reversing 35 Misc. 711, 72 N. Y. Supp. 389. One who permits the violation of the law in his precinct is guilty of a neglect of duty.

[595] Skillman v. Trenton Police Com'rs, 64 N. J. Law, 489, 45 Atl. 803. If the power is vested in a board of police commissioners to investigate charges and remove police officers for misconduct in office, upon their failure to do so they can be compelled by mandamus to consider such a charge. People v. Martin, 143 N. Y. 407, 38 N. E. 460, affirming 79 Hun, 475, 29 N. Y. Supp. 966.

[596] McAuliffe v. City of New Bedford, 155 Mass. 216, 29 N. E. 517. A regulation is reasonable which prohibits members of the police force from soliciting money for political purposes or becoming members of active political committees. State v. St. Louis Police Com'rs, 16 Mo. App. 48; People v. McClave, 59 Hun, 623, 13 N. Y. Supp. 340; People v. McLean, 59 Hun, 625, 13 N. Y. Supp. 685; People v. Board of Police Com'rs, 84 Hun, 64, 32 N. Y. Supp. 18. The unexplained accumulation of a large sum of money by a policeman will warrant his dismissal when there is positive evidence that he received it from questionable sources as "graft." People v. Tappan, 15 Misc. 20, 36 N. Y. Supp. 773; People v. Roosevelt, 2 App. Div. 536, 38 N. Y. Supp. 27; People v. Moss, 38 App. Div. 630, 56 N. Y. Supp. 1032. The use of disrespectful language to superior officers is ground for dismissal.

People v. Diehl, 50 App. Div. 58, 63 N. Y. Supp. 362; People v. York, 58 App. Div. 621, 68 N. Y. Supp. 1077, affirmed 169 N. Y. 578, 61 N. E. 1133. A policeman is not justified in remaining at his home longer than his sickness actually compels him and should report for duty as soon as able under New York police rules, 151. O'Brien v. City of Pawtucket, 20 R. I. 49, 37 Atl. 530; Lowrey v. City of Central Falls, 23 R. I. 354, 50 Atl. 639.

See the following cases in which the evidence was found insufficient.

those forbidding the use of unnecessary force or violence towards a prisoner.[597]

§ 706. Compensation.

Policemen in common with public officers and employes are entitled to compensation at the rate established by law or fixed by the terms of a particular contract.[598] It is necessary, however, that the services required should be rendered [599] and that one claiming the right should be legally employed or appointed [600] and by one having the power.[601]

Irregular suspension. Where one has been temporarily and illegally suspended or removed, he is entitled to compensation at the regular rate during such time [602] and what he may have earned

to sustain a charge of neglect of duty: People v. Roosevelt, 13 App. Div. 404; People v. Board of Police Com'rs, 13 App. Div. 69, 43 N. Y. Supp. 118; People v. Roosevelt, 15 App. Div. 401, 44 N. Y. Supp. 102; People v. Roosevelt, 16 App. Div. 331, 44 N. Y. Supp. 655; People v. Roosevelt, 19 App. Div. 152, 45 N. Y. Supp. 880; People v. Hart, 25 App. Div. 129, 48 N. Y. Supp. 268; People v. York, 35 App. Div. 430, 54 N. Y. Supp. 835; Reynolds v. City of Pawtucket, 23 R. I. 370, 50 Atl. 645.

[597] People v. Bell, 10 N. Y. Supp 829, 57 Hun, 590; People v. Roosevelt, 38 App. Div. 635, 57 N. Y. Supp. 11.

[598] Gooch v. Town of Exeter, 70 N. H. 413, 48 Atl. 1100; Healy v. Hillsboro County, 70 N. H. 588, 49 Atl. 89. Extra compensation allowed under certain circumstances. Mahon v. City of New York, 29 Misc. 251, 60 N. Y. Supp. 541, construing N. Y. Laws, 1894, c. 741. Porter v. Richmond & D. R. Co., 97 N. C. 46, 2 S. E. 374. But see Mousseau v. Sioux City, 113 Iowa, 246, 84 N. W. 1027.

[599] Gorr v. Village of Port Jervis, 57 App. Div. 122, 68 N. Y. Supp. 15; City of Wilkes Barre v. Meyers, 113 Pa. 395. Where a policeman absent without leave forfeits his pay, except in cases of sickness, he should have the proper certificate from a physician in order to take advantage of the exception.

[600] Lambert v. Gallagher, 28 Ark. 451; Wheat v. Smith, 50 Ark. 267; People v. Potter, 63 Cal. 127; State v. Carroll, 38 Conn. 449; Waterman v. Chicago & I. R. Co., 139 Ill. 658, 29 N. E. 689, 15 L. R. A. 418; Mayfield v. Moore, 53 Ill. 428; McCue v. Wapello County, 56 Iowa, 698; Pooler v. Reed, 73 Me. 129; O'Brien v. City of St. Paul, 72 Minn. 256, 75 N. W. 375; Cain v. Warner, 45 App. Div. 450, 60 N. Y. Supp. 769; Dolan v. City of New York, 68 N. Y. 274; McVeany v. City of New York, 80 N. Y. 192; Nichols v. MacLean, 101 N. Y. 526.

[601] Stephens v. Campbell, 67 Ark. 484, 55 S. W. 856; Foster v. City of Wilmington, 8 Houst. (Del.) 415, 32 Atl. 348; Seibert v. Logan County Sup'rs, 63 Ill. 155.

[602] McNeill v. City of Chicago, 93 Ill. App. 124; Gorley v. City of Louisville, 23 Ky. L. R. 1782, 65 S.

meanwhile should, as a rule, be deducted from the amount to which he would have been entitled.[603] There are authorities which hold that where police officers are temporarily suspended as provided by department or municipal regulations even for a cause afterward held insufficient, they are not entitled to wages during the suspension.[604] A legal removal destroys any right to compensation,[605] and this is sometimes effected by an abolition of the office or a reduction of the force.[606] Suspensions properly made will affect the compensation of the police officer to the extent and in the manner which may be provided by the regulations of the department.[607]

§ 707. Pensions and beneficial funds.

Long and faithful service in performing governmental duties, it has been held as a question of public policy, merits some provision from the state for old age and where injuries have been suffered in the discharge of such duties, the person receiving them or those dependent upon him are entitled to some consideration

W. 844; Galvin v. City of St. Paul, 58 Minn. 475, 59 N. W. 1102.

[603] City of Denver v. Burnett, 9 Colo. App. 531, 49 Pac. 378; City of Leadville v. Bishop, 14 Colo. App. 517, 61 Pac. 58; Buschmann v. City of New York, 35 Misc. 607, 72 N. Y. Supp. 127.

[604] City of Steubenville v. Culp, 38 Ohio St. 18.

[605] Queen v. City of Atlanta, 59 Ga. 318; State v. Williams, 6 S. D. 119, 60 N. W. 410; Meissner v. Boyle, 20 Utah, 316, 58 Pac. 1110.

[606] State v. Police Com'rs of Kansas City, 80 Mo. App. 206; Neumeyer v. Krakel, 110 Ky. 624, 62 S. W. 518. A removal may be effected through a reduction in the force. Wilkinson v. Police Com'rs of Saginaw, 107 Mich. 394; City of Lincoln v. Yeomans, 34 Neb. 329, 51 N. W. 844; Boylan v. Newark Police Com'rs, 58 N. J. Law, 133, 32 Atl. 78; Leary v. City of Orange, 59 N. J. Law, 350; Cavanagh v. Police Com'rs of Hoboken, 59 N. J. Law, 412; People v. York, 43 App. Div. 444, 60 N. Y. Supp. 208; People v. Coler, 71 App. Div. 584, 76 N. Y. Supp. 205. Act abolishing office of chief of police of New York City not unconstitutional as depriving a person of property without due process of law because person filling the office had served the length of time which would entitle him to a pension for life. Venable v. Police Com'rs of Portland, 40 Or. 458, 67 Pac. 203; Heath v. Salt Lake City, 16 Utah, 374; Everill v. Swan, 17 Utah, 514, 55 Pac. 68; Meissner v. Boyle, 20 Utah, 316, 58 Pac. 1110.

[607] McAuliffe v. City of New Bedford, 155 Mass. 216; Wellman v. Metropolitan Police of Detroit, 91 Mich. 427; Cooper v. Jersey City, 53 N. J. Law, 544; People v. McLean, 1 Misc. 463, 21 N. Y. Supp. 625; Eslinger v. Pratt, 14 Utah, 107, 46 Pac. 763.

from the public in the defense of whose interests they were received. The efficiency of a police or fire department is largely increased through its establishment and maintenance upon a civil service basis and also by the creation of beneficial funds for use in the payment of pensions to members having served faithfully a prescribed length of time [608] or to those disabled while in the performance of their duties and the further payment of gratuities to the families of those who have died [609] or who have been killed or totally disabled.[610] These funds are created by authority of law [611] and derived usually from one or both of two sources, namely, the enforced or voluntary contributions of the members of the department and receipts from what may be termed outside sources; consisting of special contributions from public funds or the setting aside of fees derived from certain sources. The right to participate in such funds depends entirely upon the language of the law [612] or regulation under which they are created. In construing such regulations or statutes, the purpose of the creation of the fund alone should be considered and payments from it should only be made to those who are entitled to its benefits considering the purpose. Favoritism or action toward that end should be avoided in the disbursement of what should be considered a trust fund.

[608] Slevin v. Police Fund Com'rs, 123 Cal. 130, 55 Pac. 785, 44 L. R. A. 114; People v. Andrews, 89 Hun, 452, 35 N. Y. Supp. 311; People v. Matsell, 94 N. Y. 179. The establishment of a pension fund does not create in any of the beneficiaries a vested right to such sums they may receive but the board creating it has the authority in its discretion to discontinue the same.

[609] Kavanagh v. Police Pension Fund Com'rs, 134 Cal. 50, 66 Pac. 36; Pennie v. Reis, 80 Cal. 266. An act creating such fund and providing for payment to the legal representatives of a police officer upon his death does not create a vested right and the act may be subsequently repealed. The repealing statute will not be regarded unconstitutional as depriving one of property without due process of law.

[610] But see State v. Ziegenhein, 144 Mo. 283, 45 S. W. 1099, which holds an act providing for a police pension fund unconstitutional as an attempt "to grant public money or thing of value in aid of or to any individual" in violation of Const. art. 4, § 47.

[611] Keyes v. City of New York, 165 N. Y. 654, 59 N. E. 1124.

[612] Clarke v. Police & Health Ins. Board, 123 Cal. 24; Clarke v. Police Life & Health Ins. Board, 127 Cal. 550, 59 Pac. 994; People v. York, 41 App. Div. 419, 59 N. Y. Supp. 735. The merger of the municipalities of Brooklyn and New York cities does not forfeit the right of a Brooklyn policeman entitled to a

§ 708. Employment of members of the learned professions.

It is often necessary for a public corporation to employ temporarily, for a particular case or special work, members of the learned professions or of the skilled trades. The authority of the corporation, where this is necessary, will depend upon the existence of the power and this is based upon the grant of the right [613] and the character of the purpose for which the employment is had.[614] The condition and principle must be remembered that

pension under the laws relative to that city, to a pension from the consolidated city.

[613] Smith v. City of Sacramento, 13 Cal. 531; Modoc County v. Spencer, 103 Cal. 498, 37 Pac. 483, construing county government act, § 25, subds. 17 and 36. Knight v. Martin, 128 Cal. 245, 60 Pac. 849. Legislation attempting to give such authority may be unconstitutional. Franklin County v. Layman, 145 Ill 138, 33 N. E. 1094, affirming 43 Ill. App. 163. Under Starr & C. Ill. St. c. 34, § 24, which authorizes counties "to make all contracts and do all other acts in relation to the property and concerns of the county, necessary to the exercise of its corporate powers" a county is authorized to retain attorneys for the purpose of testing the validity of bonds issued by it and which it claims to be illegal.

Curtis v. Gowan, 34 Ill. App. 516; Connolly v. Inhabitants of Beverly, 151 Mass. 437, 24 N. E. 404; Horn v. City of St. Paul, 80 Minn. 369, 83 N. W. 388. The authority to employ and compensate an attorney not a member of the regular legal department of the city was abrogated by Minn. Special Laws, 1891, c. 6, § 11. Cocke v. Copiah County Police, 38 Miss. 341; Marion County v. Taylor, 55 Miss. 184, construing Miss. Code, § 1385; Sears v. Gallatin County, 20 Mont. 462, 52 Pac. 204, 40 L. R. A. 405; Kornburg v. Deer Lodge County Com'rs, 10 Mont. 325, 25 Pac. 1041; Freeman v. Brooks, 29 Misc. 719, 62 N. Y. Supp. 761. The water board of the city of Syracuse has power to employ special counsel.

Quintard v. City of New York, 51 App. Div. 233, 64 N. Y. Supp. 904, considering Laws, 1880, c. 284 and Laws 1895, c. 954, relative to the employment of attorneys and the transaction of the law business of the City of Brooklyn. Lyman County v. State, 11 S. D. 391, 78 N. W. 17; Purnell v. Worth, 117 N. C. 157, 23 S. E. 161, 30 L. R. A. 262. A legislative committee under Laws 1895, p. 502, has no authority to employ counsel under a provision authorizing the payment of their necessary expenses.

Montgomery v. Jackson County Sup'rs, 22 Wis. 69. Statutes conferring power on county supervisors "to make all contracts, and to do all other acts in relation to the property or concerns of the county, necessary to the exercise of its corporate or administrative powers," does not authorize the employment of aid for the district attorney in a criminal prosecution. Wilson v. Village of Omro Trustees, 52 Wis. 131; Hopper v. Ashland County, 84 Wis. 655, 54 N. W. 1024.

[614] City of Denver v. Webber, 15 Colo. App. 511, 63 Pac. 804. The

a public corporation is a governmental agency of exceedingly limited and restricted powers; that it is not empowered in its public capacity to engage in work or enterprises which are not germane to its functions as such and that it has not, therefore, the power to expend public moneys for other than public purposes.[615]

§ 709. Special authority to employ.

The authority to thus employ is not only controlled and limited by the principles above stated but in particular cases where the power exists and the purpose of the employment is a public one, it is necessary to consider further the question of the special au-

employment is authorized of a special attorney to appear in litigation arising out of proceedings to annex a town to an adjoining city. Fite v. Black, 92 Ga. 363, 17 S. E. 349. There is no liability resting upon a county to pay for the services of an attorney in hiring out convicts.

Boise City v. Randall, 8 Idaho, 119, 66 Pac. 938; Ottawa Gaslight & Coke Co. v. People, 138 Ill. 336, 27 N. E. 924, following Sterling Gas Co. v. Higby, 134 Ill. 557, 25 N. E. 660. A county board is authorized to employ attorneys to collect delinquent taxes. Town of Bloomington v. Lillard, 39 Ill. App. 616. A town is authorized to employ attorneys to defend its interests in a cause involving the cancellation of spurious orders outstanding against it.

Village of Harvey v. Wilson, 78 Ill. App. 544. Village trustees are authorized to employ an attorney to defend its interests in a proceeding which involves the very existence as a corporation of the village. Rush County Com'rs v. Cole, 2 Ind. App. 475, 28 N. E. 772; Julian v. State, 140 Ind. 581, 39 N. E. 923. There is no authority to officially employ counsel in the rendition of services, the object of which is to influence legislation.

Garrigus v. Howard County Com'rs, 157 Ind. 103, 60 N. E. 948. An indispensable public necessity will authorize the employment of an expert accountant to examine the books and vouchers of various county officials.

Cullen v. Town of Carthage, 103 Ind. 196. A town is authorized to employ counsel to defend an action for false imprisonment against a town marshal resulting from a discharge of his duty. Barr v. State, 148 Ind. 424, 47 N. E. 829; Templin v. Fremont Dist. Tp., 36 Iowa, 411. The president of a school district has no authority to employ counsel at the expense of the district except in a case brought by or against it.

Thatcher v. Jefferson County Com'rs, 13 Kan. 182; City of Owensboro v. Weir, 95 Ky. 158, 24 S. W. 115. The fact that the regular city attorney has so failed to present a case as to secure relief does not authorize the employment of other counsel. Jenney v. Mussey Tp., 121 Mich. 229, 80 N. W. 2.

[615] See §§ 108 et seq.; 140 et seq.; and 416 et seq., ante.

thority of the public officer or the public body by whom the contract of employment is made to bind the corporation by its action.[616] The agency of a public official as representing his prin-

[616] Lassen County v. Shinn, 88 Cal. 510, 26 Pac. 365. Where the authority exists, the choice of a particular attorney is a matter of discretion and cannot be rejected. Harris v. Gibbins, 114 Cal. 418, 46 Pac. 292. A board of county supervisors may call in an expert to examine the books and accounts of a county officer.

Rice v. Gwinn, 5 Idaho, 394, 49 Pac. 412; Castle v. Bannock County, 8 Idaho, 124, 67 Pac. 35; Platt County v. Knott, 99 Ill. App. 420. A county coroner is not authorized to employ a physician for the purpose of examining a dead body in order to enable him to give expert testimony at an inquest. Perry County Com'rs v. Lamax (Ind. App.) 31 N. E. 584; Woodruff v. Noble County Com'rs, 10 Ind. App. 179, 37 N. E. 732; Ripley County Com'rs v. Ward, 69 Ind. 441; Conner v. Franklin County Com'rs, 57 Ind. 15; Miller v. Embree, 88 Ind. 133. County commissioners cannot authorize the employment of an attorney to assist in the collection of delinquent taxes.

Shirts v. Noblesville Tp., 122 Ind. 580, 24 N. E. 169; Bevington v. Woodbury County, 107 Iowa, 424, 78 N. W. 222. A county attorney is authorized to employ, under acts 21 Gen. Assem., c. 73, § 4, assistance in the prosecution of criminal cases in another county to which they were taken on a change of venue. Tesh v. Com., 34 Ky. (4 Dana) 522; Garrard County Court v. McKee, 74 Ky. (11 Bush) 234. The judgment of a county court, when authorized to employ counsel, as to the necessity for such employment cannot be questioned. Simrall v. City of Covington (Ky.) 29 S. W. 880; City of Owensboro v. Weir, 95 Ky. 158, 24 S. W. 115; Police Jury of Parish of Avoyelles v. Corporation of Mansura, 107 La. 201, 31 So. 650; Barber v. City of Saginaw, 34 Mich. 52; Cahill v. Board of Auditors, 127 Mich. 487, 86 N. W. 950, 55 L. R. A. 493. The governor of Michigan has no authority at the expense of the state to engage counsel to assist in drafting statutes and amendments to the constitution.

True v. Crow Wing County Com'rs, 83 Minn. 293, 86 N. W. 102. A board of county commissioners has the exclusive power to employ counsel to conduct litigation. The sheriff has no such authority. Carroll v. City of St. Louis, 12 Mo. 444; Butler v. Sullivan County, 108 Mo. 630, 18 S. W. 1142. A county court has no authority, under Rev. St. 1879, § 6893, to employ attorneys to assist in the collection of taxes.

Reynolds v. Clark County, 162 Mo. 630, 63 S. W. 382. A county court has the right to employ an attorney to appear for the county in a case in which it is interested. State v. Edwards, 136 Mo. 360, 38 S. W. 73. A collector of taxes has, with the approval of the mayor, the authority, under Mo. Rev. St. 1889, § 7681, to employ attorneys in proper cases. Laws v. Harlan County, 12 Neb. 637. A county auditor has the discretionary power, under Neb. Revenue Laws 1879, § 160, to appoint a competent person to examine the treasurer's books.

Hackett v. Rockingham County,

cipal is a special one; he cannot bind it by acts coming within the apparent scope of his power and authority as in the case of the agent acting for a private person or corporation but he can only make his principal liable through action that comes within the actual scope of his power and authority as expressly given. This subject has been fully considered in preceding sections.[617] A contract made by one not authorized may be, however, subsequently ratified by the proper official or official body,[618] or the corporation

52 N. H. 617; State v. Horton, 21 Nev. 466, 34 Pac. 316; Ryan v. Board of Audit of Royalton, 6 Misc. 478, 27 N. Y. Supp. 169. A board of excise has the power under Laws 1892, c. 401, § 11, to employ counsel. Adee v. Arnow, 91 Hun, 329, 36 N. Y. Supp. 1020; In re Taxpayers & Freeholders of Plattsburgh, 27 App. Div. 353, 50 N. Y. Supp. 356. N. Y. Laws, 1890, c. 322, tit. 4, § 5, subd. 20, authorizes boards of town trustees to employ attorneys, architects and other professional help, when in their discretion the business of the board or the village requires it.

Graham v. City of New York, 33 Misc. 56, 66 N. Y. Supp. 754; Rockefeller v. Taylor, 69 App. Div. 176, 74 N. Y. Supp. 812; Treeman v. City of Perry (Okl.) 65 Pac. 923. The common council of a city of the first class has the power to engage attorneys to assist a city attorney in legal matters in which the city may be interested. Taylor v. Umatilla County, 6 Or. 394. County commissioners have the authority to employ an attorney other than the official one to represent the county in a case in which it is interested.

State v. Hall, 37 Or. 479, 63 Pac. 13; Butz v. Fayette County, 168 Pa. 464, 32 Atl. 28; City Nat. Bank v. Presidio Co. (Tex. Civ. App.) 26 S. W. 775. County commissioners have the power to employ counsel to conduct a suit on behalf of the county in cases where it is an interested party. Grooms v. Atascosa County (Tex. Civ. App.) 32 S. W. 188; Field v. Marye, 83 Va. 882, 3 S. E. 707. Under Va. Const. art. 4, § 8, before a governor is authorized to employ counsel on behalf of the state, a resolution to that effect must receive the consent of both branches of the legislature. Rettinghouse v. City of Ashland, 106 Wis. 595, 82 N. W. 555.

[617] See §§ 416 et seq., and 643 et seq., ante. Perry County Com'rs v. Bader, 20 Ind. App. 339, 50 N. E. 776; Fouke v. Jackson County, 84 Iowa, 616, 51 N. W. 71; Caswell v. City of Marshaltown, 101 Iowa, 598, 70 N. W. 717; Fletcher v. City of Lowell, 81 Mass. (15 Gray) 103; Smedley v. City of Grand Haven, 124 Mich. 424, 84 N. W. 626; State v. Vallins, 140 Mo. 523; Ransom v. City of New York, 24 Barb. (N. Y.) 226; Id., 15 How. Pr. (N. Y.) 145; Mark v. Village of West Troy, 69 Hun, 442, 23 N. Y. Supp. 422; People v. York, 32 App. Div. 57, 52 N. Y. Supp. 78; Nash v. City of Knoxville, 108 Tenn. 68, 64 S. W. 1062; Wiley v. City of Seattle, 7 Wash. 576, 35 Pac. 415, considering the right of a mayor in an emergency to employ special counsel where the city attorneys refuse to act.

[618] Steiner v. Polk County, 40 Or. 124, 66 Pac. 707; Appel v. State, 9 Wyo. 187, 61 Pac. 1015.

may take action that will estop it from denying the validity of a particular contract of employment.[619]

§ 710. Work included in regular duties.

The creation of legal relations under a contract of employment may not only depend upon the considerations above stated but upon the further one that the business which a person may be employed to transact is a part of his regular duties as a public official for and on behalf of the public corporation,[620] or services for the rendition of which he can receive no other compensation than that included in his regular salary.[621] This particular question cannot be raised where the one claiming employment was not at that time a public official.

§ 711. Concrete illustrations.

The principles given in the preceding sections will control and

[619] Power v. May, 123 Cal. 147, 55 Pac. 796; First Nat. Bank of Decorah v. Doon Dist. Tp., 86 Iowa, 330; Ryce v. City of Osage, 88 Iowa, 558; Mound City v. Snoddy, 55 Kan. 126; City of Owensboro v. Weir, 95 Ky. 158; Gutta Percha & Rubber Mfg. Co. v. Village of Ogalalla, 40 Neb. 775; Trester v. City of Sheboygan, 87 Wis. 496; Town of Eagle River v. Oneida County, 86 Wis. 266, 56 N. W. 644; Langdon v. Town of Castleton, 30 Vt. 285.

[620] People v. Warren, 14 Ill. App. 296. A city attorney may be directed by the proper authorities to assist the state's attorney in conducting prosecutions in which the city has a special interest and for his services he may receive compensation in addition to his regular salary.

Warren County Com'rs v. Osburn, 4 Ind. App. 590, 31 N. E. 541. Where a regular county physician is employed, the burden is upon one engaged for special services to see the necessity for his employment. Moreland v. Common Council of Detroit, 130 Mich. 343, 89 N. W. 935.

[621] United States v. King, 147 U. S. 676; Mullett's Adm'x v. United States, 150 U. S. 566; Huffman v. Greenwood County Com'rs, 23 Kan. 281. A county attorney is entitled to reasonable compensation in addition to his salary where he is directed by the board of county commissioners to go into another county and there render services for his county and such as were authorized by law.

City of Calais v. Whidden, 64 Me. 249. The representative of a town in a legislature is under no official obligation to attend to the prosecution or adjustment of a claim in favor of the city against the state and for the rendition of such services he is entitled to a reasonable extra compensation. Pool v. City of Boston, 59 Mass. (5 Cush.) 219; Carroll v. City of St. Louis, 12 Mo. 444; McHenderson v. Anderson County, 105 Tenn. 591, 59 S. W. 1016; State v. Maloney, 92 Tenn. 62.

regulate the employment of attorneys,[622] physicians,[623] survey-

[622] City of Selma v. Mullen, 46 Ala. 411; Lassen County v. Shinn, 88 Cal. 510, 26 Pac. 365; City of Denver v. Webber, 15 Colo. App. 511, 63 Pac. 804; Buck v. City of Eureka, 124 Cal. 61; Fite v. Black, 92 Ga. 363, 17 S. E. 349; Rice v. Gwinn, 5 Idaho, 394, 49 Pac. 412; Ponting v. Isaman, 7 Idaho, 581, 65 Pac. 434; People v. Warren, 14 Ill. App. 296; Ottawa Gaslight & Coke Co. v. People, 138 Ill. 336, 27 N. E. 924; Franklin County v. Layman, 145 Ill. 138, 33 N. E. 1094; Curtis v. Gowan, 34 Ill. App. 516; Town of Bloomington v. Lillard, 39 Ill. App. 616; Village of Harvey v. Wilson, 78 Ill. App. 544; Town of New Athens v. Thomas, 82 Ill. 259; Rush County Com'rs v. Cole, 2 Ind. App. 475, 28 N. E. 772; Julian v. State, 140 Ind. 581, 39 N. E. 923.

Gordon v. Dearborn County Com'rs, 52 Ind. 322. A county is liable for the services of an attorney duly appointed to defend a poor person. Cullen v. Town of Carthage, 103 Ind. 196; Jay County Com'rs v. Taylor, 123 Ind. 148, 23 N. E. 752, 7 L. R. A. 160; Barr v. State, 148 Ind. 424, 47 N. E. 829; Templin v. Fremont Dist. Tp., 36 Iowa, 411; Caswell v. City of Marshalltown, 101 Iowa, 598, 70 N. W. 717; Bevington v. Woodbury County, 107 Iowa, 424, 78 N. W. 222; Taylor County v. Standley, 79 Iowa, 666, 44 N. W. 911; Thacher v. Jefferson County Com'rs, 13 Kan. 182; Huffman v. Greenwood County Com'rs, 23 Kan. 281; City of Owensboro v. Weir, 95 Ky. 158, 24 S. W. 115; Connolly v. Inhabitants of Beverly, 151 Mass. 437, 24 N. E. 404; Jenney v. Mussey Tp., 121 Mich. 229, 80 N. W. 2; Cahill v. State Auditors, 127 Mich. 487, 86 N. W. 950, 55 L. R. A. 493; Horn v. City of St. Paul, 80 Minn. 369, 83 N. W. 388; True v. Crow Wing County Com'rs, 83 Minn. 293, 86 N. W. 102; Cocke v. Copiah County Police, 38 Miss. 341; Reynolds v. Clark County, 162 Mo. 680, 63 S. W. 382; State v. Horton, 21 Nev. 466, 34 Pac. 316; Hackett v. Rockington County, 52 N. H. 617; In re Taxpayers & Freeholders of Plattsburgh, 27 App. Div. 353, 50 N. Y. Supp. 356; Purnell v. Worth, 117 N. C. 157, 23 S. E. 161, 30 L. R. A. 262; State v. Montgomery County Com'rs, 26 Ohio St. 599; Taylor v. Umatilla County, 6 Or. 394; Treeman v. City of Perry, 11 Okl. 66, 65 Pac. 923; City Nat. Bank v. Presidio County (Tex. Civ. App.) 26 S. W. 775; Wiley v. City of Seattle, 7 Wash. 576; Montgomery v. Jackson County Sup'rs, 22 Wis. 69; Wilson v. Village of Omro Trustees, 52 Wis. 131; Town of Eagle River v. Oneida County, 86 Wis. 266, 56 N. W. 644; Hopper v. Ashland County, 84 Wis. 655, 54 N. W. 1024; Appel v. State, 9 Wyo. 187, 61 Pac. 1015, construing Rev. St. § 1104, with reference to the manner of employing special counsel and holding that the board of county commissioners is the judge of the necessity for such employment and its determination can only be attacked for fraud.

[623] Cape Breton County v. McKay, 18 Can. Sup. Ct. R. 639; Castle v. Bannock County, 8 Idaho, 124, 67 Pac. 35; Piatt County v. Knott, 99 Ill. App. 420; Lamar v. Pike County Com'rs, 4 Ind. App. 191, 30 N. E. 912. Where a prisoner is suddenly taken ill a jailer is authorized to employ a physician at the expense of the county.

ors,[624] civil engineers,[625] architects[626] and others coming within the classes under discussion.[627]

§ 712. The employment of clerks.

Different considerations affect the employment of persons to perform clerical and ministerial duties. The engaging of members of the learned professions is what might be termed the exercise of an extraordinary power and one where the question of the right of its exercise is to be critically and closely examined. The hiring of clerks cannot be classed as the exercise of more than an ordinary power; a government is organized; departments and subdepartments and public offices are created and each one is charged by the sovereign with the performance on his behalf with certain governmental duties and functions. In order that this be properly done, it is necessary to employ unskilled laborers of the

Perry County Com'rs v. Lamax (Ind. App.) 31 N. E. 584. An overseer of the poor has no authority to employ a physician other than the regular county physician even where the latter, in the opinion of the overseer, is entirely incompetent. Logan v. City of New Orleans, 27 La. Ann. 101; Barber v. City of Saginaw, 34 Mich. 52; State v. Vallins, 140 Mo. 523; People v. York, 32 App. Div. 57, 52 N. Y. Supp. 778; Connelly v. Almshouse Com'rs of Kingston, 32 Misc. 489, 66 N. Y. Supp. 194; Ward v. Town of Forest Grove, 20 Or. 355, 25 Pac. 1020; City of Williamsport v. Richter, 81 Pa. 508; Nash v. City of Knoxville, 108 Tenn. 68, 64 S. W. 1062.

[624] Kornburg v. Deer Lodge County Com'rs, 10 Mont. 325, 25 Pac. 1041; In re Department of Public Parks, 57 Hun, 588, 11 N. Y. Supp. 176; People v. Flagg, 17 N. Y. 584.

[625] City of Ellsworth v. Rossiter, 46 Kan. 237, 26 Pac. 674; Tennessee Pav. Brick Co. v. Barker, 22 Ky. L. R. 1069, 59 S. W. 755; Mack v. City of New York, 37 Misc. 371, 75 N. Y. Supp. 809; Rettinghouse v. City of Ashland, 106 Wis. 595, 82 N. W. 555.

[626] In re Taxpayers & Freeholders of Plattsburgh, 27 App. Div. 353, 50 N. Y. Supp. 356; Butz v. Fayette County, 168 Pa. 464, 32 Atl. 28.

[627] Harris v. Gibbins, 114 Cal. 418, 46 Pac. 292; Vigo County Com'rs v. Weeks, 130 Ind. 162, 29 N. E. 776; Garrigus v. Howard County Com'rs, 157 Ind. 13, 60 N. E. 948; Estlin v. State, 28 La. Ann. 527. Where a county treasurer and auditor are authorized to offer bonds at auction, they cannot employ an auctioneer for this purpose. Ridgeway v. Michellon, 42 N. J. Law, 405. An expert accountant for the finance committee of the city of Camden can only be employed through the passage of an ordinance by the common council. Smith v. City of Utica, 53 Hun, 638, 6 N. Y. Supp. 792. Authority to employ superintendent of parks considered. Crawford County Sup'rs v. Le Clerc, 4 Chand. (Wis.) 56. The employment of interpreters in the trial of criminal cases authorized.

higher classes to do the more menial acts.[628] It is largely a question of the appropriation of public moneys rather than the inherent right to employ.[629] But the public corporation clearly cannot, even under these liberal principles, employ, to be paid from the public purse, unnecessary clerical help or that which is to be engaged in business or acts foreign to the purpose of the organization or the doing of which is not authorized by some express grant of power.[630]

Employment of laborers. The same rules apply to and control the hiring of laborers to perform the most menial tasks, the hewers of wood and drawers of water.[631] They must be employed under authority and engaged in the construction of or carrying on of authorized works of public improvement defined and measured by

[628] Lowry v. City of Lexington, 24 Ky. L. R. 516, 68 S. W. 1109; Browning v. O'Donnell, 60 N. J. Law, 356, 37 Atl. 613; Herrick v. Hoos, 61 N. J. Law, 463, 39 Atl. 656; Costello v. City of New York, 63 N. Y. 48; Com. v. Gregg, 161 Pa. 528, 29 Atl. 297; Tenney v. State, 27 Wis. 387.

[629] City & County of San Francisco v. Broderick, 125 Cal. 188, 57 Pac. 887; Arapahoe County Com'rs v. Clapp, 9 Colo. App. 167, 48 Pac. 157; McDonald v. Norman, 95 Ky. 593, 26 S. W. 808; In re Appropriations for Deputy City Officials, 25 Neb. 662, 41 N. W. 643. A stenographer is not a clerk within the meaning of Const. Neb. art. 5, § 24, which provides "that there shall be no allowance for clerk hire in the office of the attorney general." Lethbridge v. City of New York, 133 N. Y. 232, 30 N. E. 975, reversing 59 N. Y. Super. Ct. 486, 15 N. Y. Supp. 562; People v. Public Park Com'rs, 60 How. Pr. (N. Y.) 130; Langdon v. City of New York, 63 How. Pr. (N. Y.) 134; Phillips v. City of New York, 88 N. Y. 245.

[630] Hathaway v. City of Des Moines, 97 Iowa, 333, 66 N. W. 188.

[631] Town of Madison v. Newsome, 39 Fla. 149; Hathaway v. City of Des Moines, 97 Iowa, 333, 66 N. W. 188; Caswell v. City of Marshalltown, 101 Iowa, 598; City of Winfield v. Peeden, 8 Kan. App. 671, 57 Pac. 131; Haskell v. Inhabitants of Knox, 3 Me. 445; American Lighting Co. of Baltimore City v. McCuen, 92 Md. 703, 48 Atl. 352. One authorized to employ and discharge workmen has no such right in respect to those employed by a contractor engaged in public work.

Johnson v. Kimball, 170 Mass. 58; Trainor v. Board of Auditors, 89 Mich. 162, 50 N. W. 809, 15 L. R. A. 95; State v. Smith, 82 Mo. 51; Marion County v. Woulard, 77 Miss. 343, 27 So. 619. A verbal instruction to county supervisors is insufficient to authorize the employment of one as a quarantine guard. Browning v. O'Donnell, 60 N. J. Law, 356; New Brunswick Water Com'rs v. Cramer, 61 N. J. Law, 270; Failing v. City of Syracuse, 4 Misc. 50, 24 N. Y. Supp. 705; Harvier v. New York & Hudson R. R. Co., 26 Misc. 397, 56 N. Y. Supp. 204; Dowling v. Palmer, 35 Misc. 316, 71 N. Y. Supp. 90; Norfolk v. Pollard, 94 Va. 279.

the character of the public corporation as a governmental agency without the authority in this capacity to expend its public moneys for other purposes than those which strictly pertain to the science and the business of government.

§ 713. Compensation of employes.

The pay of a mere employe whether one belonging to the learned professions, skilled trades or an unskilled laborer, is dependent upon the terms of the particular contract of employment.[632] The right of compensation when it becomes a contract one cannot be impaired by legislation, unlike the pay attached to a public office which, as will be remembered, is subject at all times to legislative action in the absence of constitutional restrictions.[633] The relation which exists between the employe and the public corporation is a contract one; that which exists between the public official and the corporation is one dependent upon constitutional or statutory provisions.

[632] Posey v. Mobile County, 50 Ala. 6; Lamont v. Solano County, 49 Cal. 158; Garrigus v. Howard County Com'rs, 157 Ind. 103, 60 N. E. 948; Weatherhogg v. Jasper County Com'rs, 158 Ind. 14, 62 N. E. 477; Ringgold County v. Allen, 42 Iowa, 697; Roberts v. Pottawattomie County Com'rs, 10 Kan. 29. Since there is no statutory authority for the payment of compensation to members of a posse comitatus for their services and expenses incurred by them, a county is not liable therefor.

Smith v. City of Albany, 61 N. Y. 444. For a common council of a city to authorize the employment of one of its members in the rendition of services for the city is against public policy and no action can be maintained for the recovery of compensation for services so rendered.

Graham v. City of New York, 167 N. Y. 85, 60 N. E. 331. A clerk under civil service protection is entitled to compensation until legal removal or discharge. Shearer v. Hutchinson County, 10 S. D. 9, 70 N. W. 1051; Williams v. Dodge County, 95 Wis. 604, 70 N. W. 821. An attorney appointed to assist in a criminal case cannot recover compensation for his services unless an order of court has been entereed as provided by Revised Statutes, § 4731, certifying the amount to which he is entitled.

Kollock v. Dodge, 105 Wis. 187, 80 N. W. 608. Construing city charter of Madison with reference to the power of the common council to prescribe the duties of municipal officials and provide for their compensation. Burns' Rev. St. 1901, § 7853, prohibiting the making by a county of a percentage contract does not apply to an agreement by county commissioners for the drawing of court house plans by an architect upon a percentage of the cost of the building.

[633] See §§ 685 et seq.

The contract which fixes the compensation of an employe may be made in the same manner and under the same conditions as other contracts of employment.[634] The relation is a contract one and the relative obligations and rights of the parties are determined by the principles governing or applying to the law of contracts.[635]

An express contract when established determines the right of pay when this question is provided for.[636] In the case of an implied contract or an express one not fixing the rate of compensation, the person performing the services may recover compensation based upon a reasonable value.[637]

[634] Hall v. Los Angeles County (Cal.) 13 Pac. 854; Id., 74 Cal. 502, 16 Pac. 313; Fouke v. Jackson County, 84 Iowa, 616, 51 N. W. 71; People v. Kings County Sup'rs, 105 N. Y. 180; Burkett v. City of Athens (Tenn. Ch. App.) 59 S. W. 667. Where the law provides that a member of a board of aldermen shall not be interested in any contract work for the city of which he is an official, a firm of attorneys of which such an alderman is a member cannot recover for legal services rendered the city where a vote of the alderman, a member of the firm, was necessary to constitute a majority in favor of the employment of the firm.

[635] Bartholomew County Com'rs v. State, 116 Ind. 329, 19 N. E. 173.

[636] Nelson v. Merced County, 122 Cal. 644, 55 Pac. 421; Ponting v. Isaman, 7 Idaho, 581, 65 Pac. 434; Morgan County Com'rs v. Holman, 34 Ind. 256.

[637] City of Selma v. Mullen, 46 Ala. 411; Buck v. City of Eureka, 124 Cal. 61, 56 Pac. 612. An implied contract is created with a city attorney where, after the expiration of his term of office, he continues to perform special services for the city with the knowledge of the city council. Village of Harvey v. Wilson, 78 Ill. App. 544; City of Chicago v. Williams, 80 Ill. App. 33; Town of New Athens v. Thomas, 82 Ill. 259; Huntington County Com'rs v. Boyle, 9 Ind. 296. A county is not liable for voluntary services. City of Ellsworth v. Rossiter, 46 Kan. 237, 26 Pac. 674; Henderson County v. Dixon, 23 Ky. L. R. 1204, 63 S. W. 756; Preble v. City of Bangor, 64 Me. 115; Tucker v. City of Virginia, 4 Nev. 20; Squire v. Preston, 82 Hun, 88, 31 N. Y. Supp. 174.

People v. Jefferson County Sup'rs, 35 App. Div. 239, 54 N. Y. Supp. 782. A district attorney though authorized to engage an expert witness in a criminal case at the expense of the county can only render the county liable for a reasonable and just charge for such services. McBride v. City of New York, 56 App. Div. 520, 67 N. Y. Supp. 550; Neary v. Robinson, 98 N. Y. 81; Trustees of Elizabeth Tp. v. White, 48 Ohio St. 577, 29 N. E. 47; Cleveland County Com'rs v. Seawell, 3 Okl. 281, 41 Pac. 592. The voluntary performance of work raises no implied contract warranting the payment of compensation. Ward v. Town of Forest Grove, 20 Or. 355, 25 Pac. 1020; Steiner v. Polk County, 40 Or. 124, 66 Pac. 707; Langdon v. Town

§ 714. Compensation of public employes as affected by legislation.

Attempts have been made by legislative bodies to regulate the compensation paid public employes and especially those performing menial labor or clerical duties by limiting the hours of labor which is necessary to constitute a legal day's work [638] and also by providing, referring particularly now to laws passed in New York state,[639] that the wages to be paid laborers in the employ of municipal corporations shall be the prevailing rate of wages in their respective callings.[640] These provisions have been held con-

of Castleton, 30 Vt. 285; Brauns v. City of Green Bay, 78 Wis. 81, 46 N. W. 889.

[638] Garlinger v. United States, 30 Ct. Cl. 473. A government employe rendering two distinct statutory days' services in one calendar day of twenty-four hours is entitled to compensation for two days. Beard v. Sedgwick County Com'rs, 63 Kan. 348, 65 Pac. 638. One who receives a monthly salary and who works overtime without any claim therefor cannot claim extra compensation for his overtime under Laws 1891, c. 114, which provides that eight hours shall constitute a day's work for states, counties and other political and municipal divisions. O'Boyle v. City of Detroit, 131 Mich. 15, 90 N. W. 669. A resolution of the park board may also have the same effect with reference to the right to recover reasonable compensation for overtime. McGraw v. City of Gloversville, 32 App. Div. 176, 52 N. Y. Supp. 916. A janitor cannot recover for overtime which he may have willingly worked and without any agreement for extra compensation. McAvoy v. City of New York, 166 N. Y. 588, 59 N. E. 1125, affirming 52 App. Div. 485, construing Laws 1897, c. 415, as amended by Laws 1899, c. 567, fixing eight hours as a legal day's work except in certain cases. McNulty v. City of New York, 60 App. Div. 250, 70 N. Y. Supp. 133. Where employes work overtime they are entitled to recover compensation for such under Laws 1870, c. 385, § 1, establishing eight hours as a legal day's work.

[639] New York Laws 1894, c. 622; Laws 1897, c. 415, as amended by Laws 1899, c. 567.

[640] McMahon v. City of New York, 22 App. Div. 113, 47 N. Y. Supp. 1018. Laws 1870, c. 385, as amended by Laws 1894, c. 622, § 2, gives to laborers the right of full pay at the prevailing rate of wages in the open market and the fact that an employe accepts a smaller with an intention of waiving a statutory right will not prevent him from subsequently enforcing the claim.

McCunney v. City of New York, 40 App. Div. 482, 58 N. Y. Supp. 138. One in order to come within the protection of the law which provides that employes of municipal corporations shall receive not less than the prevailing local wages in their trades must be employed in such capacity.

Rock v. City of New York, 63 N. Y. Supp. 825. Under Act 1899, c. 567, a municipal employe cannot recover the prevailing rate of

stitutional where reasonable in their terms, and have been held to apply not only to laborers directly employed by municipalities but also to those employed by contractors engaged in construction of public works under contract with the corporation.[641] Legislation of the character suggested above, where held constitutional, will, of course, affect the compensation of employes, and contracts made will be presumed to have been executed having in view the existence and the operation of such laws. In Indiana in 1899 an act was passed which provided that "unskilled labor employed upon any public work of the state, counties, cities and towns shall receive not less than fifteen cents an hour for said labor." The supreme court of that state in considering this act held that it did not deprive a laborer of the right to agree to work for a lesser sum. The beneficial provisions of the act could be waived by the laborer and a lower compensation contracted for.[642] Legislation which provides for the payment of wages to employes of certain corporations in other than legal tender money of the United States has also been held constitutional.[643] Veteran employes may, by special legislation, be accorded privileges with respect to the payment of compensation during sickness, not given to others of the same class.[644]

§ 715. Right of removal.

As the relation between an employe of the public corporation

wages as against the city employing him since this repealed all such rights arising from the act of 1897. The acts of 1894 and 1897 afford no protection to a person holding a position by appointment and receiving a fixed salary. Bock v. City of New York, 31 Misc. 55, 64 N. Y. Supp. 777. The acts of 1894 and 1897 relative to the prevailing rate of wages do not apply to a municipal employe under a yearly employment at a fixed salary and furnished with board and lodging by the month.

McCann v. City of New York, 52 App. Div. 358, 65 N. Y. Supp. 308. Under statutory construction, Act 1892, c. 677, § 31, which provides that the repeal of a statute shall not impair any right acquired thereunder, a laborer acquiring rights with reference to the prevailing rate of wages under Laws 1894, c. 622, is not deprived of them by Laws 1899, c. 567, repealing the Laws 1894, respecting wages of laborers. People v. Coler, 32 Misc. 78, 66 N. Y. Supp. 163.

641 McAvoy v. City of New York, 166 N. Y. 588, 59 N. E. 1125, affirming 52 App. Div. 485, 65 N. Y. Supp. 274.

642 Bell v. Town of Sullivan, 158 Ind. 199, 63 N. E. 209.

643 Shaffer v. Union Min. Co., 55 Md. 74.

644 O'Hara v. City of New York, 33 Misc. 53, 66 N. Y. Supp. 909.

and the corporation is a contract one, the right of removal is dependent upon the terms of the particular contract.[645] In general it might be said that the right is one to be arbitrarily exercised [646] upon the lack of necessity for such help,[647] the completion of the particular work for which one was employed [648] or the termination of the authority for employment.[649] The question of the class or grade of employment is often material as in classified service under civil service laws, one filling a particular position may be protected while others are not.[650] The question of the power or authority of the official to remove is also an important one equally with the same proposition in connection with the authority to employ. The right of discharge or removal or suspension can only be exercised by those who are by law expressly authorized to take this action.[651] It follows logically that a legal removal or discharge terminates the relation and destroys the right of compen-

[645] Quigg v. Evans, 121 Cal. 546, 53 Pac. 1093.

[646] White v. City of Alameda, 124 Cal. 95, 56 Pac. 795; State v. Adams, 46 La. Ann. 830; State v. Walbridge, 119 Mo. 383; Connor v. City of New York, 64 Hun, 635, 19 N. Y. Supp. 85; Sheehan v. City of New York, 21 Misc. 600, 48 N. Y. Supp. 662.

[647] McNamara v. City of New York, 152 N. Y. 228, 46 N. E. 507; People v. Scannell, 163 N. Y. 599, 57 N. E. 1121, affirming 48 App. Div. 445, 62 N. Y. Supp. 930; In re Kelly, 42 App. Div. 283, 59 N. Y. Supp. 30.

[648] Cape Breton County v. McKay, 18 Can. Sup. Ct. R. 639.

[649] Connelly v. Almshouse Com'rs of Kingston, 32 Misc. 489, 66 N. Y. Supp. 194. A board of commissioners of a city almshouse have no authority to contract with a physician for a length of time beyond their own official term of office. Mack v. City of New York, 37 Misc. 371, 75 N. Y. Supp. 809. A village board of sewer commissioners has no authority to employ a supervising engineer for one year and "until the construction of the sewerage system is completed."

[650] Thompson v. Troup, 74 Conn. 121, 49 Atl. 907; People v. Ransom, 59 Hun, 624, 13 N. Y. Supp. 370; People v. Andrews, 9 Misc. 569, 30 N. Y. Supp. 398; People v. Scannel, 22 Misc. 298, 49 N. Y. Supp. 1096; People v. Dalton, 34 App. Div. 627, 54 N. Y. Supp. 1112, affirmed 49 App. Div. 71, 63 N. Y. Supp. 258; Id., 158 N. Y. 204, 52 N. E. 1119, affirming 34 App. Div. 6, 53 N. Y. Supp. 1060; Hoggett v. City of Mt. Vernon, 36 App. Div. 374, 55 N. Y. Supp. 315. An inspector of highways under Laws 1892, c. 182, § 122, Mt. Vernon city charter, is not a public officer within the protection of the civil service rules of the city. People v. Scannell, 25 Misc. 619, 56 N. Y. Supp. 117; McCunney v. City of New York, 40 App. Div. 482, 58 N. Y. Supp. 138; People v. Hertle, 46 App. Div. 505, 60 N. Y. Supp. 23, 61 N. Y. Supp. 965; People v. Kane, 70 N. Y. Supp. 982.

[651] Peters v. Bell, 51 La. Ann. 1621, 26 So. 442; American Lighting Co. v. McCuen, 92 Md. 703, 48 Atl. 352; Muldoon v. City of Lowell, 178 Mass. 134, 59 N. E. 637. Under Mass. St. 1896, c. 415, § 3, the chief

sation. When a contract of employment is fully performed by both parties, the relation ceases and no rights can accrue in favor of either as against the other.[652] An illegal suspension, removal or discharge will not deprive the person thus affected of his right of compensation; he will be entitled to pay for the unexpired term of his contract.[653]

§ 716. Limitations upon the right of removal; civil service laws.

The carrying on of the business of government necessitates the employment of a large number of persons not engaged in the performance of discretionary duties or those requiring official and personal judgment. The use of these employes for the purposes of promoting the success of political parties, factions or cliques is destructive to good government, results in a waste of public money and may also result in the carrying on of extravagant and unnecessary public works. Even without such considerations the protection of the laborer in his employment adds to its efficiency.

of the supply department has the power to appoint and remove an inspector of supplies. Percival v. Weir, 52 Neb. 373, 72 N. W. 477; People v. City of Brooklyn, 149 N. Y. 215, 43 N. E. 554. The power to appoint carries with it the arbitrary power of removal where the tenure is not defined by statute.

[652] Phillips v. City of Boston, 150 Mass. 491, 23 N. E. 202; Wilkinson v. City of Saginaw, 111 Mich. 585, 70 N. W. 142; Byrnes v. City of St. Paul, 78 Minn. 205, 80 N. W. 959; Bernard v. City of Hoboken, 27 N. J. Law (3 Dutch.) 413; Donnell v. City of New York, 68 Hun, 55, 22 N. Y. Suppp. 661; Meyers v. City of New York, 69 Hun, 291, 23 N. Y. Supp. 484, overruling 64 Hun, 635, 18 N. Y. Supp. 904; Cook v. City of New York, 9 Misc. 338, 30 N. Y. Supp. 404; Fox v. City of New York, 11 Misc. 304, 32 N. Y. Supp. 257; Francisco v. City of New York, 24 App. Div. 22, 48 N. Y. Supp. 911; O'Hara v. City of New York, 28 Misc. 258, 59 N. Y. Supp. 36. A city employe illegally discharged cannot, in addition to compensation for his time while unemployed, recover costs and counsel fees in the proceedings brought by him to compel his reinstatement.

Holt v. City of New York, 35 Misc. 642, 72 N. Y. Supp. 201. A city employe illegally discharged is entitled to recover compensation for the time during which he could have performed the services of his position. Hagan v. City of Brooklyn, 126 N. Y. 643, 27 N. E. 265.

[653] State v. Walbridge, 153 Mo. 194, 54 S. W. 447; People v. Smyth, 28 Cal. 21; Carroll v. Siebenthaler, 37 Cal. 193; Andrews v. City of Portland, 79 Me. 484; Walker v. City of Cook, 129 Mass. 579; State v. Carr, 3 Mo. App. 6; Gammon v. Lafayette County, 76 Mo. 675; Givens v. Daviess County, 107 Mo. 603; State v. Brown, 146 Mo. 401; People v. Brennan, 30 How. Pr. (N. Y.) 417; Hoke v. Henderson, 15 N. C. (4 Dev.) 1; People v. Dalton, 72 N. Y. Supp. 198; People v. French, 91 N. Y. 265

If employment and promotion are dependent, as already stated, upon racial, political or religious reasons rather than upon the character and accuracy of the work done, the routine work of government will not be performed either cheaply or efficiently. These with other considerations that readily suggest themselves have influenced legislative bodies in placing a large proportion of governmental employes under civil service rules [654] and regulations attempting to control, to minimize or prevent the evils existing under other conditions. Such laws generally exclude from their operation certain appointments or positions which, because of their nature or the character of the duties required, it is deemed advisable to exempt.[655]

§ 716a. Constitutionality of civil service laws.

Civil service legislation if not prescribing tests prohibited in the constitution is enforceable.[656] A classification [657] of employment

[654] Cahen v. Wells, 132 Cal. 447, 64 Pac. 699; Brenan v. People, 176 Ill. 620, 52 N. E. 353. The board of education of the city of Chicago, except the members of the board, superintendent and the teachers, are within the operation of the civil service Act. (Laws 1895, p. 85).

Morrison v. People, 196 Ill. 454; People v. Roberts, 148 N. Y. 360, 42 N. E. 1082, 31 L. R. A. 399. The department of public works of the city of New York is within the operation of the civil service laws construing Const. 1876, art. 5, § 3, as amended by Const. 1895, art. 5, § 9. People v. Keller, 157 N. Y. 90, 51 N. E. 431. The charter of Greater New York City in respect to civil service entitles it to establish a local system and to take the city out of he operation of the general civil service laws. State v. Smith, 19 Wash. 644, 54 Pac. 33.

[655] City of New Orleans v. Fire Com'rs, 50 La. Ann. 1000, 23 So. 906; Johnson v. Kimball, 170 Mass. 58, 48 N. E. 1020; People v. Angle, 109 N. Y. 564, 14 N. E. 413; In re Agar, 21 Misc. 145, 47 N. Y. Supp. 477; People v. Knox, 45 App. Div. 518, 61 N. Y. Supp. 469; People v. Clarke, 54 App. Div. 588, 66 N. Y. Supp. 1068; Rowley v. City of Rochester, 34 Misc. 291, 69 N. Y. Supp. 160; Chittenden v. Wurster, 152 N. Y. 345, 46 N. E. 857, 37 L. R. A. 809, reversing 14 App. Div. 483, 43 N. Y. Supp. 1035. Civil service examinations are not advisable for confidential positions or those involving the handling of public moneys in addition to the position. Sec. 8 of the New York civil service laws as amended by Laws 1884, c. 410. People v. Tobey, 153 N. Y. 381, 47 N. E. 800.

[656] People v. Kipley, 171 Ill. 44,

[657] People v. Loeffler, 175 Ill. 585, 51 N. E. 785; State v. Judge of Civil Dist. Ct., 50 La. Ann. 655; In re Balcom, 28 Misc. 1, 58 N. Y. Supp. 1097; Powell v. City of New York, 65 App. Div. 421, 72 N. Y. Supp. 990; Chittenden v. Wurster, 152 N. Y. 345, 46 N. E. 857, 37 L. R. A. 809.

is fixed and candidates or applicants for employment must take the examinations prescribed,[658] submit to the regulations for the consideration of their application and their examination papers, if any, by civil service boards.[659] When once employed, which can

49 N. E. 229, 41 L. R. A. 775. The civil service act of March 20, 1895, is not unconstitutional because attaching a penalty to a violation of its provisions. People v. Loeffler, 175 Ill. 585, 51 N. E. 785; Kipley v. Luthardt, 178 Ill. 525, 53 N. E. 84; Hope v. City of New Orleans, 106 La. 345, 30 So. 842. A civil service regulation which provides for the right of selection to fill vacancies in place of a public employment from a list of persons rendered eligible by securing ratings in examinations as high as 70 per cent does not violate the 14th Amendment of the Constitution of the United States; neither is such civil service act unconstitutional as repugnant to La. Const. art. 31, which declares that laws shall embrace but one subject.

People v. Knauber, 27 Misc. 253, 57 N. Y. Supp. 782; People v. Henry, 47 App. Div. 133, 62 N. Y. Supp. 102. Civil service rules or laws cannot prevent the dismissal of those employes who by Const. art. 10, § 3, are to hold their positions at the pleasure of the appointing power. People v. Mosher, 163 N. Y. 32, 57 N. E. 88. New York Laws 1899, c. 370, and civil service rules passed under their authority conflict with constitution, art, 10, § 2, in so far as they compel the appointment of the person graded highest on the eligible list. Construing Const. art. 10, § 2, which vests in the authorities of a city the power of appointment of employes and New York Const. art. 5, § 9, the so-called civil service amendment to the Constitution, the latter amendment was not intended so the court holds, to nullify the former but to limit the exercise of such power of appointment to persons whose fitness had been ascertained by examination. Citing: People v. Draper, 15 N. Y. 537; Menges v. City of Albany, 56 N. Y. 374; People v. Angle, 109 N. Y. 564; Smith v. St. Lawrence County Sup'rs, 148 N. Y. 187; People v. Roberts, 148 N. Y. 360; Rathbone v. Wirth, 150 N. Y. 459, 34 L. R. A. 408; People v. Lyman, 157 N. Y. 368, and Gilbert El. R. Co. v. Anderson, 3 Abb. N. C. (N. Y.) 434.

[658] Morrison v. People, 196 Ill. 454, 63 N. E. 989. Members of a board of civil service commissioners can be prosecuted under 1 Starr & C. Ann. St. (2d Ed.) p. 1102, for certifying a person as eligible without taking the examinations as required. People v. Gleason, 32 App. Div. 357, 53 N. Y. Supp. 7; People v. Common Council of Syracuse, 26 Misc. 522, 57 N. Y. Supp. 617; People v. Knox, 66 App. Div. 517, 73 N. Y. Supp. 361; Chittenden v. Wurster, 152 N. Y. 345, 46 N. E. 857, 37 L. R. A. 809.

[659] McNeill v. City of Chicago, 93 Ill. App. 124; People v. Loeffler, 175 Ill. 585, 51 N. E. 785. A city clerk may be compelled by mandamus to make appointments in conformity with the civil service act. Peters v. Bell, 51 La. Ann. 1621, 26 So. 442. One appointed as an assistant city engineer before the adoption of civil service rules does not come within their operation. People v. Alder-

be in no other way,[660] their promotion,[661] reduction in grade,[662] compensation,[663] removal or discharge,[664] can only be made in accordance with the provisions of the law under which they are engaged and the protection of which they enjoy. Suspensions or removals, however, can be made under civil service regulations upon economic grounds or where there has been a failure to make

men of Buffialo, 18 Misc. 533, 42 N. Y. Supp. 545. A conclusion of a civil service commission after examination and inquiry in respect to the character and fitness of candidates for public office cannot be collaterally attacked being in its nature a judicial determination. People v. New York City Civil Service Board, 13 App. Div. 309, 43 N. Y. Supp. 191. One whose name is wrongfully omitted from the eligible list is entitled to be certified for appointment. In re Allaire, 168 N. Y. 642, 61 N. E. 1127. But see Crowley v. Freud, 132 Cal. 440, 64 Pac. 696, and In re Agar, 21 Misc. 145, 47 N. Y. Supp. 477.

[660] People v. Loeffler, 175 Ill. 585, 51 N. E. 785; Attorney General v. Trehy, 178 Mass. 186, 59 N. E. 659; People v. Knox, 67 App. Div. 231, 73 N. Y. Supp. 650; Peck v. Belknap, 130 N. Y. 394, 29 N. E. 977.

[661] Ptacek v. People, 94 Ill. App. 571; People v. Knox, 68 App. Div. 541, 69 N. Y. Supp. 602.

[662] People v. Feitner, 49 App. Div. 101, 63 N. Y. Supp. 209.

[663] People v. Coler, 58 App. Div. 615, 56 N. Y. Supp. 943. The protection afforded an honorably discharged veteran in respect to his removal does not prevent a reduction of compensation in case of transfer from one place to another. Powell v. City of New York, 65 App. Div. 421, 72 N. Y. Supp. 990; Flynn v. City of New York, 69 App. Div. 433, 75 N. Y. Supp. 15; People v. Scannell, 69 App. Div. 400, 75 N. Y. Supp. 122; People v. Knox, 71 App. Div. 306, 75 N. Y. Supp. 896.

[664] Thompson v. Troup, 74 Conn. 121, 49 Atl. 907; People v. Thompson, 26 Hun (N. Y.) 28. The old charter of New York City which provides that no clerk, employe or subordinate shall be removed without opportunity for explanation does not entitle one to demand a formal trial for the production of evidence or disprove the charges. The decision of the head of the department as to the sufficiency of the explanation is not reviewable by the courts. People v. Dalton, 23 Misc. 294, 50 N. Y. Supp. 1028; People v. Public Park Com'rs, 60 How. Pr. (N. Y.) 130. Under New York Laws 1873, c. 335, § 28, a clerk is only entitled to notice and an opportunity to explain in cases where the removal is made for a cause personal to the party or when it is sought arbitrarily and without adequate reason to substitute another person in his place. The statute does not apply where their removal is necessary because of a decrease in appropriation and because of this the necessity for the discharge of some employes. See, also, as holding the same Phillips v. City of New York, 88 N. Y. 245.

People v. Lantry, 32 Misc. 80, 66 N. Y. Supp. 185; People v. Scannell, 56 App. Div. 624, 67 N. Y. Supp. 1142. Civil service rules prohibiting removals cannot have any retroactive effect so as to protect an incumbent removed before the rules

a sufficient appropriation for the maintenance of a department or office.[665]

Removal or suspension for cause. Civil service laws must necessarily provide for the suspension or removal of employes for cause. Public business could not be carried on or discipline of department be otherwise maintained. To effect a legal removal or suspension, however, the steps prescribed by law must be taken and in the manner designated.[666]

§ 716b. Right of discharge limited by veteran acts.

The congress of the United States and many state legislatures have passed laws which still further restrict and limit the arbitrary power of removal or suspension even where civil service laws have been adopted. The class of persons especially favored by such laws are honorably discharged veteran soldiers and sailors of the war of the rebellion [667] engaged on the Union side or per-

became operative and valid under the civil service laws. People v. Campbell, 82 N. Y. 247; Kip v. City of Buffalo, 123 N. Y. 152, 25 N. E. 165; People v. Kearny, 164 N. Y. 64, 58 N. E. 14.

[665] See cases cited in preceding note. Douglas v. Board of Education of City of Brooklyn, 21 App. Div. 209, 47 N. Y. Supp. 435. The rule would even apply to discharged veterans. Porter v. Howland, 24 Misc. 434, 53 N. Y. Supp. 683; People v. Shea, 164 N. Y. 573, 58 N. E. 1091; Kenny v. Kane, 27 Misc. 680, 59 N. Y. Supp. 555.

[666] Ptacek v. People, 94 Ill. App. 571; City of Chicago v. Luthardt, 191 Ill. 516, 61 N. E. 410; People v. Cobb, 13 App. Div. 56, 43 N. Y. Supp. 120; People v. Odell, 162 N. Y. 613, 57 N. E. 1121. An order of dismissal reciting that it was "for the good of the service" is insufficient under Laws 1898, c. 186, § 3, providing for removals from office. People v. Kearny, 48 App. Div. 125. 62 N. Y. Supp. 1097; People v. Scannell, 62 App. Div. 249, 70 N. Y. Supp. 983; People v. Keller, 158 N. Y. 187, 52 N. E. 1107; People v. Cram, 164 N. Y. 166, 58 N. E. 112, reversing 50 App. Div. 380, 64 N. Y. Supp. 158.

[667] Act of Congress Aug. 15, 1876 (19 Stat. 169). Civil Service Act, 1883, (22 Stat. 406). Kan. Laws, 1886, c. 160. Mass. St. 1896, c. 517, § 3, held constitutional in Opinion of Justices, 166 Mass. 589, 44 N. E. 625, 34 L. R. A. 58; Mich. Pub. Acts, 1897, No. 205; Minn. Gen. St. 1894, § 8041; New Jersey Act March 9, 1891 (Acts 1891, c. 59, p. 101) held unconstitutional in State v. O'Connor, 54 N. J. Law, 36, 22 Atl. 1091. New Jersey Act March 14, 1895, 3 Gen. St. p. 3701; New York Laws 1887, c. 464; Laws 1888, c. 119; Cal. Act March 31, 1891; New York Laws 1899, c. 370; New York Laws 1896, c. 821. New York Laws 1898, c. 184; New York Laws, 1892, c. 577; Greater New York Charter, § 127.

New York Const. 1895, art. 5, § 9, which requires an examination of

sons participating in other wars as enlisted soldiers or sailors in the United States army or navy. Some state legislatures also favor, in this respect, the members of state militia. The purpose of this legislation is to give a preference both in the employment [668] and retention [669] in public service, and eliminate causes

applicants as to their fitness for positions in the civil service of a state and its cities and gives preference to honorably discharged Union soldiers abrogates Laws 1894, c. 717, which attempts to exempt these classes from the operation of the civil service laws. Allison v. Board of Education of San Bernardino, 125 Cal. 72, 57 Pac. 673; People v. Gray, 23 Misc. 602, 51 N. Y. Supp. 1087. Section 127, N. Y. city charter, relative to the retention of veterans of the army or navy does not vest in them a right to any particular office or position. Ohio Law, 1892, p. 50. Brower v. Kantner, 190 Pa. 182, 43 Atl. 7. Pa. Act May 26, 1897 (P. L. 107), is unconstitutional as contravening Const. art. 6, § 4. Wyoming Laws 1890, c. 44, p. 74.

[668] Keim v. United States, 177 U. S. 290. Act of Congress of August 15, 1876, § 3, and civil service Act of 1883, § 7, applies only to cases where wrongfully discharged soldiers and sailors are equally qualified with others for employment and civil office. The legislation does not warrant or authorize the appointment of incompetent or inefficient clerks. Thompson v. City of Emporia, 9 Kan. App. 740, 60 Pac. 480.

Mass. St. 1895, c. 501, §§ 2 and 6, held unconstitutional in Brown v. Russell, 166 Mass. 14, 43 N. E. 1005, 32 L. R. A. 253; Opinion of Justices, 166 Mass. 589, 44 N. E. 625, 34 L. R. A. 58.

Mass. Acts 1896, c. 517, §§ 2 and 3, giving to veterans in the army or navy of the United States during the Civil War passing the civil service examination a preference in appointment to government offices or employments is constitutional. Ayers v. Hatch, 175 Mass. 489; State v. Miller, 66 Minn. 90, 68 N. W. 732, holding the Veteran Preference Act constitutional; Laws 1887, c. 149. Stewart v. Chosen Freeholders of Hudson County, 61 N. J. Law, 117, 38 Atl. 842; Heaviland v. Chosen Freeholders of Burlington County, 64 N. J. Law, 176, 44 Atl. 963; Kreigh v. Chosen Freeholders of Hudson County, 62 N. J. Law, 178, 40 Atl. 625; People v. Knauber, 163 N. Y. 23, 57 N. E. 161.

In re Wortman, 22 Abb. N. C. 137, 2 N. Y. Supp. 324. That Union veteran laws be applicable, it is necessary that the status of an applicant should be known. People v. Gilroy, 60 Hun, 507, 15 N. Y. Supp. 242. A veteran employed for a particular purpose and in connection with special work on its completion has no claim for continued employment under Veteran Laws 1887, c. 464. Nuttall v. Simis, 22 Misc. 19, 47 N. Y. Supp. 1097. Laws 1888, c. 119, as amended by Laws 1892, c. 577, do not apply to a mechanic working for wages at a stipulated price per day.

[669] Clark v. City of Boston, 179 Mass. 409, 60 N. E. 793. A veteran employed by the job for a temporary service is not within the protection of statutes of 1896, c. 517, § 5, and may be discharged when his special task is done. Ellis v.

which ordinarily result either in the rejection of an applicant for a public employment or in his removal or suspension if in the public service. The constitutionality of such legislation has never been seriously questioned. If it were, doubts might arise as to its legal soundness. But in order that the legislation may be constitutional it should provide for the preference only when the veteran is of equal or superior fitness and when the power of selection

Common Council of Grand Rapids, 123 Mich. 567, 82 N. W. 244; Evans v. Freeholders of Hudson County, 53 N. J. Law, 585, Daily v. Chosen Freeholders of Essex County, 58 N. J. Law, 319, 33 Atl. 739; Francis v. City of Newark, 58 N. J. Law, 522, 33 Atl. 853. A deserter receiving his discharge by special order of the war department is not an honorably discharged soldier within the Act of March 14, 1895. Cavenaugh v. Chosen Freeholders of Essex County, 58 N. J. Law, 531, 33 Atl. 943; Horan v. Board of Education of Orange, 58 N. J. Law, 533, 33 Atl. 944.

Womsley v. Jersey City, 61 N. J. Law, 499, 39 Atl. 710. The abolition of an office filled by a veteran Union soldier without discontinuing its duties is an evasion of the New Jersey Laws in relation to wrongfully discharged Union soldiers, sailors and marines and is therefore void. Peterson v. Chosen Freeholders of Salem County, 63 N. J. Law, 57, 42 Atl. 844; Caulfield v. Jersey City, 63 N. J. Law, 148, 43 Atl. 433. The preference in the retention of veterans in public service will not apply where, from economic reasons, the position is abolished.

People v. City of Yonkers, 60 Hun, 579, 14 N. Y. Supp. 455. The office of health officer of the City of Yonkers does not come within the Veteran Provisions of New York Laws 1887, c. 464. Sargent v. Gorman, 60 Hun, 578, 14 N. Y. Supp. 481; Meyers v. City of New York, 69 Hun, 291, 23 N. Y. Supp. 484. New York Laws 1888, c. 119, do not apply to an employe of the department of public works of New York City receiving daily wages. People v. Scannell, 164 N. Y. 572, 58 N. E. 1091, affirming 53 App. Div. 161, 65 N. Y. Supp. 832. The retirement of officers of a uniformed force found on medical examination to be physically or mentally disqualified is not a violation of New York Laws 1899, c. 370, § 21, relative to removal of honorably discharged soldiers from public service.

O'Hara v. City of New York, 28 Misc. 258, 59 N. Y. Supp. 36; Id., 46 App. Div. 518, 62 N. Y. Supp. 146. A veteran illegally removed is entitled to compensation for the time he was prevented from performing his duties. People v. Scannell, 27 Misc. 734, 59 N. Y. Supp. 480. People v. Brady, 49 App. Div. 238, 63 N. Y. Supp. 145; People v. Coler, 34 Misc. 119, 68 N. Y. Supp. 738; People v. Adams, 133 N. Y. 203, reversing 53 Hun, 141, 6 N. Y. Supp. 128; People v. Van Wyck, 157 N. Y. 495, 52 N. E. 559. The veterans Act of 1896, c. 821, only applies to subordinate positions and does not include an assessor in New York City who is a public officer vested with the power of individual judgment and discretion in the performance of his duties.

is left to be determined under civil service rules, if these exist.[670] Employments based upon confidential relations are usually exempted.[671] Such laws are necessarily local in their application and reference is made in the notes to cases construing their provisions and determining the rights of public employes under them.[672] The removal or discharge of veterans through the

[670] Keim v. United States, 177 U. S. 290; Thompson v. City of Emporia, 9 Kan. App. 740, 60 Pac. 480; Brown v. Russell, 166 Mass. 14, 43 N. E. 1005, 32 L. R. A. 253; Opinion of Justices, 166 Mass. 589, 34 L. R. A. 58; Id., 145 Mass. 587, 13 N. E. 15; People v. Knapp, 52 Hun, 611, 4 N. Y. Supp. 825; People v. Village of Little Falls, 8 N. Y. Supp. 512. The determination of village trustees in regard to the business capacity and fitness of a Union veteran, an applicant for a position, is judicial and cannot be questioned.

People v. Almshouse Com'rs of Newburgh, 65 Hun, 169, 20 N. Y. Supp. 21; People v. Board of Education of Long Island City, 84 Hun, 417, 32 N. Y. Supp. 377; In re Keymer, 12 Misc. 615, 34 N. Y. Supp. 447; Id., 148 N. Y. 219, 42 N. E. 667, 35 L. R. A. 447; People v. Trustees of Ballston Spa, 19 App. Div. 567, 46 N. Y. Supp. 564. Under New York Laws 1896, c. 821, if the application of a Union soldier for an office is denied, he is entitled by mandamus to a trial on the question of his qualifications. People v. Cram, 34 App. Div. 313, 54 N. Y. Supp. 355; People v. Common Council of Syracuse, 26 Misc. 522, 57 N. Y. Supp. 617; In re Balcom, 28 Misc. 1, 58 N. Y. Supp. 1097, construing Laws of New York 1899, c. 370, and Const. art. 5, § 9, and holding that where an appointment to a municipal office is to be made from a list to be ascertained by competitive examination, where the list of eligible names contains more than one veteran, the one standing highest on the list is entitled to preference as against the others. In re Allaire, 168 N. Y. 642, 61 N. E. 1127, affirming 62 App. Div. 29, 70 N. Y. Supp. 845; People v. Scannell, 62 App. Div. 249, 70 N. Y. Supp. 983; People v. Lathrop, 142 N. Y. 113, 36 N. E. 805, affirming 71 Hun, 202, 24 N. Y. Supp. 754; People v. Morton, 148 N. Y. 156, 42 N. E. 538; People v. Board of Health of Troy, 153 N. Y. 513, 47 N. E. 785.

[671] In re Ostrander, 12 Misc. 476, 34 N. Y. Supp. 295; People v. Dalton, 160 N. Y. 686, 55 N. E. 1099, affirming 41 App. Div. 458, 58 N. Y. Supp. 929; People v. Palmer, 152 N. Y. 217, 46 N. E. 328; People v. Lyman, 157 N. Y. 368, 52 N. E. 132; People v. Gardner, 157 N. Y. 520, 52 N. E. 564; People v. Coler, 157 N. Y. 676, 51 N. E. 1093.

[672] State v. Miller, 66 Minn. 90, 68 N. W. 732; State v. Barrows, 71 Minn. 178, 73 N. W. 704; Lewis v. Public Works, 51 N. J. Law, 240, 17 Atl. 112; Stockton v. Regan, 54 N. J. Law, 167, 23 Atl. 1012. The veterans act does not apply to the office of county collector. Townsend v. Boughner, 55 N. J. Law, 380, 26 Atl. 808; Rowe v. Chosen Freeholders of Hudson County, 61 N. J. Law, 120, 38 Atl. 818; Stewart v. Chosen Freeholders of Hudson County, 61 N. J. Law, 117, 38 Atl. 842; Gilhooly v. Chosen Freeholders of Hud-

abolition of their office, position or employment from economic reasons, lack of necessity or appropriations for their maintenance or on account of change in the methods of administering public affairs, if made in good faith, will not be considered a violation of the veteran acts.[673]

son County (N. J. Law) 43 Atl. 569; Hardy v. City of Orange, 61 N. J. Law, 620, 42 Atl. 581; People v. Trustees of Saratoga Springs, 159 N. Y. 568, 54 N. E. 1093; Nuttall v. Simis, 31 App. Div. 503, 52 N. Y. Supp. 308. An employment at daily wages is not necessarily a transitory one. People v. Clarke, 54 App. Div. 588, 66 N. Y. Supp. 1068. A county detective is not an employe coming within the protection of legislation in favor of wrongfully discharged veterans. People v. Trustees of Albion, 61 App. Div. 71, 70 N. Y. Supp. 21; People v. Constable, 65 App. Div. 176, 72 N. Y. Supp. 535; Pratt v. Phelan, 67 App. Div. 349, 73 N. Y. Supp. 823.

[673] Beirne v. Street & Water Com'rs, 60 N. J. Law, 109, 36 Atl. 778. If the dismissal of a veteran results from a discontinuance of old methods in the administration of public affairs and the adoption of new ones, it does not violate the veteran act if such a change is not a mere pretext for the removal of employes. Womsley v. Jersey City, 61 N. J. Law, 499, 39 Atl. 710; Sutherland v. Street & Water Com'rs, 61 N. J. Law, 436, 39 Atl. 710. An office which is held by an honorably discharged Union soldier can be legally abolished for purposes of economy. People v. Durston, 3 N. Y. Supp. 522; People v. Adams, 51 Hun, 583, 4 N. Y. Supp. 522; People v. Lathrop, 71 Hun, 202, 24 N. Y. Supp. 754; People v. City of Brooklyn, 91 Hun, 308, 36 N. Y. Supp. 172; People v. Waring, 7 App. Div. 247, 40 N. Y. Supp. 35. Employes in the street cleaning department are not entitled to the protection of the veteran act, Laws of 1892, c. 577. People v. King, 13 App. Div. 400, 42 N. Y. Supp. 961; People v. Simis, 18 App. Div. 199, 45 N. Y. Supp. 940; People v. Morton, 24 App. Div. 563, 49 N. Y. Supp. 760. Where economy requires reduction of the force of laborers, a Union veteran should be the last to be discharged, other conditions being equal. People v. Scannell, 25 Misc. 619, 56 N. Y. Supp. 117; Id., 48 App. Div. 445, 62 N. Y. Supp. 930, affirmed 163 N. Y. 599, 57 N. E. 1121; People v. Clausen, 29 Misc. 701, 61 N. Y. Supp. 579; People v. Waring, 62 N. Y. Supp. 966; People v. Feitner, 58 App. Div. 594, 69 N. Y. Supp. 141; People v. City of Brooklyn, 149 N. Y. 215, 43 N. E. 554; In re Breckenridge, 160 N. Y. 103, 54 N. E. 670. But see Stutzbach v. Coler, 168 N. Y. 416, 61 N. E. 697, affirming 62 App. Div. 219, 70 N. Y. Supp. 901.

CHAPTER IX.

PUBLIC PROPERTY.

I. Its Acquirement.

II. Its Control and Use.
(For Complete Analysis of this Subdivision see page 1893.)

III. Its Disposition.
(For Complete Analysis of this Subdivision see Vol. III.)

I. Its Acquirement.

§ 717. The acquirement of property by a public corporation.
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§ 717. The acquirement of property by a public corporation.

The power of the public corporation to acquire, control, and dispose of property will be considered in this chapter and first and logically, therefore, will be the right of acquirement; in what capacity, for what purposes and the manner of securing it. The question of whether a public corporation has exceeded its powers in the acquirement of property is one which the authorities hold, and rightfully so, without exception, can only be raised by the state in a proceeding brought for that purpose; neither the grantor of property nor those claiming under him can question the power.[1]

§ 718. The acquirement in its capacity as a public corporation.

A public corporation whether a state itself as a sovereign or one of its subordinate divisions is an agency of government and as such it is legally controlled in the exercise of all its powers and the performance of all its duties by this fundamental principle [2] that as an agency of government it is an artificial person of restricted and limited powers and rights.[3] The restrictions and limitations being based upon the sound doctrine and theory that

[1] Vidal v. Girard's Ex'rs, 2 How. (U. S.) 127; Smith v. Sheeley, 79 U. S. (12 Wall.) 358; Myers v. Croft, 80 U. S. (13 Wall.) 291; City of Eufaula v. McNab, 67 Ala. 588; Alexander v. Tolleston Club of Chicago, 110 Ill. 65; Barnes v. Suddard, 117 Ill. 237; Holten v. Lake County Com'rs, 55 Ind. 194; Baker v. Neff, 73 Ind. 68; Inhabitants of Worcester v. Eaton, 13 Mass. 371; Chambers v. City of St. Louis, 29 Mo. 543; Land v. Coffman, 50 Mo. 243; Hafner v. City of St. Louis, 161 Mo. 34, 61 S. W. 632; Matthews v. City of Alexandria, 68 Mo. 115; Stewart v. Otoe County, 2 Neb. 177; Gilbert v. City of Berlin, 70 N. H. 396, 48 Atl. 279; Raley v. Umatilla County, 15 Or. 172.

[2] See §§ 108–115, ante.

[3] People v. Ingersoll, 58 N. Y. 1. See, also, §§ 108–115, ante.

the powers of a state should be directed to the act of governing and should, under no circumstances, consider or include any action that belongs to the domain of private activity and enterprise.[4] At the present time the purpose of the organization of agencies of government seems to be incorrectly understood; the tendency being towards the idea that a public corporation should not only perform its functions as an agency of government but should also supplant private enterprise, thrift and responsibility. The organic legal and proper purpose should control the right of a public corporation to acquire property and this is especially true when considering the power of the corporation in its capacity as such to secure, hold, and dispose of property.[5] Clearly the power of a public corporation to thus acquire property is limited to the existence of the right or power based upon the purposes for which it is to be used,[6] and although the state in its sovereign capacity is sometimes less controlled by this consideration, yet, the principle should never be forgotten when the question of the power of one of the subordinate agencies of government to acquire property is at issue. Such an agency should not be permitted to secure property for any purpose other than a public one[7] and then only

[4] Hayward v. Trustees of Red Cliff, 20 Colo. 33, 36 Pac. 795; First Municipality of New Orleans v. McDonough, 2 Rob. (La.) 244; Opinion of Judges, 58 Me. 590; Opinion of the Justices, 155 Mass. 598, 30 N. E. 1142, 15 L. R. A. 809. But see Delaney v. City of Salina, 34 Kan. 532, 9 Pac. 271. See c. V, subd. 1, ante.

[5] Lynn v. Inhabitants of Nahant, 113 Mass. 433; Root v. Shields, Fed. Cas. No. 12,038; Glass v. Ashbury, 49 Cal. 571.

[6] Davies v. City of New York, 83 N. Y. 207; Alter v. City of Cincinnati 56 Ohio St. 47, 46 N. E. 69, 35 L. R. A. 737. The constitutional provision, Const. art. 8, § 6, against a city raising money for or loaning its credit to or in aid of any county corporation or association, precludes a joint ownership of property with any county, corporation or association. See §§ 416 et seq.

[7] Avery v. United States, 104 Fed. 711; City of Eufaula v. McNab, 67 Ala. 588; City of Somerville v. City of Waltham, 170 Mass. 160, 48 N. E. 1092; Stone v. City of Charlestown, 114 Mass. 214; Markley v. Village of Mineral City, 58 Ohio St. 430, 51 N. E. 28. A municipal corporation has no power to acquire land by purchase for the purpose of donating the same as an inducement to build and operate a manufacturing plant within its limits. Place v. City of Providence, 12 R. I. 1. A court of equity has the power to prevent a corporation from abusing its powers by the purchase of real property for the purpose of compelling a taxpayer to abandon or compromise litigation with it.

Beurhaus v. Cole, 94 Wis. 617, 69

when the power has been expressly given [8] or is necessarily implied as essential to the life of the corporation or the carrying on of the particular governmental object for which it was organized.[9] The general authority whether expressly or impliedly existing to acquire and hold property should be limited to the purposes of the organization of the particular corporation and never construed as including those enterprises involving speculation or profit.[10]

N. W. 986. A municipality, under Rev. St. §§ 931 and 1499, can acquire lands by devise for the purpose of establishing and maintaining a home for the aged and poor. See §§ 147 et seq.; 174 et seq.; 305 et seq. and 420 et seq.

[8] People v. McClintock, 45 Cal. 11; Von Schmidt v. Widber, 105 Cal. 151, 38 Pac. 682; City of New Haven v. New Haven & D. R. Co., 62 Conn. 252, 25 Atl. 316, 18 L. R. A. 256; Proprietors of Jeffries Neck Pasture v. Inhabitants of Ipswich, 153 Mass. 42, 26 N. E. 239; Gregory v. Jersey City, 36 N. J. Law, 166; In re City of Buffalo, 68 N. Y. 167; People v. Ingersoll, 58 N. Y. 1; In re Franklin's Estate, 150 Pa. 437, 24 Atl. 626; City of Winchester v. Redmond, 93 Va. 711, 25 S. E. 1001. "A municipal corporation has no powers except those conferred upon it expressly or by implication of its charter, or the general laws of the State, and such other powers as are essential to the attainment and maintenance of its declared objects and purposes." Lauenstein v. City of Fond du Lac, 28 Wis. 336; Trester v. City of Sheboygan, 87 Wis. 496, 58 N. W. 747. See §§ 108–115, ante. But see Budd v. Budd, 59 Fed. 735, where a charter prohibition against the appropriation of money in excess of the revenue for a fiscal year as actually collected in the absence of a definite provision for such a liability would not prevent the city council from accepting a devise of lands for public park subject to the payment of an annuity for life.

[9] Phipps v. Morrow, 49 Ga. 37. Land may be acquired by the state in payment of the debt of a defaulting public officer. Bluffton Corporation v. Studabaker, 106 Ind. 129, 6 N. E. 1; Thompson v. Waters, 25 Mich. 214; Green v. City of Cape May, 41 N. J. Law, 45; Ketchum v. City of Buffalo, 14 N. Y. 356. A corporation having the authority to establish a market necessarily possesses the implied power to purchase real estate for the purpose of constructing it. See, also, as holding the same, People v. Lowber, 28 Barb. (N. Y.) 65. Witt v. City of New York, 29 N. Y. Super. Ct. (6 Rob.) 441; Leonard v. Long Island City, 65 Hun (N. Y.) 621; State v. Common Council of Madison, 7 Wis. 688; Duncan v. City of Lynchburg (Va.) 34 S. E. 964, 48 L. R. A. 331. The ownership and operation of a rock quarry is not indispensable to the objects for which a municipal corporation is created.

[10] Hunnicutt v. City of Atlanta, 104 Ga. 1, 30 S. E. 500. Under a charter power granting authority to purchase real property for the use of a city, it has no right to buy realty or any interest therein merely as an investment. Opinion of Judges, 58 Me. 590; Opinion of

These principles can be applied to the various existing subordinate public corporations. They are organized for the performance of special governmental duties. Counties,[11] school districts,[12] road districts, library or educational boards,[13] park commissions,[14] municipal corporations proper[15] and others,[16] are each created

Justices, 155 Mass. 598, 30 N. E. 1142, 15 L. R. A. 809.

[11] Hayward v. Davidson, 41 Ind. 212. Counties have the corporate power to take and hold the real property necessary and useful for county purposes and functions.

Hayward v. Davidson, 41 Ind. 215. The court in this case classify corporations with reference to their power to take and hold real estate as follows:

1. "Those whose charters or laws of creation forbid that they should acquire and hold real estate. Such corporations cannot take and hold real estate, and a deed or devise to such a corporation can pass no title.

2. "Those whose charters or laws of creation are silent as to whether they may or may not acquire and hold real estate. In such a case, if the objects for which the corporation is formed cannot be accomplished without acquiring and holding real estate, the power so to do will be implied.

3. "Those whose charters, or laws of creation, authorize them, in some cases, and for some purpose, to take and hold the title to real estate.

4. "Those whose charters, or laws of creation, * * * confer upon them a general power to acquire and hold real estate. Corporations thus empowered may * * * take and hold real estate, as fully, and perfectly as natural persons may take and hold." They hold further that counties are quasi corporations and fall within the third class above given and that they are in some cases and for some purposes authorized to take and hold title to real property. The acquirement of real property as a location for county buildings and a poor farm is a lawful purpose.

[12] State v. County Court of New Madrid, 51 Mo. 82; Winkler v. Summers, 51 Hun, 636, 5 N. Y. Supp. 723.

[13] People v. Howard, 94 Cal. 73, 29 Pac. 485; Barnum v. City of Baltimore, 62 Md. 275; Hathaway v. Sackett, 32 Mich. 97; Le Couterlix v. City of Buffalo, 33 N. Y. 333; Betts v. Betts, 4 Abb. N. C. (N. Y.) 317.

[14] Bank of Sonoma County v. Fairbanks, 52 Cal. 196; Kreigh v. City of Chicago, 86 Ill. 407. Property held by a city in its capacity as a public corporation and in trust for the public cannot be divested of this character.

Attorney General v. Burrill, 31 Mich. 25. A township may purchase and control lands for a public park; this cannot be said to be any more foreign to the objects and purposes of a township organization than to those of villages and cities though the occasion for the exercise of the power may be less frequent and the desire less urgent. In re North Terrace Park, 147 Mo. 259, 48 S. W. 860; People v. Prospect Park Com'rs, 58 Barb. (N. Y.) 638; Choate v. City of Buffalo, 167 N. Y. 597, 60 N. E. 1108.

[15] Town of Derby v. Alling, 40

with the idea that they shall carry out effectually some act properly included within a governmental power. Each one of these corporations may acquire, under the grant of express power or the existence of the implied one above suggested, property which is to be used only for a purpose germane to the object for which the particular governmental subdivision was organized.[17] The restricted and limited power of public corporations as governmental agencies cannot be too strictly maintained and strongly urged. The state or the sovereign as one of its proper purposes can acquire and retain property because of its sovereignty [18] and for the protection of its independent and separate existence against encroachments from outside sources.

§ 719. Power to acquire property in the capacity of a trustee.

The right of a public corporation to acquire and hold property in the capacity of a trustee has been a question considered by the

Conn, 410; City of Chicago v. Ward, 169 Ill. 392, 48 N. E. 927, 38 L. R. A. 849, construing and determining the rights of the public in lands known as "Lake Park" made by filling in the shoal waters of Lake Michigan adjacent to the city of Chicago.

Inhabitants of Windham v. Inhabitants of Portland, 4 Mass. 384; Mitchell v. City of Negaunee, 113 Mich. 359, 71 N. W. 646, 38 L. R. A. 157. The furnishing of electric lights to a municipality and its inhabitants is a public purpose and acts authorizing the acquirement of property for such an object are valid. Kuschke v. City of St. Paul, 45 Minn. 225, 47 N. W. 786; Gilman v. City of Milwaukee, 31 Wis. 563. See, also, §§ 108 et seq.; 174 et seq.; 305 et seq. and 420 et seq.

[16] In re State Institutions, 9 Colo. 626, 21 Pac. 472.

[17] Edey v. City of Shreveport, 26 La. Ann. 636; Town of South Hampton v. Fowler, 52 N. H. 225. A town acquires no title to lands within its limits by virtue of its act of incorporation.

[18] Weber v. Harbor Com'rs, 85 U. S. (18 Wall.) 57; Friedman v. Goodwin, 1 McAll. 142, Fed. Cas. No. 5,119; Murphy v. Dunham, 38 Fed. 503. The title to property sunk in Lake Michigan off the coast of Illinois does not vest in the state by virtue of any state statute.

Ex parte Selma & G. R. Co., 46 Ala. 423; Hart v. Burnett, 15 Cal. 530; People v. Broadway Wharf Co., 31 Cal. 33; Kimball v. McPherson, 46 Cal. 103; City of Atlanta v. Central R. & B. Co., 53 Ga. 120. A municipal corporation has not the power to take for the purpose of laying out the public street, the property of the state purchased by the latter for a specific object. Watuppa Reservoir Co. v. City of Fall River, 147 Mass. 548, 18 N. E. 465, 1 L. R. A. 466; People v. Livingston, 8 Barb. (N. Y.) 253; Hinman v. Warren, 6 Or. 408. Tide lands belonging to the state of Oregon by virtue of its sovereignty. City of Allegheny v. Ohio & P. R. Co., 26 Pa. 355

supreme court of the United States[19] and decided in the affirmative. In the McDonogh case cited in the notes the court in the opinion by Campbell, Justice, said in part: "The precise re-

[19] Girard v. City of Philadelphia, 74 U. S. (7 Wall.) 1; McDonogh's Ex'rs v. Murdoch, 15 How. (U. S.) 367. McDonogh, a citizen of Louisiana devised the greater portion of his estate to the corporations of the cities of New Orleans and Baltimore for the education of the poor of those cities: the question of their right to accept and administer the trust estate was decided affirmatively by the supreme court of the United States in an opinion written by Justice Campbell in which it was held that the city of New Orleans, being a corporation established by law, had a right to receive a legacy for the purpose of exercising the powers granted to it, and amongst such powers and duties was that of establishing public schools for gratituous education and that the city of Baltimore was entitled and empowered under the laws of the state of Maryland to receive a legacy granted it. The court in its opinion said:

"Having thus determined that the legacy is to the cities by a universal title, and, having extracted from the will the leading and controlling intention of the testator, the next inquiry is, whether a legacy given for such objects is valid.

"The Roman jurisprudence, upon which that of Louisiana is founded, seems originally to have denied to cities a capacity to inherit, or even to take by donation or legacy. They were treated as composed of uncertain persons, who could not perform the acts of volition and personality involved in the acceptance of a succession. The disability was removed by the Emperor Adrain in regard to donations and legacies, and soon legacies ad ornatum civitatis and ad honorem civitatis became frequent. Legacies for the relief of the poor, aged, and helpless, and for the education of children, were ranked of the latter class. This capacity was enlarged by the Christian emperors, and after the time of Justinian there was no impediment. Donations for charitable uses were then favored; and this favorable legislation was diffused over Europe by the canon law, so that it became the common law of Christendom. When the power of the clergy began to arouse the jealousy of the temporal authority, and it became a policy to check their influence and wealth—they being, for the most part, the managers of property thus appropriated—limitations, upon the capacity of donors to make such gifts, were first imposed. These commenced in England in the time of Henry III; but the learned authors of the history of the corporations of that realm affirm that cities were not included in them—'perhaps upon the ground, that the grants were for the public good;' and, although 'the same effect was produced by the grant in perpetuity to the inhabitants,' 'the same practical inconvenience did not arise for it, nor was it at the time considered a mortmain.' Merewether & St. Corp. 489, 702.

"A century later, there was direct inhibition upon grants to cities, boroughs, and others, which have a perpetual commonality, and others

sult of the legislation is, that corporations there, with the capacity of acquiring property, must derive their capacity from the sovereign authority, and the practice is, to limit that general capacity within narrow limits, or to subject each acquisition to the revisal of the sovereign. We have examined the legislation of the European states, so as better to appreciate that of Louisiana. No corporation can exist in Louisiana, have a public character, appear in courts of justice, exercise rights as a political body, except by legislative authority, and each may be dissolved, when deemed necessary or convenient to the public interest. Corporations created by law are permitted to possess an estate, receive donations and legacies, make valid obligations and contracts, and manage their own business.

"The privileges which thus belong to corporations legally existing, have been granted to the inhabitants of New Orleans in various legislative acts. The authorities of the city have, besides, received powers of government extending to all subjects affecting

'which have offices perpetual,' and, therefore, 'be as perpetual as people of religion.' The English statutes of mortmain forfeit to the King or superior lord the estates granted, which right is to be exerted by entry; a license, therefore, from the King severs the forfeiture. The legal history of the continent of this subject does not materially vary from that of England. The same alternations of favor, encouragement, jealousy, restraint, and prohibition, are discernible. The Code Napoleon, maintaining the spirit of the ordinances of the monarchy, in 1731, 1749, 1762, provides 'that donations, during life or by will, for the benefit of hospitals of the poor of a commune, or the establishments of public utility, shall not take effect, except so far as they shall be authorized by an ordinance of the government.'

"The learned Savigny, writing for Germany, says: 'If modern legislation, for reasons of policy or political economy, have restrained conveyances in mortmain, that those restrictions formed no part of the common law.' The laws of Spain contain no material change of the Roman and ecclesiastical laws upon this subject. The Reports of the supreme court of Louisana (in which state these laws were long in force) attest their favor to such donations.

"This legislation of Europe was directed to check the wealth and influence of judicial persons who had existed for centuries there, some of whom had outlived the necessities which had led to their organization and endowment. Political reasons entered largely into the motives for this legislation—reasons which never have extended their influence to this continent, and, consequently, it has not been introduced into our systems of jurisprudence. Perin v. Carey, 24 How. (U. S.) 465.

their order, tranquility, and improvement. It is agreed, that these powers are limited to the objects for which they are granted, and cannot be employed for ends foreign to the corporation.

"But there can be no question as to the degree of appreciation in which the subject of education is held in Louisiana. The constitution of the state imposes upon the legislature the duty of providing public schools for gratuitous education; and various acts attest the zeal of that department in performing that public duty. Among these, there is one which authorizes and requires the corporate authorities of the city of New Orleans to establish them in that city, and to enact ordinances for their organization, government, and discipline; they are likewise charged with the instruction, education, and reformation of juvenile delinquents and vagrants. These acts are from a sovereign authority, and endow the city with the powers of acquiring, retaining, and disposing of property without limitation as to value, and assign to it, as one of its municipal functions, the charge of popular education. No parliamentary grant or royal license in Great Britain—no government ordinance in France—could remove more effectually a disability if one existed, or create a capacity, if one were wanting, to the corporations of those countries. * * * The city of Baltimore is legally incorporated, and endowed with the powers usually granted to populous and improving cities. The General Assembly of Maryland, in 1825, authorized the city to establish public schools, and to collect taxes for their support; and, in 1842, it was empowered to receive in trust, and to control for the purposes of the trusts, any property which might be bestowed upon it, by gift or will, for any of its general corporate purposes, or in and of their indigent and poor, or for the general purposes of education, or for charitable purposes of any description whatsoever, within its limits. The legal capacity of the city, therefore, corresponds with that of the city of New Orleans."

The same question has also been passed upon in different states, including Pennsylvania,[20] Maryland,[21] Missouri,[22] Louisiana,[23] Ohio [24] and others.[25] The test in each case is whether the

[20] City of Philadelphia v. Clifford, 4 Yeates (Pa.) 379; Girard v. City of Philadelphia, 4 Phila. (Pa.) 413; Straub v. City of Pittsburgh, 138 Pa. 356, 22 Atl. 93; Philadelphia v. Fox, 64 Pa. 169.

[21] Barnum v. City of Baltimore, 62 Md. 275. The city of Baltimore under its charter power to receive money in trust or other property bestowed upon it for the general purposes of education, can acquire

trust property for the establishment of a chair in an educational institution to give such instruction as will aid the practical application of the mechanical arts and give boys in that institution such useful and practical mechanical education as will enable them to gain a livelihood by successful manual labor. But see Trippe v. Frazier, 4 Har. & J. (Md.) 446; Dashiell v. Attorney General, 5 Har. & J. (Md.) 392.

[22] Chambers v. City of St. Louis, 29 Mo. 543. In this case the validity was sustained of a devise by Bryan Mullanphy of one-third of all his property, real and personal, to the city of St. Louis in trust to be and consist of a fund to furnish relief to all poor immigrants and travelers coming to St. Louis on their way bona fide to settle in the west.

[23] Girard v. City of New Orleans, 2 La. Ann. 898; State v. McDonogh's Ex'rs, 8 La. Ann. 171.

[24] Perin v. Carey, 24 How. (U. S.) 465. On appeal in the circuit court of the United States for the southern district of Ohio, the court here held that the city of Cincinnati as a corporation was capable of taking in trust devises and bequests for charitable purposes and that these were charities in a legal sense valid in equity and could be enforced in equity through its jurisdiction in such matters without the intervention of legislation by the state of Ohio. The validity was upheld of a devise to the city of Cincinnati and its successors of real and personal property in trust for the purpose of building and maintaining two colleges for the education of boys and girls, the surplus to be applied to the education and support of poor orphans, a preference being given to the relations and descendants of the testator. Justice Wayne in the opinion of the court says: "After a close examination of all the legislation of Ohio relating to corporations, and its systems of education, we have not been able to detect any sentence or word going to show any intent to alter the law as it stood before the adoption of the Constitution of 1851, in respect to a corporation receiving and taking, either by testament or donation, property for a charity, or to prevent them from having trustees for the execution of it according to the intention of the donor. To take such privileges from them can only be done by statute expressly, and not by any implications by statutes, or from any number of sections in statutes analogous to the subject, containing directions for the management of corporations. The law is, that where the corporation has a legal capacity to take real or personal estate, then it may take and hold it upon trust in the same manner and to the same extent as private persons may do. It is true that if the trust be repugnant or inconsistent with the proper purposes for which it was created, that may furnish a good reason why it may not be compelled to execute it. In such a case, the trust itself being good, will be executed under the authority of a court of equity. Neither is there any positive objection, in point of law, to a corporation taking property upon trust not strictly within the scope of the direct purposes of its institutions, but collateral to them, as for the benefit of a stranger or another corporation. But if the purposes of the trust be germane to the objects of the corporation, if they relate to matters which will promote and perfect these objects, if they tend to

purpose of the grant or the gift is one which a public corporation itself might further or advance and if so, then the power exists because it is an object germane and appropriate to the general objects for which the public corporation as an agency of government

the suppression of vice and immorality, to the advancement of the public health and order, and to the promotion of trade, industry, and happiness, where is the law to be found which prohibits the corporation from taking the devise upon such trust in a state where the statutes of mortmain do not exist, the corporation itself having an estate as well by devise as otherwise? We know of no authority which inculcates such a doctrine, or prohibits the execution of such trusts, even though the act of incorporation may have for its main objects mere civil and municipal government and powers. Vidal v. Girard's Ex'rs, 2 How. 190. This court announced the same principle again in the case of McDonogh's Ex'rs v. Murdoch, 15 How. (U. S.) 367, with other and new illustrations, and with direct reference to the capacity of a corporation to take such trusts, if within its general objects, or such as were collateral or incidental to its main purpose. There is nothing in the Ohio statute of wills to prevent corporations from taking by devise. Much was also said in the argument denying the legality of trusts, in consequence of the uncertainty of the beneficiaries, and because the relatives of the testator were to have the preference. As to the first, white boys and girls make as distinctive a status of a class who are to be the first beneficiaries of the trust, and the words in the 36th section, that 'if any surplus shall remain, etc., it shall be applied to the support of poor white male and female orphans, neither of whose parents are living, and who are without any means of support,' make as certain description as could have been expressed." Urmey's Ex'rs v. Wooden, 1 Ohio St. 160; McIntyre Poor School Trustees v. Zanesville Canal & Mfg. Co., 9 Ohio 203; Philadelphia Baptist Ass'n v. Hart's Ex'rs, 9 Ohio St. 287; Id., 4 Wheat. (U. S.) 1.

[25] City of New Orleans v. Gurley, 56 Fed. 376; Peake v. City of New Orleans (C. C. A.) 60 Fed. 127; McGill v. Brown, Fed. Cas. No. 8,952. Bequests sustained to the citizens of Winchester, Va., to purchase a fire engine and hose and one "to the select members belonging to the monthly meeting of Women Friends held at Hopewell, Frederick County, Virginia," the interest be applied "towards the relief of the poor belonging thereto."

Holland v. City of San Francisco, 7 Cal. 361; In re Robinson's Estate, 63 Cal. 620. A municipal corporation may take and hold property for charitable uses. Town of Hamden v. Rice, 24 Conn. 350; City of Richmond v. State, 5 Ind. 334; Craig v. Secrist, 54 Ind. 419. A county can take and devise a permanent fund for the education of a designated class of children in the county. Phillips v. Harrow, 93 Iowa, 92, 61 N. W. 434. Under Iowa Code, § 482, a city can take and devise in trust for religious societies without regard to the donation, it having the power to take whatever action will tend to promote the prosperity and improve

was itself organized.[26] One of the leading cases on this subject, Vidal v. Girard's Ex'rs, is cited below.

This case established the right of the City of Philadelphia to accept and administer the bequest of Stephen Girard for the edu-

the morals and convenience of its inhabitants.

Phillips v. Harrow, 93 Iowa, 92, 61 N. W. 434. A city may accept a devise and trust for the religious societies within it without regard to denomination, it having the power, under Iowa Code, § 482, to do whatever will tend to promote the morals, comfort and convenience of its inhabitants.

City of Maysville v. Wood, 19 Ky. L. R. 1292, 43 S. W. 403, 39 L. R. A. 93. But in Kentucky it is held that a municipal corporation cannot hold land in trust for religious purposes. Webb v. Neal, 87 Mass. (5 Allen) 575; Lovett v. Town of Charlestown, 66 N. H. 584, 32 Atl. 160. A town may take and administer a bequest for the benefit of widows whose pecuniary relief is not more than $500.

Opinion of the Justices, 70 N. H. 638, 50 Atl. 328; Sargent v. Cornish, 54 N. H. 18. A municipal corporation may take and hold property in trust for any purpose not foreign to its institution nor incompatible with the objects of its organization. Coggeshall v. Pelton, 7 Johns. Ch. (N. Y.) 292; Wright v. Linn, 9 Pa. 433; Bell County v. Alexander, 22 Tex. 350.

[26] Lake Superior Ship Canal R. & Iron Co. v. Cunningham, 44 Fed. 819; Handley v. Palmer (C. C. A.) 103 Fed. 39, affirming 91 Fed. 948. Under chapter 65 of the Virginia Code which confers upon any board of education or any other corporation or any county, the power to take a grant, gift, devise or bequest for literary or educational purposes, a city can accept and administer a trust fund for the erection of school houses for the education of the poor. The court in its opinion after referring to this section of the Code say: "Further reference might be made to the constitutional and legislative provisions for the establishment and maintenance of free schools, which in some respects require and make use of the agency of the municipal corporations of the state in the administration of the free-school system." And in speaking of the general capacity of a public corporation to acquire and hold property as a trustee, the court also say: "What may be said to be the common law of the states of this country, as well as of England, in this regard, is that a municipal corporation may take property in trust for purposes of a public nature germane to the objects of the corporation. Educational purposes are public purposes, and are to be considered unrelated to the objects of a municipal corporation, unless made so by the general statute laws of the state, or excluded from the purposes for which the particular corporation was created by the law of its creation. That such is the law of Pennsylvania is abundantly established by the decisions of the supreme court of that state, which were cited, discussed, and approved by the learned judge of the court below." 2 Dillon, Mun. Corp. (2d Ed.), § 437; City of Philadelphia v. Fox, 64 Pa. 169; City of Philadelphia v. Elliott, 3 Rawle (Pa.)

cation and support of orphans. The court in its opinion by Justice Story collates and discusses all the cases then decided upon the question at issue and in that opinion say: "But if the purposes of the trust be germane to the objects of the incorporation; if they relate to matters which will promote, and aid, and perfect those objects; if they tend (as the charter of the city of Philadelphia expresses it) 'to the suppression of vice and immorality, to the advancement of the public health and order, and to the promotion of trade, industry, and happiness,' where is the law to be found which prohibits the corporation from taking the devise upon such trusts, in a state where the statutes of mortmain do not exist

170; Cresson's Appeal, 30 Pa. 437; Vidal v. Girard's Ex'rs, 2 How. (U. S.) 127, 11 Law Ed. 205. Gifts for public uses, generally recognized as benevolent, have "always been highly favored by the courts of the United States and the different states, without regard to the existence or nonexistence of statutes of charitable uses similar to that of 43 Eliz. Indeed, in all countries, as they have come under the influences of the Christian religion, to some extent, of the duty of fostering and protecting such gifts." Low v. Common Council of Marysville, 5 Cal. 214; Scott v. Des Moines, 34 Iowa, 552; Phillips v. Harrow, 93 Iowa, 92, 61 N. W. 434; Wrentham v. Inhabitants of Norfolk, 114 Mass. 555; In re Crane's Will, 42 N. Y. Supp. 904.

Vidal v. Girard's Ex'rs, 2 How. (U. S.) 127.

City of Philadelphia v. Fox, 64 Pa. 169. "A municipal corporation may be a trustee under the grant or will of an individual or private corporation, but only as it seems for public purposes, germane to its objects. City of Philadelphia v. Elliott, 3 Rawle (Pa.) 170; Cresson's Appeal, 30 Pa. 437; Vidal v. Girard's Ex'rs, 2 How. (U. S.) 127. I am aware that it has been said by high authority in England that it may take and hold in trust for purposes altogether private. Corporation of Gloucester v. Osborn, 1 H. L. Cas. 285. But the administration of such trusts, and the consequent liabilities incurred, are altogether inconsistent with the public duties imposed upon the municipality. It could hardly be pretended, I think, in this country, that it could be a trustee for the separate use of a married woman, to educate the children of a donor or testator, or to accumulate for the benefit of particular persons. It certainly is not compellable to execute such trusts, nor does it seem competent to accept and administer them. The trusts held by the city of Philadelphia, which are enumerated in the bill before us, are germane to its objects. They are charities, and all charities are in some sense public. If a trust is for any particular persons, it is not a charity. Indefiniteness is of its essence. The objects to be benefited are strangers to the donor or testator. The widening and improvement of streets and avenues, planting them with ornamental and shade trees, the education of orphans, the building of school-houses, the assistance and encouragement of young me-

(as they do not in Pennsylvania), the corporation itself having a legal capacity to take the estate as well by devise as otherwise? We know of no authorities which inculcate such a doctrine or prohibit the execution of such trusts, even though the act of incorporation may have for its main objects mere civil and municipal government and regulations and powers. If, for example, the testator by his present will had devised certain estate of the value of one million dollars for the purpose of applying the income thereof to supplying the city of Philadelphia with good and wholesome water for the use of the citizens, from the river Schuylkill (an object which some thirty or forty years ago would have been thought of transcendent benefit), why, although not specifically enumerated among the objects of the charter, would not such a devise upon such a trust have been valid and within the scope of the legitimate purposes of the corporation, and the corporation capable of executing it as trustee? We profess ourselves unable to perceive any sound objection to the validity of such a trust; and we know of no authority to sustain any objection to it. Yet, in substance, the trust would be as remote from the express provisions of the charter as are the objects (supposing them otherwise maintainable) now under our consideration. In short, it appears to us that any attempt to narrow down the powers given to the corporation so as to exclude it from taking property upon trusts for purposes confessedly charitable and beneficial to the city or the public, would be to introduce a doctrine inconsistent with sound principles, and defeat instead of promote the true policy of the state. We think then, that the charter of the city does invest the corporation with powers and rights to take property upon trust for charitable purposes, which are not otherwise obnoxious to legal animadversion; and, therefore, the objection that it is incompetent to take or administer a trust is unfounded in principle or authority, under the law of Pennsylvania."

The right, however, should be expressly granted.[27] It is not

chanics, rewarding ingenuity in the useful arts, the establishment and support of hospitals, the distribution of soup, bread or fuel to the necessitous, are objects within the general scope and purposes of the municipality."

27 Vidal v. Girard's Ex'rs, 2 How. (U. S.) 127. "The Act of 11th of March, 1789, incorporating the city of Philadelphia, expressly provides that the corporation, thereby constituted by the name and style of the mayor, aldermen and citizens of Philadelphia, shall have perpetual succession, 'and they and their suc-

usually considered as one which will be implied, and, where the object for which the trust was created has failed, a court of chancery will afford relief by ordering a reconveyance of the property to those legally entitled to it.[28] In the Vidal case cited above the court said: "But without doing more at present than merely to glance at this consideration, let us proceed to the inquiry whether the corporation of the city can take real and personal property in trust. Now, although it was in early times held that a corporation could not take and hold real or personal estate in trust upon the ground that there was a defect of one of the requisites to create a good trustee, viz., the want of confidence in the person, yet that doctrine has been long exploded as unsound, and too artificial; and it is now held, that where the corporation has a legal capacity to take real or personal estate, there it may take and hold it upon trust, in the same manner and to the same extent as a private person may do. It is true that, if the trust be

cessors shall at all times forever be capable in law to have, purchase, take, receive, possess, and enjoy lands, tenaments and hereditaments, liberties, franchises and jurisdictions, goods, chattels, and effects to them and their successors forever, or for any other or less estate,' etc., without any limitation whatsoever as to the value or amount thereof, or as to the purposes to which the same were to be applied, except so far as may be gathered from the preamble of the act, which recites that the then administration of government within the city of Philadelphia was in its form 'inadequate to the suppression of vice and immorality, to the advancement of the public health and order, and to the promotion of trade, industry, and happiness, and in order to provide against the evils occasioned thereby, it is necessary to invest the inhabitants thereof with more speedy, rigorous, and effective powers of government than at present established.' Some, at least, of these objects might certainly be promoted by the application of the city property or its income to them—and especially the suppression of vice and immorality, and the promotion of trade, industry, and happiness. And if a devise of real estate had been made to the city directly for such objects, it would be difficult to perceive why such trusts should not be deemed within the true scope of the city charter and protected thereby.

Dailey v. City of New Haven, 60 Conn. 314, 22 Atl. 945, 14 L. R. A. 69. Where charter authority is lacking, a city has no power to accept a bequest to it in trust for the assistance of deserving indigent persons. City Council of Augusta v. Walton, 77 Ga. 517. A public corporation cannot, in the absence of an express grant of the power, accept a testamentary trust for the establishment and maintenance of a poor house for the support of the poor of the county. In re Franklin's Estate, 150 Pa. 437, 24 Atl. 626.

[28] Harris v. Whiteside County Sup'rs, 105 Ill. 445.

repugnant to, or inconsistent with the proper purposes for which the corporation was created, that may furnish a ground why it may not be compelled to execute it. But that will furnish no ground to declare the trust itself void, if otherwise unexceptionable; but it will simply require a new trustee to be substituted by the proper court, possessing equity jurisdiction, to enforce and perfect the objects of the trust."

Grants not sustained as being foreign to the objects for which public corporations are organized. The reasoning which sustains the validity of the grants referred to in the preceding paragraph have as effectually prevented public corporations from accepting and administering bequests for objects foreign to the purposes for which they are created and in which they have no interest in their capacity as a public corporation.[29]

§ 720. Power to acquire in the capacity of a private corporation.

The decisions recognize the fact that a public corportion may at times assume for certain purposes the character of a private corporation.[30] The doctrine is wrong but the power to act in such a capacity has been affirmatively decided in some cases. Where this legal condition exists, the public corporation may, by the exercise of an express or an assumed power, acquire property in this capacity[31] and when this is done it will be treated as a private corporation and subject to all the rules of law which regulate rights and liabilities as devolving upon a private individual.[32]

[29] Vidal v. City of Philadelphia, 2 How. (U. S.) 128; Perin v. Carey, 24 How. (U. S.) 465; South Newmarket Methodist Seminary v. Peaslee, 15 N. H. 317; Sargent v. Cornish, 54 N. H. 18; Town of North Hempstead v. Town of Hempstead, 2 Wend. (N. Y.) 109; Jackson v. Hartwell, 8 Johns. (N. Y.) 330; Hornbeck v. Westbrook, 9 Johns. (N. Y.) 73. But see Attorney General v. Town of Dublin, 38 N. H. 459, where the court held that "No one can entertain a doubt that to maintain the institutions of religion is an object quite consistent with the general purpose for which towns are created, and that towns have at least an indirect interest in promoting religion within their limits."

[30] City of New Orleans v. Heirs of Guillotte, 12 La. Ann. 818; Town of New Shoreham v. Ball, 14 R. I. 566.

[31] Adams v. Natchez, J. & C. R. Co., 76 Miss. 714, 25 So. 667; People v. City of Albany, 4 Hun (N. Y.) 675; Scalf v. Collin County, 80 Tex. 514, 16 S. W. 314.

[32] Touchard v. Touchard, 5 Cal. 306; San Francisco Gas Co. v. City

When a public corporation engages in a doubtful enterprise from a governmental standpoint it loses its character as a part of the sovereign, becomes a private individual and cannot invoke its character as a public corporation to aid it in taking advantage of those with whom it may have had business dealings. Its rights and its liabilities are measured strictly by the laws which determine all private rights or liabilities.[33]

In this connection it must be remembered, however, that the question involved is not the power of the legislature over the revenues of the corporation and its property. In respect to legislative control, a subordinate public corporation represents the state or sovereign; acts as a trustee for the people of a particular locality permitting local self-government and, finally, may, in exceptional cases, act as a private corporation in its proper sense.[34] The corporation acting as an agency of local self-government acquires property for a public use, for the purpose of carrying out the idea of local self-government, and which it holds, as the courts express it, as a trustee for the local public community or public as a whole. The property acquired in this capacity is not subject to the arbitrary control of the legislature or of the sovereign, but be-

of San Francisco, 9 Cal. 453; Roosevelt v. Draper, 23 N. Y. 318; Burbank v. Fay, 65 N. Y. 57. Where one state owns land within the limits of another, it occupies the position of a private proprietor and its estate in such lands is subject to all the incidents of ordinary ownership. Atkins v. Town of Randolph, 31 Vt. 226; Hunneman v. Fire Dist. No. 1, 37 Vt. 40.

[33] Central Bank of Georgia v. Little, 11 Ga. 346; Rittenhouse v. City of Baltimore, 25 Md. 336. "The rights, powers, and liabilities of municipal corporations, in respect to contracts made by them, must be considered with reference to the subject-matter to which such contracts relate, and the character in which the municipal body acts in making them. Where the corporation appears in the character of a mere property holder, and enters into a contract with reference to such property, as any private citizen or other proprietor might do; or where it engages in an enterprise not necessarily connected with, or growing out of, its public capacity as a part of the local government, then all its rights and liabilities are to be measured and determined by the same rules that govern individuals or private corporations, and it cannot claim exemption or immunity from the legal liabilities growing out of the contracts by reason of its public municipal character. But in respect to contracts made by them in the exercise of powers entrusted to them in their municipal character, exclusively for public purposes, courts have no power to review or control their acts, unless they transcend the limits of their delegated powers."

[34] See §§ 82, 89 and 97, ante.

longs to the particular locality and is vested in the people of that locality as a necessary resultant of the idea held by some courts that local communities in this country, independent of the general government, have the inherent right of local self-government.[35] Property may be acquired by a public corporation in its local capacity, the disposal and regulation of which will be subject to the principles of law based upon acquirement and use of property for a public purpose. When a public corporation acquires property in its capacity as a local agent of government, the public use which attaches to property secured in this way cannot be changed or divested.[36] This principle does not prevent, however, the sovereign

[35] People v. Common Council of Detroit, 28 Mich. 228.

[36] Hoadley's Adm'rs v. City of San Francisco, 124 U. S. 639; Grogan v. City of San Francisco, 18 Cal. 590; City of Terre Haute v. Terre Haute Waterworks Co., 94 Ind. 305; Mt. Hope Cemetery v. City of Boston, 158 Mass. 509; People v. Common Council of Detroit, 28 Mich. 228; Matthews v. City of Alexandria, 68 Mo. 115; Spaulding v. Town of Andover, 54 N. H. 38; Still v. Village of Lansingburgh, 16 Barb. (N. Y.) 107; People v. Ingersoll, 58 N. Y. 1. Where the court say: "In political and governmental matters the municipalities are the representatives of the sovereignty of the state, and auxiliary to it; in other matters, relating to property rights and pecuniary obligations, they have the attributes and the distinctive legal rights of private corporations, and may acquire property, create debts, and sue and be sued as other corporations; and in the borrowing of money and incurring pecuniary obligations in any form, as well as in the buying and selling of property within the limits of the corporate powers conferred, they neither represent nor bind the state." And also add that municipal corporations hold all such property as trustees for the inhabitants within the territorial limits of the corporation whether taxpayers or not and that moneys obtained through the pledging of public credit or by the levy of taxes are a trust fund for public use.

Webb v. City of New York, 64 How. Pr. (N. Y.) 10; Milam County v. Bateman, 54 Tex. 153; State v. Woodward, 23 Vt. 92; Roper v. McWhorter, 77 Va. 214; Town of Milwaukee v. City of Milwaukee, 12 Wis. 93. "The difficulty about the question is, to distinguish between the corporation as a civil institution or delegation of merely political powers and as an ideal being endowed with the capacity to acquire and hold property for corporate or other purposes. In its political or governmental capacity, it is liable at any time to be changed, modified or destroyed by the legislature; but in its capacity of owner of property, designed for its own, or the exclusive use and benefit of its inhabitants, its vested rights of property are no more the subject of legislative interference or control, without the consent of the corporators, than those of a merely

from changing the trustee or in regulating or changing its use so long as such action does not impair or destroy the rights which a community as a whole may have in it.

§ 721. The location of property acquired.

The power of the public corporation to acquire property being so limited and restricted, the location of that which it can legally acquire is necessarily limited. The rule holds that such a corporation has no power in its capacity as a public one to acquire property outside the limits of its own territorial organization.[37] The exception to this rule being that where it is necessary to complete a park, water or sewage system,[38] erect a pest house or contagious hospital, to acquire property outside of its own limits, this may be done.

The limition with respect to location does not apply in those cases where the corporation may have legally acquired property in an assumed capacity of a private corporation or that of a trustee. The exercise of the power is not restricted in these cases to its organized limits.[39]

private corporation or person. Its rights of property, once acquired, though designed and used to aid it in the discharge of its duties as a local government, are entirely distinct and separate from its powers as a political or municipal body." But see Warren County Sup'rs v. Patterson, 56 Ill. 111; Beach v. Haynes, 12 Vt. 15; Konrad v. Rogers, 70 Wis. 492.

[37] Thompson v. Moran, 44 Mich 602; Town of Concord v. Town of Boscawen, 17 N. H. 465; Town of North Hempstead v. Town of Hempstead, 2 Wend. (N. Y.) 109; Riley v. City of Rochester, 9 N. Y. (5 Seld.) 64, reversing 13 Barb. 321.

[38] Bank of Augusta v. Earle, 13 Pet. (U. S.) 519; Thompson v. Moran, 44 Mich. 602; Lester v. City of Jackson, 69 Miss. 887, 11 So. 114; Chambers v. City of St. Louis, 29 Mo. 543; Hafner v. City of St. Louis, 161 Mo. 34, 61 S. W. 632. A city can acquire land outside its limits for wharf purposes under general power given by Rev. St. 1845, c. 34, § 1, to hold, purchase and have such real property as its purposes may require. Choate v. City of Buffalo, 39 App. Div. 379, 57 N. Y. Supp. 383; In re City of New York, 99 N. Y. 569; Seebold v. Shitler, 34 Pa. 133; Newman v. Ashe, 68 Tenn. (9 Baxt.) 380; Minnesota & M. Land & Ins. Co. v. City of Billings, 111 Fed. 972; Cochran v. Village of Park Ridge, 138 Ill. 295, 27 N. E. 939. See, also, §§ 441, 458, ante.

[39] McDonogh's Ex'rs v Murdoch, 15 How. (U. S.) 367; Chambers v. City of St. Louis, 29 Mo. 543. The greater part of the estate of Bryan Mullanphy devised to St. Louis in trust for the relief of poor immigrants consisted of lands in St.

§ 722. Manner of acquirement; by purchase.

The right of a public corporation to acquire property having been established, the manner of this acquirement is the next consideration and in all respects the same rules apply as to the acquirement of property by a private person or corporation. The usual mode for the acquisition of public property is by purchase and sale.[40]

(a) **Acquirement by lease.** In many cases the purchase of property is considered by the authorities inadvisable or the purchase of

Louis County outside the city limits.

[40] Gillette-Herzog Mfg. Co. v. Canyon County, 85 Fed. 396. A rejected bridge remains the property of the builders when the county refuses to pay for it.

Lore v. City of Wilmington, 4 Del. Ch. 575. When in the purchase of real property a city will incur an indebtedness in excess of its charter limit, its proposed action may be enjoined at the suit of citizens or taxpayers.

Hunnicutt v. City of Atlanta, 104 Ga. 1, 30 S. E. 500. Under a charter power granting authority to purchase for the use of the city real property, it has no right to purchase realty or any interest therein merely as an investment.

Ball v. Bannock County, 5 Idaho, 602, 51 Pac. 454. The purchase of real property can be made when within the limit of expenditure without submitting the question of the purchase to the voters but the purchase of a site upon which to build a county court house is not an ordinary and necessary expense.

Hay v. City of Springfield, 64 Ill. App. 671. A municipality may, in the exercise of a granted power for lighting the streets, buy or build a plant for such a purpose. City of Champaign v. Harmon, 98 Ill. 491. Land sold at a tax sale cannot be purchased by a city.

Holten v. Lake County Com'rs, 55 Ind. 194. County commissioners have the prima facie right to purchase a tract of land to be used as a home for the poor of the county and this question cannot be raised in a collateral proceeding.

City of Richmond v. McGirr, 78 Ind. 192. Where the power to purchase real property is expressly conferred, such authority carries with it the implied right to purchase on credit. Keller v. Wilson, 90 Ky. 350, 14 S. W. 332; Bardstown & L. Turnpike Co. v. Nelson County, 109 Ky. 800, 60 S. W. 862. The purchase of a turnpike road authorized. Roberts v. City of Lousiville, 92 Ky. 95, 13 L. R. A. 844; Parish of Concordia v. Bertron, 46 La. Ann. 356, 15 So. 60; First Municipality v. McDonough, 2 Rob. (La.) 244; Inhabitants of Worcester v. Eaton, 13 Mass. 371. A city may lawfully acquire by purchase or devise, real estate in addition to that which is necessary for the erection of public buildings.

Inhabitants of Stoughton v. Paul, 173 Mass. 148, 53 N. E. 272. Under Mass. St. 1886, c. 240, §§ 2, 10 and 15, land may be purchased by the water commissioners of a town and a mortgage upon the property as-

particular property required is impossible and so long as the purpose or the use of the property is one which is public in its char-

sumed. Thayer v. McGee, 20 Mich. 195. The action of a board of county supervisors in acquiring real property will be presumed to be for a legitimate purpose and authorized by law.

Mitchell v. City of Negaunee, 113 Mich. 359, 38 L. R. A. 157; James v. Wilder, 25 Minn. 305; Sheidley v. Lynch, 95 Mo. 487, 8 S. W. 434. A county has the implied power to purchase the necessary land for the erection of a court house and the amount or quantity is discretionary with the public authorities.

Kansas City v. Bacon, 147 Mo. 259, 48 S. W. 860; Linville v. Bohanan, 60 Mo. 554; City of Jefferson v. Curry, 71 Mo. 85. The city of Jefferson can buy land sold for nonpayment of taxes due the city under Mo. Acts 1872, p. 390, § 1. Morse v. Granite County Com'rs, 19 Mont. 450, 48 Pac. 745; Stewart v. Otoe County, 2 Neb. 177; Jewett v. Town of Alton, 7 N. H. 253; Curtis v. City of Portsmouth, 67 N. H. 506; Jersey City v. Chosen Freeholders of Hudson County, 53 N. J. Law, 531, 22 Atl. 343. A resolution to purchase by the board of freeholders may be set aside because of an excessive price to be paid.

Winkler v. Summers, 51 Hun, 636, 5 N. Y. Supp. 723. Where a city council has arranged for the purchase of a school house site at a price much in excess of its value they can be enjoined, under N. Y. Laws 1887, c. 673, which authorizes such a writ at the instance of taxpayers to prevent the officers of a municipality from wasting the public funds under their control.

Ketchum v. City of Buffalo, 14 N. Y. (4 Kern.) 356; Peterson v. City of New York, 17 N. Y. 449; People v. Earle, 47 How. Pr. (N. Y.) 368; Barker v. Town of Floyd, 32 Misc. 474, 66 N. Y. Supp. 216. The mere possession of a tract of land under contract of purchase is insufficient to validate it where otherwise unauthorized.

Beckrich v. City of North Tonawanda, 171 N. Y. 292, 64 N. E. 6; State v. Darke County Auditor, 43 Ohio St. 311; Avery v. Job, 25 Or. 512, 36 Pac. 293. The action, although discretionary, of a city council in contracting for the purchase of waterworks at an extravagant price and inadequate for the purpose will be enjoined at the suit of taxpayers. Culpeper Sup'rs v. Gorrell, 20 Grat. (Va.) 484. The discretionary action of county supervisors in the exercise of an authorized power for the purchase of land will not be inquired into in a collateral proceeding.

Lidgerwood Park Waterworks Co. v. City of Spokane, 19 Wash. 365; Potter v. Black, 15 Wash. 186, 45 Pac. 787. The city of Whatcom under its charter (Laws 1883, p. 150) has power to purchase land at a tax sale for delinquent street grade taxes. Konrad v. Rogers, 70 Wis. 492, 36 N. W. 261. But see Williams v. Lash, 8 Minn. 496 (Gil. 441). A county has no right to purchase lands at an execution sale upon the judgment obtained under an official bond of a defaulting county treasurer under a statute authorizing it to purchase lands "for public uses." See, however, the later case of Shepard v. Murray County, 33 Minn. 519, which holds

acter and which is authorized, under the principles suggested in preceding sections, a leasehold interest can be acquired.[41]

(b) Acquirement through grant or gift. A public corporation as a part of its governmental duties and functions can properly carry on many undertakings of a charitable nature and those, which it manages in its capacity as a public corporation, it has been held by many authorities, it holds as a trustee for the individuals as a whole who may permanently or temporarily reside within its limits. For reasons given a public corporation, it has been held, when authorized, can acquire and hold property through grant or gift from any source,[42] which it is generally held, where not lim-

to the contrary under the authority granted in Gen. St. 1866, c. 8, § 75. See, also, 31 Am. & Eng. Corp. Cas. 277, note, citing authorities upon the proposition that a municipal corporation cannot, in the absence of statutory authority, purchase lots at a tax sale.

[41] Halbut v. Forest City, 34 Ark. 246; City of Chicago v. Peck, 196 Ill. 260, 63 N. E. 711. A lease irregularly executed but for an authorized purpose will be considered as the contract of the city and not a lease of the mayor.

Brown County Com'rs v. Barnett, 14 Kan. 627. The judgment of county commissioners as to the unfitness or insufficiency of buildings made by the county for county purposes will not be reviewed by the courts and leases for such purposes will, therefore, be held valid. Williams v. Kearny County Com'rs, 61 Kan. 708, 60 Pac. 1046; City of Somerville v. City of Waltham, 170 Mass. 160; Gardner v. Dakota County Com'rs, 21 Minn. 33; Aull v. City of Lexington, 18 Mo. 401. A city board of health may rent a building to be used as a hospital for cholera patients.

Fitton v. Inhabitants of Hamilton City, 6 Nev. 196; Curtis v. City of Portsmouth, 67 N. H. 506. The powers granted by Pub. St. c. 40, § 4, to cities, to provide public libraries, reading rooms and memorial buildings may be exercised through the lease of suitable accommodations as well as by the purchase of real property and the erection of buildings.

Ford v. City of New York, 4 Hun (N. Y.) 587. The lease to be valid must be made in compliance with all the requirements of the law. Witt v. City of New York, 29 Super. Ct. (6 Rob.) 441; Holder v. City of Yonkers, 39 App. Div. 1, 56 N. Y. Supp. 912; Gushee v. City of New York, 26 Misc. 287, 56 N. Y. Supp. 1002; Davies v. City of New York, 83 N. Y. 207; Wade v. City of New Bern, 77 N. C. 460; Multnomah v. City & Suburban R. Co., 34 Or. 93, 55 Pac. 441; Barnett v. Ashmore, 5 Wash. 163, 31 Pac. 466; Gilman v. City of Milwaukee, 31 Wis. 563. A city may lease land for temporary use as a street under a charter which authorizes it to acquire real and personal property sufficient for the convenience of the inhabitants. But see City of Mobile v. Moog, 53 Ala. 561. The power to lease must be expressly given.

[42] Vidal v. Girard's Ex'rs, 2 How. (U. S.) 127; Budd v. Budd, 59 Fed. 735. A devise of land for a public

ited by the terms of the grant or gift,[43] can be used for any of the many public purposes the corporation is authorized to undertake and carry out.[44]

§ 723. Property acquired through dedication.

The principle is well established in the United States that the

park may be accepted where it is accompanied with the provision for the payment of an annuity to the donor for life. United States v. Case Library, 98 Fed. 512; Handley v. Palmer (C. C. A.) 103 Fed. 39; Beebe's Heirs v. City of Little Rock, 68 Ark. 39, 56 S. W. 701; Yosemite S. & T. Co. v. Dunn, 83 Cal. 264, 23 Pac. 369; Delaney v. City of Salina, 34 Kan. 532; Fulbright v. Perry County, 145 Mo. 432, 46 S. W. 955; Lester v. City of Jackson, 69 Miss. 887. A devise of lands to a city for a public park is valid though they lie outside the city limits.

Morse v. Granite County Com'rs, 19 Mont. 450; Sargent v. Cornish, 54 N. H. 18. The bequest of a sum of money is valid, the income of which is to be used yearly in the purchase and use for display of United States flags. Coggeshall v. Pelton, 7 Johns Ch. (N. Y.) 292. A legacy is valid to a town for the purpose of erecting a town house for the transaction of public business.

In re Crane's Will, 159 N. Y. 557, 54 N. E. 1089, affirming 12 App. Div. 271, 42 N. Y. Supp. 904. By statute and also by the common law the city of New York may acquire personal and real property by bequest. Christy v. Ashtabula County Com'rs, 41 Ohio St. 711; Raley v. Umatilla County, 15 Or. 172, 13 Pac. 890; Attorney General v. City of Providence, 8 R. I. 8; McIntosh v. City of Charleston, 45 S. C. 584, 23 S. E. 943; Bell County v. Alexander, 22 Tex. 350. A county may take a devise of lands for educational purposes or for the support of the poor.

Beurhaus v. Cole, 94 Wis. 617, 69 N. W. 986. A municipality under Rev. St., §§ 931, 1499, can acquire lands by devise for the purpose of establishing and maintaining a public library and a home for the aged and poor. See, also, authorities cited under §§ 719 et seq., ante.

[43] Ecroyd v. Coggeshall, 21 R. I. 1, 41 Atl. 260. A grantor of real property to a municipality is charged with knowledge of its want of authority to accept a deed limiting the use of land.

[44] Beatty v. Kurtz, 2 Pet. (U. S.) 566. The dedication of land "for the Lutheran church" is valid under the bill of rights of Maryland though German Lutherans were not incorporated and no trustees were appointed to take the legal title to the land. Redwood Cemetery Ass'n v. Bandy, 93 Ind. 246. Land may be dedicated to the public use as a cemetery. Christian Church v. Scholte, 2 Iowa, 27; Patrick v. Y. M. C. A. of Kalamazoo, 120 Mich. 185, 79 N. W. 208; Humphrey v. Whitney, 20 Mass. (3 Pick.) 158. Land devised to a town for the use "of the ministry" may be appropriated to the support of several ministers within the town.

public may acquire property through the doctrine of dedication.[45] The rule formerly was to the contrary since dedication is based upon a direct grant which requires as one of its essentials a specific

[45] Northern Pac. R. Co. v. City of Spokane (C. C. A.) 64 Fed. 506; Doe ex dem Kennedy's Ex'rs v. Jones, 11 Ala. 63; Mayo v. Wood, 50 Cal. 171. "A deed which conveys to the present and future owners of town lots in a city, certain streets and public squares in such city 'for the public use of the inhabitants of such city, to be applied to such public purposes as the future incorporated authorities of said city from time to time declare and determine' dedicates the land to a public use, and contains a sufficient designation of the grantees to make it operative as a conveyance."

Hoadley v. City & County of San Francisco, 50 Cal. 265. An act of the legislature ratifying and affirming a void municipal ordinance providing for the laying out of public squares on pueblo lands within its limits operates as a selection and dedication of the squares to a public use and no other or further acceptance by the public is needed to make the dedication complete.

City of Hartford v. New York & N. E. R. Co., 59 Conn. 250, 22 Atl. 37; Coe College v. City of Cedar Rapids (Iowa) 87 N. W. 444. The fact that a strip of land as a street is merely a cul de sac, if other conditions are sufficient, will not defeat a dedication. Busse v. Town of Central Covington, 19 Ky. L. R. 157, 38 S. W. 865, 39 S. W. 848.

Southern R. Co. v. Standiford, 21 Ky. L. R. 1023, 53 S. W. 668. There cannot be a dedication of land to a private use and, therefore, a private individual or a corporation cannot acquire title to land by dedication. See the following cases as holding the same: Lake Erie & W. R. Co. v. Whitham, 155 Ill. 514, 40 N. E. 1014, 2 L. R. A. 612; Louisville, St. L. & T. R. Co. v. Stephens, 16 Ky. L. R. 552, 22 S. W. 14; Watson v. Chicago, M. & St. P. R. Co., 46 Minn. 321, 48 N. W. 1129; Minneapolis Mill. Co. v. Minneapolis & St. L. R. Co., 46 Minn. 330, 48 N. W. 1132; Methodist Episcopal Church v. City of Hoboken, 33 N. J. Law, 13.

McNeil v. City of Boston, 178 Mass. 326, 59 N. E. 810. An entrance into a public building cannot become a public way by dedication since its use by the public is permissive only on the part of the public authorities and may be stopped at any time.

Peninsula Iron Co. v. Crystal Falls Tp., 60 Mich. 510, 27 N. W. 666; Vick v. City of Vicksburg, 1 Miss. (1 Walk.) 379. The interests of those beneficially entitled to easements on grants of a public or charitable nature will not be permitted to fail for want of a person to take a legal title.

Moses v. St. Louis Sectional Dock Co., 84 Mo. 242. The commencement of proceedings to condemn will not defeat a prior and valid dedication. Todd v. Pittsburg, Ft. W. & C. R. Co., 19 Ohio St. 514. The public and not merely a public corporation must be the chief beneficiary of a dedication which is an appropriation of lands to a public use.

Spencer v. Peterson, 41 Or. 257, 68 Pac. 519. In a civil case where

and definite grantee.[46] The subject is an important one as an examination of existing conditions will show that a very large proportion of the public highways and pleasure grounds have been acquired in this manner. The first question to be considered in this connection is the manner of dedication and the subject logically and readily lends itself to the common division into first, statutory dedication and, second, what is regarded or termed a dedication by common law.

Definition. Dedication has been defined as the setting apart of land for a public use [47] and involves not only the manner of dedi-

the dedication of a road is a question at issue, a preponderance of evidence is all that is necessary.

Klinkener v. School Directors of McKeesport, 11 Pa. 444; Baird v. Rice, 63 Pa. 489; State v. Robinson, 12 Wash. 491, 41 Pac. 844. The establishment of a highway by statutory dedication is not an exclusive method. See, also, cases cited under the two preceding notes.

[46] City of New Orleans v. United States, 10 Pet. (U. S.) 662. It is not necessary that a public corporation be incorporated in order that property may be dedicated to a public use within its limits. Webb v. City of Demopolis (Ala.) 13 So. 289; City & County of San Francisco v. Calderwood, 31 Cal. 585; Town of Derby v. Alling, 40 Conn. 410; City of Macon v. Franklin, 12 Ga. 239. A municipal corporation may make a valid dedication of land belonging to it. Warren v. Town of Jacksonville, 15 Ill. 236. The public is an ever existing grantee capable of taking dedications for public uses and its interests are of sufficient consideration to support them.

Davenport v. Buffington (Ind. T.) 45 S. W. 128; Bumpus v. Miller, 4 Mich. 159; McGinnis v. City of St. Louis, 157 Mo. 191, 57 S. W. 755. The prohibition in the city charter against the improvement or repair of a street not required according to the provisions of the charter and law does not prohibit it from acquiring the use of a street by common-law dedication.

Hertford Com'rs v. Winslow, 71 N. C. 150; Taylor v. Commonwealth, 29 Grat. (Va.) 780. An interesting case giving the history of the establishment of highways and streets by dedication. See, also, note 32 Am. Eng. Corp. Cas. 49–87.

[47] City of Los Angeles v. Kysor, 125 Cal. 463; Welton v. Town of Wolcott, 50 Conn. 259; Phipps v. State, 7 Blackf. (Ind.) 512. No presumption of dedication of uncultivated land of the United States for a highway can be raised from its use as such. Smith v. City of St. Paul, 72 Minn. 472; City of Buffalo v. Delaware, L. & W. R. Co., 68 App. Div. 488, 74 N. Y. Supp. 343. The acquiescence by owners of real property in certain municipal regulations will not constitute a dedication. In re Hunter, 164 N. Y. 365, 58 N. E. 288. Denying rehearing 57 N. E. 735. A mode of dedication established by statute is not exclusive. Ferdinando v. City of Scranton, 190 Pa. 321, 42 Atl. 692; Bates v. City of Beloit, 103 Wis. 90; Elliott, Roads & St. § 112.

cation as suggested in the previous paragraph, but also the consideration of the right of the party to make the dedication, the question of intent and the nature and requisites of the dedicator's act.

§ 724. Statutory.

The statutes of the different states contain provisions for the granting or dedicating of property interests to the public and where it is thus granted it is termed a statutory dedication.[48] The statutory dedication is usually effected through the making of a map or plat of property laid out in streets, alleys, blocks or lots, to be signed and acknowledged by the owners of the property and then duly filed and recorded.[49] The plat is usually conclusive of

[48] Pacific Gas Imp. Co. v. Ellert, 64 Fed. 421; London & San Francisco Bank v. City of Oakland, 86 Fed. 30; Noyes v. Ward, 19 Conn. 250. It is not necessary to establish in the public a right to the use of land as a highway through dedication that it should have been used for the period of fifteen years nor that the public use should have been adverse and uninterrupted. Conner v. New Albany, 1 Blackf. (Ind.) 43; Waltman v. Rund, 109 Ind. 366, 10 N. E. 117; Arnold v. Weiker, 55 Kan. 510; Ruddiman v. Taylor, 95 Mich. 547; Village of Buffalo v. Harling, 50 Minn. 551; Osterheldt v. City of Philadelphia, 195 Pa. 355, 45 Atl. 923, rehearing denied, 195 Pa. 362; Greene v. O'Connor, 18 R. I. 56, 19 L. R. A. 262; Daniels v. Almy, 18 R. I. 244; Monaghan v. Memphis Fair & Exposition Co., 95 Tenn. 108; Vaughan v. Lewis, 89 Va. 187; State v. Forrest, 12 Wash. 483, 41 Pac. 194; Yates v. Town of West Grafton, 33 W. Va. 507, 11 S. E. 8.

[49] London & San Francisco Bank v. City of Oakland, 90 Fed. 691; City & County of San Francisco v. Center, 133 Cal. 673, 66 Pac. 83; Town of Lake View v. Le Bahn, 120 Ill. 92, 9 N. E. 269. A plat is not defective because the figures are not designated; being made by a surveyor it will be presumed that surveyor's terms are meant. City of Chicago v. Ward, 169 Ill. 392, 48 N. E. 927, 38 L. R. A. 849. The marking of land upon a plat as "open ground; no building" and "public ground; forever to remain vacant of buildings" is sufficient dedication to the use of the public; the particular object and purpose of which may be shown by parol evidence where not expressed in such a grant.

Strunk v. Pritchett, 27 Ind. App. 582, 61 N. E. 973; Waterloo v. Union Mill Co., 59 Iowa, 437; Moore v. Kleppish, 104 Iowa, 319, 73 N. W. 830; Armistead v. Vicksburg S. & P. R. Co., 47 La. Ann. 1381, 17 So. 888; Palen v. City of Ocean City, 64 N. J. Law, 669, 46 Atl. 774. The inclusion of a wharf in the markings on a plat properly recorded and filed does not conclusively establish a dedication of that wharf to a public use. Burrows v. Webster, 21 N. Y. Supp. 828. A map showing a street twenty-six feet wider

the rights of all parties in respect to land designated as dedicated to the public; land not so marked, it will not be presumed, was intended to be dedicated to the public.[50] In order that it shall be effectual and complete as such, it is necessary that the terms of the law authorizing it be substantially complied with.[51] The

that it was ever laid out, opened or used, is not admissible to establish the laying of the street without evidence of an acceptance of the dedication or that the map was made for the owners of the land.

City of Buffalo v. Delaware, L. & W. R. Co., 39 N. Y. Supp. 4; People v. Underhill, 144 N. Y. 316, 39 N. E. 333; Fereday v. Mankedick, 172 Pa. 535, 34 Atl. 46; Charleston Rice Mill. Co. v. Bennett & Co., 18 S. C. 254. The dedication of a street to the use of the public does not change or divest the title of the adjacent proprietors; their rights remain the same subject to the easement created.

[50] Ruch v. City of Rock Island, 5 Biss. 95, Fed. Cas. No. 12,105; Schmitt v. City & County of San Francisco, 100 Cal. 302, 34 Pac. 961; Evans v. Welsh, 29 Colo. 355, 68 Pac. 776; McWilliams v. Morgan, 61 Ill. 89. The marking of a strip as "depot" is no evidence of an intention to dedicate to a public use. See, also, as holding the same: Taft v. Tarpey, 125 Cal. 376; Baltimore & O. S. W. R. Co. v. City of Seymour, 154 Ind. 17, 55 N. E. 953, and Village of Benson v. St. Paul, M. & M. R. Co., 73 Minn. 481.

Town of Princeton v. Templeton, 71 Ill. 68; Village of Winnetka v. Prouty, 107 Ill. 218; Samuell v. Town of Sherman, 170 Ill. 265, 48 N. E. 576; Steinaur v. Tell City, 146 Ind. 490, 45 N. E. 1056; Cowles v. Gray, 14 Iowa, 1; Fisher v. Carpenter, 36 Kan. 184, 12 Pac. 941; Williams v. Boston Water Power Co., 134 Mass. 406; Attorney General v. Whitney, 137 Mass. 450. The mere coloring green on a map of a triangular strip of land is no evidence of dedication where it is not otherwise marked or indicated. Ferdinando v. City of Scranton, 190 Pa. 321, 42 Atl. 692; Ayres v. Fellrath, 5 Tex. Civ. App. 557, 24 S. W. 347; Robinson v. Coffin, 2 Wash. T. 251; Van Valkenburgh v. City of Milwaukee, 30 Wis. 338. But see Warden v. Blakely, 32 Wis. 690.

[51] London & San Francisco Bank v. City of Oakland, 90 Fed. 691. Affirming 86 Fed. 30. The fact that a plat is incorrect in its delineation of certain lands will not affect its sufficiency as a dedication of the streets correctly designated. Ham v. Common Council of Dadeville, 100 Ala. 199; Field v. Barling, 149 Ill. 566; City of Chicago v. Van Ingen, 152 Ill. 624; Waltman v. Rund, 109 Ind. 366, 10 N. E. 117; City of New Albany v. Williams, 126 Ind. 1, 25 N. E. 187; Minneapolis & St. P. R. Co. v. Town of Britt, 105 Iowa, 198, 74 N. W. 933; Edwards & Walsh Construction Co. v. Jasper County, 117 Iowa, 365, 90 N. W. 1006. An instrument defective in showing intent may be substantiated by parol evidence. Terrill v. Town of Bloomfield, 14 Ky. L. R. 614, 20 S. W. 289; Diamond Match Co. v. Village of Ontonagon, 72 Mich. 249, 40 N. W. 448; Dickerson v. City of Detroit, 99 Mich. 498; Downer v. St. Paul &

acknowledgment of the instrument [52] and the conveyance with its filing [53] and the manner of its mechanical execution [54] are generally prescribed and the law requires a strict compliance with its terms. The statutes afford the sole and only basis in the case of a statutory dedication for the claim on the part of the public and it will be readily seen that the rule above stated must be the correct one. An incomplete statutory dedication may, however, through the continued action of the owner and the public authorities, become effectual as a common-law dedication.[55] In order that this be true, however, it is essential that the necessary condi-

Chicago R. Co., 22 Minn. 251; Buschmann v. City of St. Louis, 121 Mo. 523, 26 S. W. 687; Village of Weeping Water v. Reed, 21 Neb. 261, 31 N. W. 797. A defective plat may be cured by subsequent legislation or by act of the owner. Pillsbury v. Alexander, 40 Neb. 242; Lewis v. City of Portland, 25 Or. 133; Tilzie v. Haye, 8 Wash. 187, 35 Pac. 583; Brown v. City of Baraboo, 98 Wis. 273, 74 N. W. 223.

[52] Gould v. Howe, 131 Ill. 490, 23 N. E. 602. The acknowledgment of a plat before a notary is a nullity where the statute provides that it should be acknowledged "before a justice of the supreme court, justice of the circuit court or a justice of the peace." Earll v. City of Chicago, 136 Ill. 277, 26 N. E. 370; Gosselin v. City of Chicago, 103 Ill. 623; Village of Vermont v. Miller, 161 Ill. 210, 43 N. E. 975; Blair v. Carr, 162 Ill. 362, 44 N. E. 720; Rusk v. Berlin, 173 Ill. 634, 50 N. E. 1071; Giffen v. City of Olathe, 44 Kan. 342, 24 Pac. 470; Village of Grandville v. Jenison, 84 Mich. 54, 47 N. W. 600; Fulton Village v. Mehrenfeld, 8 Ohio St. 440.

Williams v. Milwaukee Industrial Exposition Ass'n, 79 Wis. 524, 48 N. W. 665. A plat defective because of the omission of the seal of the ackowledging justice may be cured by subsequent legislation.

[53] Earll v. City of Chicago, 136 Ill. 277; Heitz v. City of St. Louis, 110 Mo. 618.

[54] Blair v. Carr, 162 Ill. 362, 44 N. E. 720; Village of North Chillicothe v. Burr, 185 Ill. 332, 57 N. E. 32. A plat is not defective where the width of the street can be gathered from the plat and certificate as a whole.

[55] Porter v. Carpenter, 39 Fla. 14; Gould v. Howe, 131 Ill. 490, 23 N. E. 602; Field v. Carr, 59 Ill. 198; Clark v. McCormick, 174 Ill. 164, 51 N. E. 215; Village of Augusta v. Tyner, 197 Ill. 242, 64 N. E. 378; Town of Woodruff Place v. Raschig, 147 Ind. 517; Miami County Com'rs v. Wilgus, 42 Kan. 457, 22 Pac. 615. Blocks marked on a defective plat as "public square" will be considered as dedicated to those respective uses. Wilgus v. Miami County Com'rs, 54 Kan. 605, 38 Pac. 787; Flersheim v. City of Baltimore, 85 Md. 489; Ruddiman v. Taylor, 95 Mich. 547, 55 N. W. 376; Smith v. City of St. Paul, 72 Minn. 472, 75 N. W. 708; Ehmen v. Village of Gothenburg, 50 Neb. 715; Beasley v. Town of Belvidere, 59 N. J. Law, 409; Brown v. City of Baraboo, 98 Wis. 273, 74 N. W. 223. See, also, cases cited in § 714, post.

tions of a common-law dedication exist,[56] and these include, as will be noted later,[57] not only a grant or gift on the part of the individual, but an acceptance of that grant by the public. Where a statutory dedication is defective, although it may not become a common-law dedication in favor of the public at large, yet, when property has been sold adjoining streets or highways thus attempted to be dedicated, the owners of such property will acquire an easement in the land set aside for this purpose.[58] The filing and recording of a plat sufficient to constitute a statutory dedication is conclusive upon the one filing it[59] and the designating of ground on a recorded plat as "streets," "alleys," "public grounds" or "parks," constitutes an unrestricted dedication of such land to the public use. This may be indefinite and vary according to the circumstances. Its care and its management must devolve upon some local authority or body corporate which directs its use subject to the control of the courts in case of an abuse of the trust.[60]

[56] Cook v. Village of Hillsdale, 7 Mich. 115; Patrick v. Y. M. C. A. Ass'n of Kalamazoo, 120 Mich. 185; City of San Antonio v. Sullivan, 23 Tex. Civ. App. 619, 57 S. W. 42.

[57] See §§ 739, 742, post.

[58] Gormley v. Clark, 134 U. S. 338; Kuecken v. Voltz, 110 Ill. 264; Village of Augusta v. Tyner, 197 Ill. 242, 64 N. E. 378; City of Keokuk v. Cosgrove, 116 Iowa, 189, 89 N. W. 983; Danforth v. City of Bangor, 85 Me. 423, 27 Atl. 268; Beasley v. Town of Belvidere, 59 N. J. Law, 408, 35 Atl. 797. But see Mason v. City of Chicago, 163 Ill. 351, 45 N. E. 567, where such a claim was defeated because of the use of the property originally to be dedicated for private purposes for more than twenty years. City of Baltimore v. Northern Cent. R. Co., 88 Md. 427, 41 Atl. 911.

[59] Northern Pac. R. Co. v. City of Spokane, 56 Fed. 915; Arnold v. Weiker, 55 Kan. 510, 40 Pac. 901. A narrow strip on a plat into which streets open will be considered as having been dedicated to a public use although it is not named as a street or alley. Great Northern R. Co. v. City of St. Paul, 61 Minn. 1, 63 N. W. 96; Burns v. City of Liberty, 131 Mo. 372, 33 S. W. 18; Clark v. City of Elizabeth, 40 N. J. Law, 172; Matter of Curran v. Guilfoyle, 38 App. Div. 82, 55 N. Y. Supp. 1018; City of Deadwood v. Whittaker, 12 S. D. 515, 81 N. W. 908; City of Madison v. Mayers, 97 Wis. 399, 73 N. W. 43, 40 L. R. A. 635.

[60] Coffin v. City of Portland, 27 Fed. 412; Webb v. City of Demopolis, 95 Ala. 116, 21 L. R. A. 62; Evans v. Blankenship (Ariz.) 39 Pac. 812. The platting of certain land as "public grounds" is effectual and complete as a dedication to the city. Jones v. Phillips, 59 Ark. 35; Town of San Leandro v. Le Breton, 72 Cal. 170, 13 Pac. 405; City of Napa v. Howland, 87 Cal. 84, 25 Pac. 247. A finding that land

was dedicated as a "public levee" is supported by evidence of its character as a "public landing." The word "levee" is used in connection with a navigable stream having the same meaning as "landing."

Carter v. City of Chicago, 57 Ill. 283; Doe v. President & Trustees of Attica, 7 Ind. 641; Rhodes v. Town of Brightwood, 145 Ind. 21, 43 N. E. 942. The rights of the public in a tract of land dedicated as a park in the plat of an addition can be enforced by the municipality to which this addition is subsequently annexed. Lake Erie & W. R. Co. v. Town of Boswell, 137 Ind. 336; Davenport v. Buffington, 1 Ind. T. 424, 45 S. W. 128; Livermore v. City of Maquoketa, 35 Iowa, 358; Young v. Makaska County, 88 Iowa, 681, 56 N. W. 177. A county owning land platting it as a town site and recording the plat which shows upon it a tract marked "public square" indicates its intention to dedicate a square to the town for park purposes.

Miami County Com'rs v. Wilgus, 42 Kan. 457, 22 Pac. 615; Forbes v. Board of Education of Ft. Scott, 7 Kan. App. 452, 53 Pac. 533; Wilgus v. Miami County Com'rs, 54 Kan. 605, 38 Pac. 787; Allen v. Rinehardt, 12 Ky. L. R. 411, 14 S. W. 420; City of Covington v. McDonald, 94 Ky. 1; Caperton v. Humpick, 95 Ky. 105; Town of Alexandria v. O'Shea, 51 La. Ann. 719, 25 So. 382; Attorney General v. Tarr, 148 Mass. 309, 19 N. E. 358, 2 L. R. A. 87. The reservation of land "free for landing places for the public use of the inhabitants of Gloucester" means a dedication of the property and the phrase "for the inhabitants of Gloucester" does not limit its public use to this alone. Hennepin County Com'rs v. Dayton, 17 Minn. 260 (Gil. 237); Village of White Bear v. Stewart, 40 Minn. 284, 41 N. W. 1045; Middleton v. Wharton, 41 Minn. 266; Campbell v. City of Kansas, 102 Mo. 326, 13 S. W. 897, 10 L. R. A. 593. Where a square is "dedicated for a grave yard" it is sufficient as a dedication in pais although the original plat was not signed or acknowledged by the proprietors of the town site but only filed with the recorder of deeds and used in connection with the public sales of lots.

Rutherford v. Taylor, 38 Mo. 315; Price v. Inhabitants of Breckenridge, 77 Mo. 447; Bauman v. Boeckeler, 119 Mo. 189; Snoddy v. Bolen, 122 Mo. 479, 24 L. R. A. 507; St. Louis & S. F. R. Co. v. Gordon, 157 Mo. 71, 57 S. W. 742; Witherspoon v. City of Meridan, 69 Miss. 288, 13 So. 843; Farlin v. Hill, 27 Mont. 27, 69 Pac. 237; Lincoln Land Co. v. Ackerman, 24 Neb. 46; Brown v. Stein, 38 Neb. 596; Ehmen v. Village of Gottenburg, 50 Neb. 715, 70 N. W. 237. A plat properly recorded and acknowledged showing subdivisions of land into lots and blocks with a block marked as "Ehmen's Park" operates as a statutory dedication of such a block for a public park.

Price v. Inhabitants of Plainfield, 40 N. J. Law, 608. The word "park" written on the block on a plat of such property indicates a dedication to a public use. Common Council of Bayonne v. Ford, 43 N. J. Law, 292. A tract of land on a plat marked as "Annette Park" becomes a public park by dedication. In re Hunter, 163 N. Y. 542, 57 N. E. 735. Rehearing denied, 164 N. Y. 365, 58 N. E. 288. Hertford Com'rs v. Winslow, 71 N.

§ 725. Common-law.

Dedication implies a conveyance and an acceptance; the transaction including a contract either express or implied.[61] But no specific length of time of use by the public is necessary.[62] A statutory dedication can be said to be based upon an express grant or contract as prescribed by statutory provisions. A common-law dedication operates by way of an estoppel in pais rather than by the affirmative and direct act of the parties as authorized by statute.[63] But in order to constitute a common-law dedication, no par-

C. 150; Conrad v. West-End Hotel & Land Co., 126 N. C. 776, 36 S. E. 282; Huber v. Gazley, 18 Ohio, 18; Meier v. Portland C. R. Co., 16 Or. 500, 1 L. R. A. 856; Steel v. City of Portland, 23 Or. 176, 31 Pac. 479; Com. v. Connellville Borough, 201 Pa. 154, 50 Atl. 825; Com. v. Beaver Borough, 171 Pa. 542, 33 Atl. 112; City of Pittsburg v. Epping-Carpenter Co., 194 Pa. 318, 45 Atl. 129; Mason v. City of Sioux Falls, 2 S. D. 640; Williams v. Smith, 22 Wis. 594.

Bates v. City of Beloit, 103 Wis. 90, 78 N. W. 1102. The designation of an unplatted space as "Mechanics' Green" and another as "Public Square" together with the use of these places by the public and their improvement by the public authorities will operate as a dedication. But see Grant v. City of Davenport, 18 Iowa, 179, where a tract of land designated as "preserved landing" was held not a dedication to a public use. City of Pella v. Scholte, 24 Iowa, 283, where it is held that the words "grand square" marked on a town plat does not necessarily imply a dedication of the block to the public. Extrinsic evidence is necessary to fix their meaning. Baker v. Vanderburg, 99 Mo. 378, 12 S. W. 462. See, also, authorities cited in § 718.

[61] Hall v. Armstrong, 53 Conn. 554. A right of way granted temporarily to an individual for a particular purpose is extinguished by the lack of possibility for such use. Grube v. Nichols, 36 Ill. 92; City of Chicago v. Borden, 190 Ill. 430, 60 N. E. 915; City of Helena v. Albertose, 8 Mont. 499, 20 Pac. 817; Heckerman v. Hummel, 19 Pa. 64; Schettler v. Lynch, 23 Utah, 305, 64 Pac. 955. See, also, note 32 Am. & Eng. Corp. Cas. 49.

[62] Ogle v. Philadelphia, W. & B. R. Co., 3 Houst. (Del.) 267; Hill v. City of Sedalia, 2 Mo. App. Rep'r, 1019.

[63] United States v. Illinois Cent. R. Co., 2 Biss. 174, Fed. Cas. No. 15,437; Bayliss v. Pottawattamie County Sup'rs, 5 Dill. 549, Fed. Cas. No. 1,142; Hibberd v. Mellville (Cal.) 33 Pac. 201; McKinzie v. Gilmore (Cal.) 33 Pac. 262. Where the owner of property opened a road through his land, fenced it on both sides, permitted it to be used by the public and to be repaired and improved by the public authorities, this was held a sufficient dedication to the public.

Silva v. Spangler (Cal.) 43 Pac. 617; Smith v. City of San Luis Obispo, 95 Cal. 463; People v. Eel River & E. R. Co., 98 Cal. 665, 33 Pac. 728; Starr v. People, 17 Colo. 458; Chi-

ticular form, ceremony or instrument is necessary. All that is required is the assent of the owner of the land and its use by the public for the purposes intended by the appropriation.[64] To constitute

cago, R. I. & P. R. Co. v. City of Joliet, 79 Ill. 25. The difference between a statutory and common-law dedication is that the one vests the legal title of the ground set apart for public purposes in the municipal corporation in trust for the public while the other leaves the legal title in the original owner charged, however, with the same rights and interests in the public which it would have if the fee was in the corporation. Moffett v. South Park Com'rs, 138 Ill. 620, 28 N. E. 975; City of Dubuque v. Maloney, 9 Iowa, 450; Leonard's Heirs v. City of Baton Rouge, 39 La Ann. 275, 4 So. 241; Village of Mankato v. Willard, 13 Minn. 13 (Gil. 1); City of St. Louis v. Wetzel, 110 Mo. 260; Parisa v. City of Dallas, 83 Tex. 253; Witter v. Damitz, 81 Wis. 385.

3 Washburn, Real Prop. (4th Ed.) c. 2, § 6. "To effect such a dedication, there must be a donation by the owner or some unequivocal act united with an intent to divest himself, to some extent, of the ownership or power of control over the property, and to vest an independent and irrevocable interest in some other person or body. No one but the owner of land in fee can dedicate it, or the use of it, to the public. And it is, moreover, essential to a dedication that the owner should intend what he does as a dedication, and this must be found affirmatively by the jury to constitute it such. The law considers such a state of things in the nature of an estoppel in pias, which precludes the original owner from revoking such dedication; for this would be a violation of good faith to the public, and to those who have acquired private property with a view to the enjoyment of the use thus publicly granted." Dillon, Mun. Corp. (4th Ed.) § 628. "It differs (common law), also, in the mode of operation, since by the language above quoted the estate vests in the public by conveyance or grant, whereas, at common law, a dedication to public uses, in cases where there is no express grant to a grantee upon consideration, operates by way of an estoppel in pias of the owner, rather than by grant or the transfer of an interest in the land."

[64] Banks v. Ogden, 69 U. S. (2 Wall.) 57; City of Cincinnati v. White's Lessee, 6 Pet. (U. S.) 431; Barclay v. Howell's Lessee, 6 Pet. (U. S.) 498; City of New Orleans v. United States, 10 Pet. (U. S.) 662; Morgan v. Chicago & A. R. Co., 96 U. S. 716; Robertson v. Town of Wellsville, 1 Bond. 81, Fed. Cas. No. 11,930. "To dedicate property to public use is simply to appropriate, or set it apart to such use. There must be not only an intention to dedicate, but an act manifesting such intention. Hence, an expression of an intention, without some act to effectuate it, does not make a valid dedication. The law, however, requires no particular form or solemnity to constitute a valid dedication. A writing signed and acknowledged is not necessary. A dedication may be by parol, and may be established by proof of the verbal declarations of

a complete dedication, an acceptance is necessary by the public.[65] This rule obtains because, upon the establishment and acceptance of a public highway, certain obligations and duties with respect to its maintenance are created and become fixed upon the public authorities.[66] It is just that a rule of law should control the creation

the owner, or may be presumed without proof of any act of dedication, from the acquiescence of the owner in the use and occupation of property by the public. But usually, such use and occupation must be adverse to the title of the owner to raise a presumption of dedication."

Town of Westmount v. Warmington, 9 Quebec J. B. 101; Godfrey v. City of Alton, 12 Ill. 29; McIntyre v. Storey, 80 Ill. 127; Union Stock Yards & Transit Co. v. Karlik, 170 Ill. 403, 48 N. E. 1008; Woodburn v. Town of Sterling, 184 Ill. 208, 56 N. E. 378. Intention to dedicate may be proven by oral declarations of the landowner. Davenport v. Buffington, 1 Ind. T. 424; Doe d. Sargeant's Heirs v. State Bank of Indiana, 4 McLean, 339, Fed. Cas. No. 12,360; Williams v. Wiley, 16 Ind. 362; Baltimore & O. S. W. R. Co. v. City of Seymour, 154 Ind. 17.

Wilson v. Sexton, 27 Iowa, 15. "To constitute a dedication of land for a highway, no particular formality is required. Any act of the owner of the soil clearly indicating an intention to dedicate is sufficient. The intention may be manifested by writing, sealed or unsealed, by parol, or by acts inconsistent with any inference except such intention. Proof of the animus dedicandi may be by circumstances and may rest in pais. The use of the way by the public with the knowledge and assent of the owner of the soil, will be considered evidence of dedication; and when such use extends through a long series of years, the animus dedicandi is presumed. When the owner of the soil so long acquiesces in the use of the way, having knowledge thereof, he is estopped to deny his prior dedication." Agne v. Seitsinger, 104 Iowa, 482; Hall v. McLeod, 59 Ky. (2 Metc.) 98; Singleton v. School Dist. No. 34, 10 Ky. L. R. 851, 10 S. W. 793; Rector v. Hartt, 8 Mo. 448; McKee v. City of St. Louis, 17 Mo. 184; Missouri Inst. for the Blind v. How, 27 Mo. 211; Rose v. City of St. Charles, 49 Mo. 509; New York & N. H. R. Co. v. Pixley, 19 Barb. (N. Y.) 428; Cook v. Harris, 61 N. Y. 448; Grinnell v. Kirkland, 68 N. Y. 629; Le Clercq v. Town of Gallipolis, 7 Ohio (1st pt.) 217; Oswald v. Grenet, 22 Tex. 94; State v. Trask, 6 Vt. 355; Buntin v. City of Danville, 93 Va. 200, 24 S. E. 830.

[65] Hayward v. Manzer, 70 Cal. 476, 13 Pac. 141; Brakken v. Minneapolis & St. L. R. Co., 29 Minn. 41. An acceptance is shown by user by the public and by an actual exemption of care and control by the public authorities in improving or working upon the highway. Garnett v. City of Slater, 56 Mo. App. 207. See §§ 735 et seq., post.

[66] Reed v. City of Birmingham, 92 Ala. 239; Town of Salida v. McKinna, 16 Colo. 523, 27 Pac. 810; Green v. Belitz, 34 Mich. 512; Warren v. Brown, 31 Neb. 8; New York & L. B. R. Co. v. Borough of South

of these duties and that private parties ought not to be permitted to arbitrarily, and of their own volition, throw burdens upon a public corporation which in the discretion of public authorities it is not feasible or advisable that they should assume. The extent of the interest granted is another distinguishing characteristic as between a statutory and a common-law dedication, but this subject will be considered in a later section.[67] In the determination of whether the facts in a particular case create a common-law dedication, the character of the land used, whether wild and uninclosed or cultivated, will be considered. Where it is of the character last named, a highway opened and used with the assent of the owner will be presumed to have been dedicated by him to the use of the public. The conditions justify the presumption that he is aware of its use. This principle is not true where land used for a highway is wild and uninclosed.[68]

§ 726. Who may dedicate.

A dedication is the giving or the grant of an interest in property by the owner to the public for a public use, and the legality of the act is necessarily limited by the legal power or control of the donor over the property given away by him. The owner alone can dedicate his interest.[69] A gift by one not the

Amboy, 57 N. J. Law, 252, 30 A. 628.

[67] See § 733.

[68] Ely v. Parsons, 55 Conn. 83; 10 Atl. 499; Short v. Walton, 61 Ga. 28; State v. Kansas City, St. J. & C. B. R. Co., 45 Iowa, 139. See cases cited under § 731, note 97, post.

[69] Johnson v. Common Council of Dadeville, 127 Ala. 244, 28 So. 700; Watkins v. Lynch, 71 Cal. 21, 11 Pac. 808; Logan v. Rose, 88 Cal. 263, 26 Pac. 106; City of Eureka v. Fay, 107 Cal. 166; Franklin v. City of Macon, 12 Ga. 259; Gentleman v. Soule, 32 Ill. 271. If a mortgagee assents to a dedication made by the mayor, he will be bound by it as also those claiming under him. See, also, as holding this same proposition, Smith v. Heath, 102 Ill. 130, and Bushnell v. Scott, 21 Wis. 451.

Vaughan v. Mann, 59 Ill. 492; James v. Illinois Cent. R. Co., 195 Ill. 327, 63 N. E. 153; Town of Fowler v. Linquist, 138 Ind. 566; Porter v. Stone, 51 Iowa, 373; State v. O'Laughlin, 19 Kan. 504. The inability of the original owner to make a dedication will rebut a presumption. Smith v. Smith, 34 Kan. 293. One keeping government land cannot dedicate a way across it nor can one be acquired by prescription. City of Detroit v. Detroit & M. R. Co., 23 Mich. 173; Burton v. Martz, 38 Mich. 761; Plumb v. City of Grand Rapids, 81 Mich. 381, 45 N. W. 1024; McBeth v. Trabue, 69 Mo. 642; Warren v.

owner is ineffectual [70] as well as the grant of a greater interest in real property than one possesses and such action can in no way impair the interests of those apparently diminished or given away.[71]

Brown, 31 Neb. 8, 47 N. W. 633; Pruden v. Lindsley, 29 N. J. Eq. 615. Trustees of lands may dedicate them to a public use consistent with the trust. Property held for school purposes cannot be devoted under this principle to highway uses. Earle v. City of New Brunswick, 38 N. J. Law, 47. Executors having general power to sell may legally dedicate property to a public use. Robertson v. Meyer, 59 N. J. Eq. 366, 45 Atl. 983; Orrick v. City of Ft. Worth (Tex. Civ. App.) 32 S. W. 443. The heir of one not joining in the dedication of a part of community property to a city for street purposes is estopped by his acceptance of the property and a conveyance of a portion of it by description referring to the street in dispute. Town of Gate City v. Richmond, 97 Va. 337, 33 S. E. 615; Lawe v. City of Kaukauna, 70 Wis. 306, 35 N. W. 561.

[70] Nelson v. City of Madison, 3 Biss. 244, Fed. Cas. No. 10,110; Hoole v. Attorney General, 22 Ala. 190; California Nav. & Imp. Co. v. Union Transp. Co., 126 Cal. 433, 58 Pac. 936, 46 L. R. A. 825; Spurrier v. Bland, 20 Ky. L. R. 340, 49 S. W. 467; Cyr v. Madore, 73 Me. 53; Village of Buffalo v. Harling, 50 Minn. 551, 52 N. W. 931; City of St. Louis v. Laclede Gas-Light Co., 96 Mo. 197, 9 S. W. 581.

[71] McKey v. Hyde Park Village, 134, U. S. 84, Id., 37 Fed. 389. The use by the public of a street belonging to one who, at the time of its establishment was an infant, for a period of ten years after the attainment of his majority, is sufficient to effect a dedication of the land. This question is, however, for a jury to determine and it is error to instruct that plaintiff's knowledge of the use of the land as a street coupled with his nonaction is a conclusive presumption of dedication.

Smith v. City of Portland, 30 Fed. 734; City of Eureka v. Croghan, 81 Cal. 524, 22 Pac. 693; Niles v. City of Los Angeles, 125 Cal. 572, 58 Pac. 190; State v. Merrit, 35 Conn. 314. Unauthorized acts in dedicating property may be subsequently ratified by the proprietors. City of Edwardsville v. Barnsback, 66 Ill. App. 381; City of Alton v. Fishback, 181 Ill. 396, 55 N. E. 150; City of Lawrenceburgh v. Wesler, 10 Ind. App. 153, 37 N. E. 956. In the absence of ownership in the alleged donor as against a person claiming possession of land for the statutory period, an old city plat upon which a street is located is not prima facie evidence of its dedication.

Town of Edenville v. Chicago, M. &. St. P. R. Co., 77 Iowa, 69, 41 N. W. 568; City of Kansas City v. Banks, 9 Kan. App. 885, 61 Pac. 333. An oral dedication by an agent without authority is not effectual. South Baltimore Harbor & Imp. Co. of Anne Arundel County v. Smith, 85 Md. 537, 37 Atl. 27; Gregory v. City of Ann Arbor, 127 Mich. 454, 86 N. W. 1013; Bauman v. Boeckeler, 119 Mo. 189, 24 S. W. 207. The action of tenants in respect to an alleged dedication is not binding upon the

Where one owning a limited interest in real property dedicates a larger one than he possesses at that time but subsequently the full and complete interest passes to him, the original grant of the larger interest then becomes complete as such.[72]

§ 727. The nature and requisites of dedication; should be irrevocable.

It is generally necessary to a dedication of property to a public use that it should be forever and irrevocable,[73] for it would be unjust to allow a public corporation to accept and improve a grant of real property, acquire valuable rights in it as a trustee for the

owner. Kansas City Milling Co. v. Riley, 133 Mo. 574, 34 S. W. 835; McBeth v. Trabue, 69 Mo. 642; St. Louis & S. F. R. Co. v. Gordon, 157 Mo. 71, 57 S. W. 742; Lewis v. City of Lincoln, 55 Neb. 1, 75 N. W. 154; McMannis v. Butler, 51 Barb. (N. Y.) 436; Matter of Rhinelander, 68 N. Y. 105; Todd v. Pittsburgh, Ft. W. & Co. R. Co., 19 Ohio St. 514; Lewis v. City of Portland, 25 Or. 133, 35 Pac. 256, 22 L. R. A. 736; Lownsdale v. Portland, Deady 1, Fed. Cas. No. 8,578; Scott v. State, 33 Tenn. (1 Sneed) 629; Roberts v. Turnpike Co., 98 Tenn. 133; Merton v. Dolphin, 28 Wis. 456.

[72] Beebe's Heirs v. City of Little Rock, 68 Ark. 39, 56 S. W. 791; Kansas City Mill. Co. v. Riley, 133 Mo. 574, 34 S. W. 835; Longworth v. Sedevic, 165 Mo. 221, 65 S. W. 260. A dedication by one not the owner may be subsequently ratified by the true owner of the property. Reid v. Board of Education of Edina, 73 Mo. 295; Carter v. City of Portland, 4 Or. 339; Lewis v. City of Portland, 25 Or. 133, 22 L. R. A. 736; City of Deadwood v. Whittaker, 12 S. D. 515, 81 N. W. 908.

[73] Ruch v. City of Rock Island, 5 Biss. 95, Fed. Cas. No. 12,105; London & San Francisco Bank v. City of Oakland (C. C. A.) 90 Fed. 691, affirming 86 Fed. 30. The dedication and acceptance to a public use are irrevokable and no rights can be acquired through adverse possession by the grantor or those obtaining under him in lands dedicated to a public use. This principle is not affected either by the length of possession or the character and value of the improvements made.

Davenport v. Buffington (C. C. A.) 97 Fed. 234, 46 L. R. A. 377. The court in its opinion by Judge Sanborn in part say: "Besides, we are unwilling to concede that a nation or a state which becomes the proprietor of a town site, plats it, and dedicates its streets and parks to public use, has any greater or better right to revoke or avoid its grant or covenant than a private proprietor would have. It may be that either, before any rights have accrued, can revoke the dedication, but, after lots have been sold, after streets have been graded, after parks have been cared for and improved according to the plat,—in other words, after rights have vested in reliance upon the dedication,—we deny the right of nation or of individual to revoke

public and have these interests constantly jeopardized through a possibility of an arbitrary revocation of the grant by the original donor or those claiming under him. The public thoroughfares of a community are generally secured through the operation of the principle of dedication and it is readily seen that the public incon-

it, or to release or destroy the right of the public to the exclusive use of the parks and streets for the purposes for which they were granted. Nations, states and municipalities have and exercise two classes of powers,—one governmental, by which they rule their people; the other proprietary or business, by which they carry on their business affairs as legal personalities. The same fundamental principles of justice, of law, and of equity govern them in the exercise of their powers of the latter class which control the acts of private individuals. Illinois Trust & Sav. Bank v. Arkansas City, 76 Fed. 271, 282, 22 C. C. A. 171, 182, 34 L. R. A. 518, and 40 U. S. App. 257, 277, and cases there cited; United States v. Northern Pac. R. Co. (C. C. A.) 95 Fed. 864, 880. When the Cherokee Nation platted the town of Downingville, and when it undertook to revoke the dedication which that plat evidenced, it was not exercising its governmental, but its proprietary or business powers, and it was subject to the same principles of law and of equity, and to the same rules of estoppel, that would have governed a private proprietor under like circumstances. A nation, state, or municipality which dedicates land that it owns in the site of a town to public use for the purpose of a park is as conclusively estopped as a private proprietor from revoking that dedication, from selling the park, and from appropriating the land which it occupies to other purposes after lots have been sold, after the town has been settled, and after the park has been improved with moneys raised by the taxation of its residents and taxpayers in reliance upon the grant and covenant which the dedication evidences. Monongahela Nav. Co. v. United States, 148 U. S. 312, 341, 13 Sup. Ct. 622; Rutherford v. Taylor, 38 Mo. 315, 319; Warren v. Lyons City, 22 Iowa, 351; Ransom v. Boal, 29 Iowa, 69; Price v. Thompson, 48 Mo. 361, 365; Franklin County Com'rs v. Lathrop, 9 Kan. 453, 463; McCullough v. Board of Education, 51 Cal. 418; Harris County v. Taylor, 58 Tex. 690, 695. As the Cherokee Nation had no right to take possession of or to occupy the parks in the town of Downingville for the construction of residences in the year 1896, the appellant, Davenport, acquired no such right by his purchase from that nation, and the injunction was rightfully granted." The court also held that a resident and a taxpayer of a city could maintain a suit in equity to prevent the diversion to private use by the original proprietor of the town site of land which, when the town was laid out and platted, was dedicated as a public park and has since been maintained as such.

Harper v. State, 113 Ala. 91, 21 So. 354; Stewart v. Conley, 122 Ala. 179; City of San Francisco v.

venience and loss would be great if a rule other than that given should obtain. The underlying principle supporting the doctrine of estoppel is applicable to the question considered from the standpoint of the donor. It is based on the idea that a man shall not defeat his own act or deny its validity to the prejudice of another.[74]

Canavan, 42 Cal. 541; Wheeler v. Benjamin, 136 Cal. 51, 68 Pac. 313. Chapin v. State, 24 Conn. 236; Town of Derby v. Alling, 40 Conn. 410; City of Chicago v. Sawyer, 166 Ill. 290, 46 N. E. 759; City of Indianapolis v. Kingsbury, 101 Ind. 200; Getchell v. Benedict, 57 Iowa, 121; Osage City v. Larkins, 40 Kan. 206, 19 Pac. 658, 2 L. R. A. 56; Beall v. Clore, 69 Ky. (6 Bush) 676; Abrey v. Park & Boulevard Com'rs, 95 Mich. 181, 54 N. W. 714; Michigan Cent. R. Co. v. Bay City, 129 Mich. 264, 88 N. W. 638; Sanborn v. City of Minneapolis, 35 Minn. 314. A judgment for taxes against land to which is attached a public easement cannot affect the easement. Cummings v. City of St. Louis, 90 Mo. 259, 2 S. W. 130; McGinnis v. City of St. Louis, 157 Mo. 191, 57 S. W. 755; Methodist Episcopal Church v. Hoboken, 33 N. J. Law, 13; Borough of Brigantine v. Holland Trust Co. (N. J. Eq.) 35 Atl. 344; City of Atlantic v. Groff, 64 N. J. Law, 527, 45 Atl. 916; New York & L. B. R. Co. v. Borough of South Amboy, 57 N. J. Law, 252, 30 Atl. 628. Hunter v. Trustees of Sandy Hill, 6 Hill (N. Y.) 407. A dedication of land for use as a burying ground is valid and the owner cannot revoke it after acceptance. In re Hunter, 163 N. Y. 542, 57 N. E. 735. Rehearing denied 164 N. Y. 365, 58 N. E. 288. Meier v. Portland Cable R. Co., 16 Or. 500, 19 Pac. 610, 1 L. R. A. 856; Penny Pot Landing v. City of Philadelphia, 16 Pa. 79; Peck & Salsbury v. Providence Steam Engine Co., 8 R. I. 353; Chapin v. Brown, 15 R. I. 579, 10 Atl. 639; Buntin v. City of Danville, 93 Va. 200, 24 S. E. 830; Schettler v. Lynch, 23 Utah, 305, 64 Pac. 955; City of Seattle v. Hill, 23 Wash. 92, 62 Pac. 446.

[74] Glenwood Cemetery v. Close. 11 D. C. (4 McArthur) 96; Lansburgh v. District of Columbia, 8 App. (D. C.) 10; Forney v. Calhoun County, 84 Ala. 215, 4 So. 153; Tutwiler v. Kendall, 113 Ala. 664, 21 So. 332. Where no rights have been acquired the owner will not be estopped from denying a dedication. Stewart v. Conley, 122 Ala. 179, 27 So. 303; Sussman v. County of San Luis Obispo, 126 Cal. 536, 59 Pac. 24; Guthrie v. Town of New Haven, 31 Conn. 308; Brunswick & W. R. R. Co. v. City of Waycross, 91 Ga. 573; Rusk v. Berlin, 173 Ill. 634, 50 N. E. 1071; Pittsburgh, C., C. & St. L. R. Co. v. Noftsker, 26 Ind. App. 614, 60 N. E. 372; City of Indianapolis v. Board of Church Extension of U. P. Church, 28 Ind. App. 319, 62 N. E. 715. Where a portion of a street has been abandoned, a municipality will afterwards be estopped from claiming it as a part of the public highway. Minneapolis & St. L. R. Co. v. Town of Britt, 105 Iowa, 198, 74 N. W. 933; Gray v. Haas, 98 Iowa, 502; Giffen v. City of Olathe, 44 Kan. 342, 24

The law precludes the original owner or those claiming under him from revoking their gift, for this would be not only unjust to the public but a violation of good faith and especially to those who have acquired private property with a view to its enjoyment through the use of the highways thus publicly granted.[75] The law will not permit a man to say that what he has said and done as a willing act and by which others have acquired rights was not according to the truth nor to act in a manner which will destroy the effect of that which he has previously and legally done.

§ 728. Intent necessary to a dedication.

The act of dedication whether statutory or common law results in the transfer of property or property interests to the public for a public use and without direct compensation. It is true that indirectly the donor usually receives far more than the actual value of the property given because through his gift his remaining property is made more valuable for use and for sale to others.[76]

Pac. 470; State v. Wilson, 42 Me. 9; Hinckley v. Hastings 19 Mass. (2 Pick.) 162; Hobbs v. Inhabitants of Lowell, 36 Mass. (19 Pick.) 405; Price v. Town of Breckenridge, 92 Mo. 378, 5 S. W. 20; City of Omaha v. Hawver, 49 Neb. 1; State v. Atherton, 16 N. H. 203; Whittaker v. Ferguson, 16 Utah, 240, 51 Pac. 980. Where the owner of land acquiesces in its continual use for such a length of time that the public convenience will be materially affected by an interruption of the enjoyment of the easement, an intention to dedicate will be presumed. Ralston v. Town of Weston, 46 W. Va. 544, 33 S. E. 326.

[75] Rusk v. Berlin, 173 Ill. 634, 50 N. E. 1071; State v. Waterman, 79 Iowa, 360, 44 N. W. 677; Franklin County Com'rs v. Lathrop, 9 Kan. 453; Hiss v. Baltimore & H. P. R. Co., 52 Md. 242; City of Port Huron v. Chadwick, 52 Mich. 320; Riedinger v. Marquette & W. R. Co., 62 Mich. 46, 28 N. W. 785; State v. Boscawen, 32 N. H. 331. A town may be estopped from denying the legal existence of a highway. Trustees of Watertown v. Cowen, 4 Paige (N. Y.) 510; Conrad v. West End Hotel & Land Co., 126 N. C. 776. The owner is concluded in his dedication of land where private parties have acquired rights in land thus dedicated by the purchase of abutting property even though no formal acceptance of the dedication by the public authorities has been made. Seegar v. Harrison, 25 Ohio St. 14; Neff v. Bates, 25 Ohio St. 169; Whittaker v. City of Deadwood, 12 S. D. 523, 81 N. W. 910; Smith v. Allen (Tex. Civ. App.) 40 S. W. 204; City of Richmond v. Stokes, 31 Grat. (Va.) 713.

[76] Archer v. Salinas City, 93 Cal. 43, 28 Pac. 839, 16 L. R. A. 145. "The setting apart of a public park upon such map is for the convenience and enjoyment of the inhab-

Since dedication in this respect is primarily a donation to the public and because also technically as a matter of law the act involves a contract either express or implied, it is necessary that there should be established from words or acts clearly and beyond a reasonable doubt the fact that it was the owner's intention to dedicate the property [77] and this question is usually one for the jury.[78]

itants of the place, and, as it enhances the value of the private property fronting thereon, so the owner who has dedicated it is presumed to have received in the increased prices for which that property was sold, the compensation for its surrender to the public as a public park." Fairbury Union Agricultural Board v. Holly, 169 Ill. 9, 48 N. E. 149. The method does not affect the validity of a dedication. Gray v. Haas, 98 Iowa, 502.

[77] Bayliss v. Pottawattamie County, 5 Dill. 549, Fed. Cas. No. 1,142; Demartini v. City & County of San Francisco, 107 Cal. 502, 40 Pac. 496; People v. Blake, 60 Cal. 497; City of Anaheim v. Langenberger, 134 Cal. 608, 66 Pac. 855; Quinn v. Anderson, 70 Cal. 454, 11 Pac. 746; Ward v. Farwell, 6 Colo. 66. A question of intent is one for a jury to determine. Starr v. People. 17 Colo. 458; Williams v. New York & N. H. R. Co., 39 Conn. 509; Porter v. Carpenter, 39 Fla. 14; City of Macon v. Franklin, 12 Ga. 239; Swift v. City of Lithonia, 101 Ga. 706, 29 S. E. 12. The acts relied upon must be such as to clearly show a purpose to surrender control over the property in question and devote the same to a definite public use.

Town of Havana v. Biggs, 58 Ill. 483. The dedication may be made sometime after the public have been using the property dedicated. Hemingway v. City of Chicago, 60 Ill. 324; Harding v. Town of Hale, 61 Ill. 192. The question of intent is one for a jury to determine. Town of Princeton v. Templeton, 71 Ill. 68; McIntyre v. Storey, 80 Ill. 127; City of Chicago v. Johnson, 98 Ill. 618; Shelhouse v. State, 110 Ind. 509, 11 N. E. 484. The intent to dedicate by the owner

[78] Alvord v. Ashley, 17 Ill. 363; Waugh v. Leech, 28 Ill. 488; Rees v. City of Chicago, 38 Ill. 322; Maltman v. Chicago, M. & St. P. R. Co., 41 Ill. App. 229; State v. McClure, 53 Kan. 295, 36 Pac. 353; Greenup Co. v. Maysville & B. S. R. Co., 14 Ky. L. R. 699, 21 S. W. 351; Lawrence v. Inhabitants of Mt. Vernon, 35 Me. 100; Adams v. Iron Cliffs Co., 78 Mich. 271, 44 N. W. 270; Skjeggerud v. Minneapolis & St. L. R. Co., 38 Minn. 56, 35 N. W. 572; Nixon v. Town of Biloxi (Miss.) 5 So. 621; Wood v. Hurd, 34 N. J. Law, 87. The dedication of land to a public use is a question of intent and must be disproved or defeated by the acts and declarations of the owner and the circumstances under which the user has been permitted. The question of intent is one for a jury to determine under direction of the court. DeLong v. Spring Lake & Sea Girt Co., 65 N. J. Law, 1, 47 Atl. 491; Flack v. Village of Green Island, 122 N. Y. 107, 25 N. E. 267.

"The doctrine of all the authorities is, that the intention to dedicate land to the public use is of the very essence of the act; but this intention may be proved as a fact, or inferred from circumstances."[79] "An intent on the part of the owner to dedicate is absolutely essential, and unless such intention can be found in the facts and circumstances of the particular case, no dedication exists."[80] This intent may be shown as declared by numerous authorities in several ways which will be noted in succeeding sections.[81] A formal or original grant is conclusive evidence of an intent to dedicate,[82] and although this may be legally insufficient it

must be clearly and unequivocally shown; mere evidentiary facts tending to show do not of themselves constitute a dedication. Pittsburgh, C., C. & St. L. R. Co. v. Town of Crown Point, 150 Ind. 536, 50 N. E. 741. The presumption of dedication will not be defeated by the owner's participation in a matter not inconsistent with the public use of a highway constructed by him.

Grant v. City of Davenport, 18 Iowa, 187; Morrison v. Marquardt, 24 Iowa, 35. The acts and circumstances relied upon to establish a dedication without a deed or other written evidence should be unequivocal, clear and convincing. Goodfellow v. Riggs, 88 Iowa, 540, 55 N. W. 319; Youngerman v. Board of Supervisors of Polk County Sup'rs, 110 Iowa, 731, 81 N. W. 166; Minneapolis & St. L. R. Co. v. Town of Britt, 105 Iowa, 198; Giles v. Ortman, 11 Kan. 59; Boerner v. McKillip, 52 Kan. 508; Allen v. Rinehardt, 90 Ky. 466; David's Heirs v. City of New Orleans, 16 La. Ann. 404; Pickett v. Brown, 18 La. Ann. 560; DeGrilleau v. Frawley, 48 La. Ann. 184, 19 So. 151; State v. Wilson, 42 Me. 21; Hall v. City of Baltimore, 56 Md. 187; Broumel v. White, 87 Md. 521; Hayden v. Stone, 112 Mass. 346; Hurley v. City of West St. Paul, 83 Minn. 401, 86 N. W 427; Landis v. Hamilton, 77 Mo. 554. The acts relied on to establish dedication must be inconsistent and irreconcilable with any other construction.

Kinnare v. Gregory, 55 Miss. 612; Eiseley v. Spooner, 23 Neb. 470; Close v. Swanson, 64 Neb. 389, 89 N. W. 1043; Doe d. Douglas v. Lock, 4 Nev. & M. 807; Craig v. Wells, 11 N. Y. 321; Commonwealth v. Beaver Borough, 171 Pa. 542, 33 Atl. 112; Lamar County v. Clements, 49 Tex. 347; Oak Cliff Sewerage Co. v. Marsalis (Tex. Civ. App.) 69 S. W. 176; State v. Travis County, 85 Tex. 435; Colbert v. Shephard, 89 Va. 401; Miller v. Town of Aracoma, 30 W. Va. 606, 5 S. E. 148; Pierpont v. Town of Harrisville, 9 W. Va. 215; Roberts v. Robertson, 53 Vt. 690, 38 Am. Rep. 710.

[79] Smith v. State, 23 N. J. Law, (3 Zab.) 712.

[80] Dillon, Mun. Corp. (4th Ed.) § 636.

[81] See §§ 729 et seq., post.

[82] Kittle v. Pfeiffer, 22 Cal. 484; People v. Eel River & E. R. Co., 98 Cal. 665, 33 Pac. 728; City of Macon v. Dasher, 90 Ga. 195; Litt-

will still be regarded as evidence of such intention.[83] The intent of the owner is also evidenced by the signing of a petition asking for the establishment of a highway to be used by the public.[84]

§ 729. Intent as shown by the filing of a map or plat.

The act of filing and recording a plat or map is sufficient to establish the intent on the part of the owner to make a donation to the public,[85] and also operates as a conveyance to the public of the particular interest fixed either by statute or by custom and usage in that state;[86] an easement or fee simple as the case may be. A

ler v. City of Lincoln, 106 Ill. 353; Waggeman v. Village of North Peoria, 160 Ill. 277, 43 N. E. 347; Browne v. Inhabitants of Bowdoinham, 71 Me. 144; McKenna v. City of Boston, 131 Mass. 143; White v. City of St. Louis, 153 Mo. 80, 54 S. W. 478; Pierce v. Chamberlain, 82 Mo. 618; City of Ashland v. Chicago & N. W. R. Co., 105 Wis. 398, 80 N. W. 1101. One who petitions the city to vacate a street is afterwards estopped to claim its abandonment or the condition of the fact of no dedication.

[83] Morris v. School Dist. No. 86, 63 Ark. 149, 37 S. W. 569; Trickey v. Schlader, 52 Ill. 78. But see Fountain v. Keen, 116 Iowa, 406, 90 N. W. 82; McLaughlin v. Stevens, 18 Ohio, 94.

[84] People v. Marin County, 103 Cal. 223, 37 Pac. 203, 26 L. R. A. 659; Norfolk & W. R. Co. v. Rasnake, 90 Va. 170, 17 S. E. 879.

[85] Fitzgerald v. Saxton, 58 Ark. 494, 25 S. W. 499; Los Angeles Cemetery Ass'n v. City of Los Angeles (Cal.) 32 Pac. 240; City of Anaheim v. Langenberger, 134 Cal. 608, 66 Pac. 855; Bayard v. Hargrove, 45 Ga. 342; Earll v. City of Chicago, 136 Ill. 277; Boyer v. State, 16 Ind. 451; Town of Fowler v. Lindquist, 138 Ind. 566, 37 N. E. 133; City of Evansville v. Evans, 37 Ind. 229; Shanklin v. City of Evansville, 55 Ind. 240; Yost v. Leonard, 34 Iowa, 9; City of Baton Rouge v. Bird, 21 La. Ann. 244; Calhoun v. Town of Colfax, 105 La. 416, 29 So. 887; Barney v. City of Baltimore, 1 Hughes, 118, Fed. Cas. No. 1,029; City of Duluth v. St. Paul & D. R. Co., 49 Minn. 201; Gamble v. City of St. Louis, 12 Mo. 617; City of Hannibal v. Draper, 15 Mo. 634; New Orleans J. & G. M. R. Co. v. Moye, 39 Miss. 374; Briel v. City of Natchez, 48 Miss. 423; Pierson v. City of Lebanon, 69 Mo. App. 321; Gregory v. City of Lincoln, 13 Neb. 352; Pope v. Town of Union, 18 N. J. Eq. (3 C. E. Green) 282; In re 29th St., 1 Hill (N. Y.) 189; In re 39th St., 1 Hill (N. Y.) 191; May v. City of Brooklyn, 17 N. Y. Supp. 348; In re 32d St., 19 Wend. (N. Y.) 128; Bissell v. New York Cent. R. Co., 23 N. Y. 61; Rives v. Dudley, 56 N. C. (3 Jones Eq.) 126; City of Seattle v. Hill, 23 Wash. 92, 62 Pac. 446. But see City of Eureka v. McKay & Co., 123 Cal. 666, 56 Pac. 439.

[86] Nelson v. City of Madison, 3 Biss. 244, Fed. Cas. No. 10,110; Illinois & M. Canal v. Haven, 11 Ill. 554; Woollacott v. City of Chicago, 187 Ill. 504, 58 N. E. 426. But see

map or plat because of some defect or failure to comply strictly with the law and therefore regarded as ineffectual to accomplish a statutory dedication may still, through the subsequent acts of the owner, constitute a common-law dedication of the property indicated upon it as donated or granted to the public for their use either as a highway, street, alley, park or public ground.[87]

§ 730. Intent as evidenced by the sale of property with reference to a plat or survey.

The mere filing of a map or plat not sufficient under the statutes or the making of a survey and the marking of land surveyed into square blocks, streets, alleys and parks may not of itself be considered such an act as will constitute a dedication to the public of a part of the property.[88] But if the owner make sales of prop-

Davenport & R. I. Bridge Ry. & Terminal Co. v. Johnson, 188 Ill. 472, 59 N. E. 497.

[87] Banks v. Ogden, 69 U. S. (2 Wall.) 57; Bayliss v. Pottawattamie County Sup'rs, 5 Dill. 549, Fed. Cas. No. 1,142; Town of Derby v. Alling, 40 Conn. 410; Earll v. City of Chicago, 136 Ill. 277, 26 N. E. 370; Field v. Carr, 59 Ill. 198; Smith v. Town of Flora, 64 Ill. 93; Zearing v. Raber, 74 Ill. 409; Hudson v. Miller, 97 Ill. App. 74; Maywood Co. v. Village of Maywood, 118 Ill. 61; Town of Lake View v. Le Bahn, 120 Ill. 92, 9 N. E. 269; Marsh v. Village of Fairbury, 163 Ill. 401, 45 N. E. 236; City of Chicago v. Sawyer, 166 Ill. 290, 46 N. E. 759; Rusk v. Berlin, 173 Ill. 634, 50 N. E. 1071; Village of North Chillicothe v. Burr, 185 Ill. 322, 57 N. E. 32; Strunk v. Pritchett, 27 Ind. App. 582, 61 N. E. 973; Shea v. City of Ottumwa, 67 Iowa, 39; Agne v. Seitsinger, 104 Iowa, 482, 73 N. W. 1048. It is for the jury to determine the facts of the case whether there is a grant of the right of way and its acceptance by the public authorities.

Wyandotte County Com'rs v. First Presbyterian Church, 30 Kan. 620. The dedication of lots "to church purposes" and marking them on the plat as "church lots" is a sufficient dedication even if not in strict conformity with the statute and independent of the question of whether a dedication for church purposes is a dedication to public purposes.

Cook v. Village of Hillsdale, 7 Mich. 115. If a plat is insufficient to effect a statutory dedication, the elements of a common-law dedication must exist in order that there be an appropriation to a public use. Conkling v. Village of Mackinaw City, 120 Mich. 67, 79 N. W. 6; Village of Wayzata v. Great Northern R. Co., 46 Minn. 505, 49 N. W. 205; Ragan v. McCoy, 29 Mo. 356; McGinnis v. City of St. Louis, 157 Mo. 191, 57 S. W. 755; Church v. City of Portland, 18 Or. 73, 22 Pac. 528, 6 L. R. A. 259; City of Harrisburg's Appeal (Pa.) 10 Atl. 787.

[88] People v. Hibernia Sav. & Loan Soc. 84 Cal. 634, 24 Pac. 295; City of Logansport v. Dunn, 8 Ind.

erty with reference to such survey or plat and representations in effecting the sales in regard to the location of streets, squares, parks or other public grounds, a dedication of these necessarily follows. The cases are many and establish this proposition beyond controversy.[89] In respect to the application of the principle

378; Leland University v. City of New Orleans, 47 La. Ann. 100, 16 So. 653; Bailey v. Copeland, Wright (Ohio) 150; Leland v. City of Portland, 2 Or. 46; Lewis v. City of Portland, 25 Or. 133, 35 Pac 256, 22 L. R. A. 736; Hamilton County v. Rape, 101 Tenn. 222, 47 S. W. 416; Wolf v. Brass, 72 Tex. 133, 12 S. W. 159; Diedrich v. Northwestern Union R. Co., 42 Wis. 248.

89. United States v. Illinois Cent. R. Co., 154 U. S. 225. Here in reference to the effect of platting by the government, where the essential statutory requirements were followed, it was said: "Again, the sale of the lots was, in law, an effectual dedication of the streets and public grounds for municipal uses, and, as observed by counsel, the purchasers of the lots acquired a special interest in the streets and public grounds on which their lots abutted, and the United States could make no disposition of them after the sale inconsistent with the use to which they had been dedicated.

"The only parties interested in the public use for which the ground was dedicated are the owners of lots abutting on the ground dedicated, and the public in general. The owners of abutting lots may be presumed to have purchased in part consideration of the enhanced value of their property from the dedication, and it may be conceded they have a right to invoke, through the proper public authorities, the protection of the property in the use for which it was dedicated. The only party interested, outside of abutting owners, is the general public, and the enforcement of any rights which such public may have is vested only in the parties clothed with the execution of such trust, who are in this case the corporate authorities of the city, as a subordinate agency of the state, and not the United States."

Rainey v. Herbert, 55 Fed. 443, affirming 54 Fed. 248; Cowley v. City of Spokane, 99 Fed. 840; Reed v. City of Birmingham, 92 Ala. 339, 9 So. 161; Sherer v. City of Jasper, 93 Ala. 530, 9 So. 584; Western R. of Alabama v. Alabama G. T. R. Co., 96 Ala. 272, 11 So. 483, 17 L. R. A. 474; Webb v. City of Demopolis, 95 Ala. 116, 13 So. 289, 21 L. R. A. 62; Ham v. Common Council of Dadeville (Ala.) 14 So. 9. The principle applies whether a town is incorporated or not at the time. Avondale Land Co. v. Town of Avondale, 111 Ala. 523; Prescott v. Edwards, 117 Cal. 298, 49 Pac. 178; Town of San Leandro v. Le Breton, 72 Cal. 170, 13 Pac. 405. Here it was said: "Upon these facts the court below found as conclusions of law:—'that the town proprietors in making the map and plat of the town, as stated, and in placing the same as a public record of the county in the office of the county recorder, it operated as a declaration on their part to dedicate

to public parks and grounds, the recent case of Archer v. Salinas City, cited in the notes, is instructive. The court say: "The same principles which are applicable to the dedication of public streets apply to the dedication of a public park or square. All dedications for public use are to be considered with reference to the purpose for which the dedication is made or the use to which the property dedicated may be applied, and that purpose may be ascertained by the designation which the owner has affixed to the

the place named "Court Square" to the purposes of an open, public town square for the use of the inhabitants of the town and the public. That in immediately following up the making and filing of the said map and plat by sales and conveyances by them of lots and blocks in the town to bona fide purchasers, in accordance with such map and plat, such dedication became absolute and irrevocable.' These conclusions are assailed by the appellants as not warranted by the facts, and whether they are or not is the principal question presented in the cause.

"It is settled law that where one owning land lays off a town or village thereon, and makes a map of the town site showing it to be divided into streets, alleys, blocks, and lots, and then sells lots with reference to such map, he thereby makes an irrevocable dedication of the space represented on the map as streets to the use of the public. There are many cases to this effect, but only a few need be cited. (Kittle v. Pfeiffer, 22 Cal. 489; Stone v. Brooks, 35 Cal. 501; Rowan's Ex'rs v. Town of Portland, 47 Ky. [8 B. Mon.] 232; Bartlett v. City of Bangor, 67 Me. 464; Briel v. City of Natchez, 48 Miss. 423; Wiggins v. McCleary, 49 N. Y. 346). And if there be public squares or plazas represented on the map, the same rule applies to them, and dedication thereof may be established in the same manner. (City of Cincinnati v. White's Lessee, 6 Pet. [U. S.] 431; Village of Watertown v. Cowen, 4 Paige [N. Y.] 510; Huber v. Gazley, 18 Ohio, 18; City of Logansport v. Dunn, 8 Ind. 378; Carter v. City of Portland, 4 Or. 339; Ruch v. City of Rock Island, 5 Biss. 95, Fed. Cas. No. 12,105; Grogan v. Town of Hayward, 6 Sawy. 498, 4 Fed. 161). To make the dedication complete, no formal acceptance of it is necessary. In this case no such acceptance could have been had till the town was organized by the legislature in 1872; and until then the former owners held the title of the property dedicated in trust for the public. (Grogan v. Town of Hayward, supra; Jersey City v. Morris Canal & Banking Co., 12 N. J. Eq. [1 Beasley] 547; Carpenteria School Dist. v. Heath, 56 Cal. 478)."

City of Eureka v. Armstrong, 83 Cal. 623, 22 Pac. 928, 23 Pac. 1085; Archer v. Salinas City, 93 Cal. 43, 28 Pac. 839, 16 L. R. A. 145. A landowner subdivided and marked a space "Central Park" on the map, and offered and sold lots with reference to the plat. Held, a dedication to the public unalterable and that acceptance and use were not necessary. It was said, upon attempt by the owner's grantee to re-

land upon the map, whether it be a street, a school lot, or a public park. The setting apart of a public park upon such map is for the convenience and enjoyment of the inhabitants of the place; and as it enhances the value of the private property fronting thereon, so the owner who has dedicated it is presumed to have received in the increased prices for which that property was sold the compensation for its surrender to the public as a public park. The word 'park,' written upon a block of land designated upon a map, is as significant of a dedication, and of the use to which the land is dedicated, as is the word 'street' written upon such map.

claim: "Upon the foregoing facts, we are of the opinion that Stone dedicated the land in controversy for use as a public park, and that the finding of the court that the land was so dedicated is fully sustained by the evidence. When the owner of property which is within the limits of an incorporated city or town makes, and records a map of such property, by which he subdivides the same into blocks and lots bounded by streets which are continuations of other streets already laid out by the city or town, and sells and conveys the lots abutting upon those streets, he thereby dedicates to the public the streets so laid out by him as prolongations of other streets, as well as the other streets which are laid out upon such map intersecting and connecting the same; and if upon such map or plan he has designated a space or block as a public park, such space or block is as fully dedicated to public use as are the streets delineated thereon. The purchasers of such lots have not merely an easement in the streets upon which the lots abut, but all of the streets are set apart for the purpose of enabling such purchasers to have reciprocal intercourse with the public outside of the subdivided tract, and are thus themselves dedicated to the entire public for all purposes to which streets can properly be applied."

Village of Watertown v. Cowen, 4 Paige, [N. Y.] 513; Price v. Inhabitants of Plainfield, 40 N. J. Law, 608; Carter v. City of Portland, 4 Or. 339; City of Cincinnati v. White's Lessee, 6 Pet. [U. S.] 431; Rowan's Ex'rs v. Town of Portland, 47 Ky. [8 B. Mon.] 246; Town of San Leandro v. Le Breton, 72 Cal. 170, 13 Pac. 405. Dedication is an ultimate fact, dependent upon the establishment of other facts, and is to be found from the evidence presented to the court. Harding v. Jasper, 14 Cal. 648. It results from the acts of the owner of the land, coupled with the intent with which he does those acts. It may be express, and completed by a single act, as when the land is dedicated by deed, or it may be implied from a series of acts, as when the owner subdivides a tract of land into blocks and streets, and causes a map of such subdivisions to be recorded, and sells the several subdivisions which front upon those streets. Whenever the dedication is complete, the property thereby becomes public property, and the owner loses all control over it or right to its use. Even though the acceptance pre-

The word carries with itself the idea of an open or inclosed tract of land for the comfort and enjoyment of the inhabitants of the city or town in which it is located, and is so defined by lexicographers. In England, the word, when applied to an inclosed tract of land in the country, has a different signification, and signifies that the lands inclosed are the private grounds of the proprietor. In this country, too, a man may inclose his own land

sumed from an express dedication may not impose upon the public all the obligations that an express acceptance would impose, yet the owner is as much concluded by his dedication in the one case as in the other. If the dedication is complete by his act, whether express or implied, it is thereafter irrevocable by him, and the effect of such dedication cannot be qualified by any act or declaration thereafter made on his part."

Brown v. Stark, 83 Cal. 636, 24 Pac. 162; City of Denver v. Clements, 3 Colo. 472; Porter v. Carpenter, 39 Fla. 14, 21 So. 788; Winter v. Payne, 33 Fla. 470, 15 So. 211; Harrison v. Augusta Factory, 73 Ga. 447; Field v. Barling, 149 Ill. 556, 37 N. E. 850, 24 L. R. A. 406; Clarke v. Gaffeney, 116 Ill. 362; Marsh v. Village of Fairbury, 163 Ill. 401, 45 N. E. 236; Clark v. McCormick, 174 Ill. 164. It is here said: "If one owning land exhibit a map of it, on which a street is defined though not as yet open, and building lots be sold by him with reference to a front or rear on that street, or lots be conveyed being described as by streets (Schenley v. Com., 36 Pa. 62; Id., 29) this is an immediate dedication of that street, and the purchasers of lots have a right to have that street thrown open forever. (Wyman v. City of New York, 11 Wend. [N. Y.] 487; Livingston v. City of New York, 8 Wend. 85. And see In re 29th St., 1 Hill [N. Y.] 189; In re 39th St., 1 Hill, 192.) And this principle is not limited in its application to the single street on which such lots may be situated. If the owner of land lays out and establishes a town and makes and exhibits a plan of the town, with various plats of spare ground, such as streets, alleys, quays, etc., and sells the lots with clear reference to that plan, the purchasers of the lots acquire, as appurtenant to their lots, every easement, privilege and advantage which the plan represents as belonging to them as a part of the town, or to their owners as citizens of the town. And the right thus passing to the purchasers is not the mere right that such purchasers may use these streets, or other public places, according to their appropriate purposes, but a right vesting in the purchasers that all persons whatever, as their occasion may require or invite, may so use them. In other words, the sale and conveyance of lots in the town, and according to its plan, imply a grant or covenant to the purchasers that the streets and other public places, indicated as such upon the plan, shall be forever open to the use of the public, free from all claim or interference of the proprietor inconsistent with such use. (Rowan's Ex'rs v. Town of Portland, 47 Ky. [8 B. Mon.]

and style it a park, or give that name to his place, without giving to the public any right to its use, for in such a case there would be no semblance of dedication; but the meaning of a word is to be determined by the circumstances connected with its use. In London, as well as in any city in this country, the term 'park' signi-

232, 237. See, also, Town of Bowling Green v. Hobson, 42 Ky. [3 B. Mon.] 478; Huber v. Gazley, 18 Ohio, 18; Dummer v. Jersey City, 20 N. J. Law [Spencer] 86, 106; Wickliffe v. City of Lexington, 50 Ky. [11 B. Mon.] 163)."

McDonald v. Stark, 176 Ill: 456, 52 N. E. 37; Village of Augusta v. Tyner, 197 Ill. 242, 64 N. E. 378; Wolfe v. Town of Sullivan, 133 Ind. 331, 32 N. E. 1017; Town of Woodruff Place v. Raschig, 147 Ind. 517, 46 N. E. 990; Ross v. Thompson, 78 Ind. 90; Fossion v. Landry, 123 Ind. 136, 24 N. E. 96; Rhodes v. Town of Brightwood, 145 Ind. 21, 43 N. E. 942; Leffler v. City of Burlington, 18 Iowa, 361; Fisher v. Beard, 32 Iowa, 346; Mason City v. Day (Iowa) 78 N. W. 198; Hull v. City of Cedar Rapids, 111 Iowa, 466, 83 N. W. 28; Hitchcock v. City of Oberlin, 46 Kan. 90, 26 Pac. 466; Brooks v. City of Topeka, 34 Kan. 277; Schneider v. Jacob, 86 Ky. 101, 5 S. W. 350; Burthe v. Fortier, 15 La. Ann. 9; Arrowsmith v. City of New Orleans, 24 La. Ann. 194; Land v. Smith, 44 La. Ann. 931, 11 So. 577; Heselton v. Harmon, 80 Me. 326, 14 Atl. 286; Bartlett v. City of Bangor, 67 Me. 460; Van Witsen v. Gutman, 79 Md. 405, 29 Atl. 608, 24 L. R. A. 403; Hawley v. City of Baltimore, 33 Md. 270; Flersheim v. City of Baltimore, 85 Md. 489, 36 Atl. 1098; Broumel v. White, 87 Md. 521, 39 Atl. 1047; Tinges v. City of Baltimore, 51 Md. 600; Richardson v. Davis, 91 Md. 390, 46 Atl. 964; Greene v. Canny, 137 Mass. 64; Plumb v. City of Grand Rapids, 81 Mich. 381; Finnegan v. City of St. Joseph, 123 Mich. 330, 82 N. W. 51; Great Northern R. Co. v. City of St. Paul, 61 Minn. 1, 63 N. W. 96, 240; Smith v. City of St. Paul, 72 Minn. 472, 75 N. W. 708; Harrison County Sup'rs v. Seal, 66 Miss. 129, 5 So. 622, 3 L. R. A. 659; City of Vicksburg v. Marshall, 59 Miss. 563; Kansas City Milling Co. v. Riley, 133 Mo. 574; Pillsbury v. Alexander, 40 Neb. 242, 58 N. W. 859; McCague v. Miller, 55 Neb. 762, 76 N. W. 422; New York & L. B. R. Co. v. Borough of South Amboy, 57 N. J. Law, 252, 30 Atl. 628; Vanatta v. Jones, 42 N. J. Law, 561; Inhabitants of Hohokus Tp. v. Erie R. Co., 65 N. J. Law, 353, 47 Atl. 566; Central R. Co. v. City of Bayonne, 52 N. J. Law, 503; People v. Underhill, 69 Hun, 86, 23 N. Y. Supp. 388; In re City of Brooklyn, 73 N. Y. 179; Lord v. Atkins, 138 N. Y. 184, 33 N. E. 1035; Collins v. Asheville Land Co., 128 N. C. 563, 39 S. E. 21; Conrad v. West End Hotel & Land Co., 126 N. C. 776, 36 S. E. 282; Carter v. City of Portland, 4 Or. 339; Church v. City of Portland, 18 Or. 73, 6 L. R. A. 259; Spencer v. Peterson, 41 Or. 257, 68 Pac. 519, 1108; In re Pearl St., 111 Pa. 565; Com. v. Philadelphia & R. R. Co., 135 Pa. 256; Dubois Cemetery Co. v. Griffin, 165 Pa. 81, 30 Atl. 840; Com. v. Beaver Borough, 171 Pa. 542, 33 Atl, 112; Fereday v. Mankedick 172 Pa. 535, 34 Atl. 46; Cotter v. City of Philadelphia, 194 Pa. 496, 45 Atl.

fies an open space intended for the recreation and enjoyment of the public, and this signification is the same, whether the word be used alone or with some qualifying term, as Hyde Park, or Regent's Park, or, as in the present case, 'Central Park.' Upon this point the authorities are uniform." A conveyance of property partially or wholly described by reference to highways does not, however, establish a dedication to a public use where other circumstances or conditions prove that the intent to dedicate was lacking.[90]

§ 731. Intent as shown by other acts of the owner.

An intent to dedicate is also evidenced by the acts of owners of real property in locating, extending or widening streets;[91] remov-

336; Thaxter v. Turner, 17 R. I. 799, 24 Atl. 829; Wilson v. Acree, 97 Tenn. 378, 37 S. W. 90; Hamilton County v. Rape, 101 Tenn. 222; Weynand v. Lutz (Tex. Civ. App.) 29 S. W. 1097; Preston v. City of Navasota, 34 Tex. 684; Ostrom v. Arnold (Tex. Civ. App.) 58 S. W. 630; Riddle v. Town of Charlestown, 43 W. Va. 796, 28 S. E. 831; Donahoo v. Murray, 62 Wis. 100; Eastland v. Fogo, 66 Wis. 133; Fisher v. Laack, 76 Wis. 313. See, also, a late case upon this question—Village of Riverside v. McLain, 210 Ill. 308, 71 N. E. 408, where many cases are cited and collated in the able brief and argument by Frank F. Reed, Esq., solicitor for the appellees.

[90] New Orleans & S. R. Co. v. Jones, 68 Ala. 48; City of Los Angeles v. Kysor, 125 Cal. 463, 58 Pac. 90; Gerf v. Pfleging, 94 Cal. 131, 29 Pac. 417; City of Eureka v. McKay & Co., 123 Cal. 666, 56 Pac. 439; City of Carlinville v. Castle, 177 Ill. 105, 52 N. E. 383; Town of Bowling Green v. Hobson, 42 Ky. (3 B. Mon.) 478; Sandford v. City of Covington, 12 Ky. L. R. 450, 14 S. W. 497; Hawthorn v. Myers, 18 Ky. L. R. 608, 37 S. W. 593; James v. City of Louisiville, 19 Ky. L. R. 447, 40 S. W. 912; Kentucky Refining Co. v. Selvage, 19 Ky. L. R. 1071, 41 S. W. 288; Bright v. Palmer, 20 Ky. L. R. 771, 47 S. W. 590; Exterkamp v. Covington Harbor Co., 20 Ky. L. R. 966, 47 S. W. 1086; City of Owensboro v. Muster, 23 Ky. L. R. 1164, 64 S. W. 840; Glenn v. City of Baltimore, 73 Md. 390, 10 Atl. 70; Pitts v. City of Baltimore, 73 Md. 326, 21 Atl. 52; City of Baltimore v. Fear, 82 Md. 246, 33 Atl. 637; City of Omaha v. Hawver, 49 Neb. 1, 67 N. W. 891; Meredith v. Sayre, 32 N. J. Eq. 557; Jersey City v. Sackett, 44 N. J. Law, 428; People v. Kellogg, 67 Hun, 546, 22 N. Y. Supp. 490; Mark v. Village of West Troy, 27 N. Y. Supp. 543; In re City of New York, 73 App. Div. 394, 77 N. Y. Supp. 31; Hogue v. City of Albina, 20 Or. 182, 25 Pac. 386, 10 L. R. A. 673; Patterson v. Peoples' Natural Gas Co., 172 Pa. 554, 33 Atl. 575; City of San Antonio v. Sullivan, 23 Tex. Civ. App. 619, 57 S. W. 42; Talbott v. Richmond & Danville R. Co., 31 Grat. (Va.) 685; State v. McCabe, 74 Wis. 481, 43 N. W. 322.

[91] Caperton v. Humpick, 15 Ky. L. R. 430, 23 S. W. 875; Neal v.

ing fences [92] or permitting ways thus opened to be used as a public thoroughfare,[93] and the inference from these acts or others of a similar character of the intent to dedicate is strengthened when public authorities are permitted to assume the control and regulation of these thoroughfares and to make improvements and repairs upon them.[94] But merely permitting land to lie open and

Hopkins, 87 Md. 19, 39 Atl. 322; Smith v. State, 23 N. J. Law, 712; Sweatman v. City of Deadwood, 9 S. D. 380, 69 N. W. 582; Bellar v. City of Beaumont (Tex. Civ. App.) 55 S. W. 410.

[92] City of Sullivan v. Tichenor, 179 Ill. 97, 53 N. E. 561; Eastern Cemetery Co. v. City of Louisville, 13 Ky. L. R. 279, 15 S. W. 1117; McMillan v. McCormick, 38 Mich. 693; Town of Johnson City v. Wolfe, 103 Tenn. 227, 52 S. W. 991; Bartlett v. Beardmore, 77 Wis. 356, 46 N. W. 494.

[93] Ayers v. State, 59 Ark. 26, 26 S. W. 19; Hargro v. Hodgdon, 89 Cal. 623, 26 Pac. 1106; Wolfskill v. Los Angeles County, 86 Cal. 405, 24 Pac. 1094; Sussman v. County of San Luis Obispo, 126 Cal. 536; Town of Kent v. Pratt, 73 Conn. 573, 48 Atl. 418; Illinois Cent. R. Co. v. People, 49 Ill. App. 538; Township of Whitley v. Linville, 174 Ill. 579; Sullivan v. State, 52 Ind. 309. Such use must be with the consent of the owners not with their knowledge alone as use with knowledge only does not create a presumption of dedication.

Ford v. Town of North Des Moines, 80 Iowa, 626, 45 N. W. 1031; Philbrick v. Town of University Place, 106 Iowa, 352, 76 N. W. 742; State v. Waterman, 79 Iowa, 360; Hamlen v. Keith, 171 Mass. 77, 50 N. E. 462; St. Paul, M. & M. R. Co. v. City of Minneapolis, 44 Minn. 149, 46 N. W. 324; Ayres v. Pennsylvania R. Co., 52 N. J. Law, 405; Iselin v. Starin, 71 Hun, 164, 24 N. Y. Supp. 748; Union Co. v. Peckham, 16 R. I. 64; Kirkman v. City of Nashville, (Tenn. Ch. App.) 55 S. W. 1072; Richardson v. City of Dallas (Tex) 16 S. W. 622; Missouri Pac. R. Co. v. Lee, 70 Tex. 496, 7 S. W. 857; Grace v. Walker, 95 Tex. 39, 64 S. W. 930. Modifying 61 S. W. 1103.

[94] Niles v. City of Los Angeles, 125 Cal. 572; Woodburn v. Town of Sterling, 184 Ill. 208, 56 N. E. 378. Citing cases. Lake Erie & W. R. Co. v. Town of Boswell, 137 Ind. 336, 36 N. E. 1103; Cromer v. State, 21 Ind. App. 502, 52 N. E. 239; Evansville & T. H. R. Co. v. State, 149 Ind. 276; Gerberling v. Wunnenberg, 51 Iowa, 125; Hull v. City of Cedar Rapids, 111 Iowa, 466, 83 N. W. 28; Hammerslough v. Kansas City, 46 Kan. 37, 26 Pac. 496; City of Abilene v. Wright, 4 Kan. App. 708, 46 Pac. 715; Hood v. Town of Lebanon, 12 Ky. L. R. 813, 15 S. W. 516; Albaugh v. Goldsborough, 80 Md. 49; Conkling v. Village of Mackinaw City, 120 Mich. 67, 79 N. W. 6; Kennedy v. LeVan, 23 Minn. 513; Baldwin v. City of Springfield, 141 Mo. 205, 42 S. W. 717; Matter of Curran, 38 App. Div. 82, 55 N. Y. Supp. 1018; Cook v. Harris, 61 N. Y. 448; People v. Loehfelm, 102 N. Y. 1; Wakeman v. Wilbur, 147 N. Y. 657, 42 N. E. 341; Town of Johnson City v. Wolfe, 103 Tenn. 227, 52 S. W. 991; Albert v. Gulf, C. & S. F. R. Co., 2 Tex. Civ. App.

unfenced and without an attempt to maintain exclusive, private possession [95] or permissive use of enclosed land,[96] does not establish an intent to throw it open for public use and this is especially true when considering the character of land, whether cultivated or wild and uncultivated and vacant.[97] Negatively, acts of the

664, 21 S. W. 779; Gibbs v. Ashford (Tex. Civ. App.) 66 S. W. 858; Thurston County v. Walker, 27 Wash. 500, 67 Pac. 1099; McHugh v. Town of Minocqua, 102 Wis. 291, 78 N. W. 478.

[95] Coburn v. San Mateo County, 75 Fed. 520; Silva v. Spangler (Cal.) 43 Pac. 617; Niles v. City of Los Angeles, 125 Cal. 572; Starr v. People, 17 Colo. 458, 30 Pac. 64; Beach v. City of Meriden, 46 Conn. 502; City of Madison v. Booth, 53 Ga. 609; City of Chicago v. Stinson, 124 Ill. 510, 17 N. E. 43; Marcy v. Taylor, 19 Ill. 634; Kelly v. City of Chicago, 48 Ill. 388. The failure of a property owner to enclose his premises or institute action of trespass against parties using them cannot be regarded as conclusive evidence of an intention to dedicate and this is true where a road way was opened and ditches dug on either side.

City of Ottawa v. Yentzer, 160 Ill. 509, 43 N. Y. 601; Tucker v. Conrad, 103 Ind. 349; Sarver v. Chicago, B. & Q. R. Co., 104 Iowa, 59, 73 N. W. 498; Fairchild v. Stewart, 117 Iowa, 734, 89 N. W. 1075; Vicksburg S. & P. R. Co., v. City of Monroe, 48 La. Ann. 1102, 20 So. 664; Stacey v. Miller, 14 Mo. 478; Town of New Windsor v. Stocksdale, 95 Md. 196, 52 Atl. 596; Green v. Chelsea, 24 Pick (Mass.) 71; In re Hand St., 6 N. Y. Supp. 158; City of Buffalo v. Delaware, L. & W. R. Co., 39 N. Y. Supp. 4; Friedlander v. Condict, 29 Misc. 7, 59 N. Y. Supp. 976; Strong v. City of Brooklyn, 68 N. Y. 1; Wilson v. Acree, 97 Tenn. 378, 37 S. W. 90; McReynolds v. Broussard, 18 Tex. Civ. App. 409; Ramthun v. Halfman, 58 Tex. 551; Harris v. Commonwealth, 20 Grat. (Va.) 833; Morse v. Ranno, 32 Vt. 600; Town of Gate City v. Richmond, 97 Va. 337; Town of Randall v. Rovelstad, 105 Wis. 410, 81 N. W. 819.

[96] Ayers v. State, 59 Ark. 26; State v. McClure, 53 Kan. 295; Perkins v. Fielding, 119 Mo. 149, 24 S. W. 444; Field v. Mark, 125 Mo. 502, 28 S. W. 1004; Plummer v. Ossipee, 59 N. H. 55; Morris & E. R. Co. v. Jersey City, 63 N. J. Eq. 45, 51 Atl. 387; Goodfellow v. Riggs, 88 Iowa, 540; Root v. Commonwealth, 98 Pa. 170; Evans v. Borough of Lititz, 162 Pa. 561; Worth v. Dawson, 33 Tenn. (1 Sneed) 59; Cunningham v. Hendricks, 89 Wis. 632, 62 N. W. 410.

[97] Tutwiler v. Kendall, 113 Ala. 664, 21 So. 332; Harding v. Jasper, 14 Cal. 642; Latham v. City of Los Angeles, 87 Cal. 514, 25 Pac. 673; Fox v. Virgin, 11 Ill. App. 513; Id., 5 Ill. App. 515; Bryan v. City of East St. Louis, 12 Ill. App. 390; Peyton v. Shaw, 15 Ill. App. 192; Owens v. Crossett, 105 Ill. 354; Conkling v. Village of Mackinaw, 120 Mich. 67; Graham v. Hartnett, 10 Neb. 517; Rathman v. Norenberg, 21 Neb. 467; Oyler v. Ross, 48 Neb. 211; Gilder v. City of Brenham, 67 Tex. 345, 3 S. W. 309; Chinnock v. Hartley Whitney, Rural Dist. Council, 63 J. P. 327.

owner which show a lack of intent will rebut such a claim.[98] The fencing or enclosing of property,[99] its use, improvement or culti-

[98] Gage v. Mobile & O. R. Co., 84 Ala. 224, 4 So. 415; Town of Holly Grove v. Smith, 63 Ark. 5, 37 S. W. 956; Niles v. City of Los Angeles, 125 Cal. 572, 58 Pac. 190; Stallard v. Cushing, 76 Cal. 472; City & County of San Francisco v. Grote, 120 Cal. 59, 52 Pac. 127, 41 L. R. A. 335. No dedication to a public use will result from the mere use of land by its owner without consent or objection.

Taylor v. Dyches, 69 Ga. 455; Cotter v. City of Augusta, 80 Ga. 425; City of Chicago v. Stinson, 124 Ill. 510; Huff v. Hastings Exp. Co., 195 Ill. 257, 63 N. E. 105; City of Covington v. McDonald, 14 Ky. L. R. 817, 21 S. W. 235; Spurrier v. Bland, 20 Ky. L. R. 1340, 49 S. W. 467; Schneider v. Jacob, 86 Ky. 101; White v. Bradley, 66 Me. 254. The presumptive use by the public of a way laid out by the owner as mill or store will not prove a dedication; it is but a license which may be revoked at the pleasure of the owner. Moreover, in such a case the right of the public is not complete without an acceptance; neither will mere individual use by members of the community nor unauthorized repairs by a street commissioner establish either the dedication or an acceptance.

Neal v. Hopkins, 87 Md. 19; Village of Benson v. St. Paul, M. & M. R. Co., 73 Minn. 481, 76 N. W. 261; Baker v. Squires, 77 Mo. App. 329. The construction of a building four feet from the lot line and paving this strip with the same material as the sidewalk is no evidence of a dedication to the public. City of Helena v. Albertose, 8 Mont. 499, 20 Pac. 817; Brown v. Stein, 38 Neb. 596, 57 N. W. 401; In re Wayne Ave., 124 Pa. 135, 16 Atl. 631; City of San Antonio v. Sullivan (Tex. Civ. App.) 57 S. W. 42; Tupper v. Huson, 46 Wis. 646. But see City of Chicago v. Drexel, 141 Ill. 89; Klenk v. Town of Walnut Lake, 51 Minn. 381; Buschmann v. City of St. Louis, 121 Mo. 523, 26 S. W. 687. The payment of taxes will not rebut a clear intention to dedicate the property to the city.

[99] Jones v. Phillips, 59 Ark. 35, 26 S. W. 386; Spaulding v. Bradley, 79 Cal. 449, 22 Pac. 47; People v. Reed, 81 Cal. 70, 22 Pac. 474; Smithers v. Fitch, 82 Cal. 153, 22 Pac. 935; People v. Sperry, 116 Cal. 593, 48 Pac. 723; City of Chicago v. Hill, 124 Ill. 646, 17 N. E. 46; McWilliams v. Morgan, 61 Ill. 89; Mansur v. State, 60 Ind. 357; Bidinger v. Bishop, 76 Ind. 244; State v. Green, 41 Iowa, 693; Quinton v. Burton, 61 Iowa, 471. Where a hedge is planted adjoining a highway, the land outside of it is dedicated to the public use.

State v. Adkins, 42 Kan. 203, 21 Pac. 1069; Neal v. Hopkins, 87 Md. 19, 39 Atl. 322; Cyr v. Madore, 73 Me. 53; Wright v. Tukey, 57 Mass. (3 Cush.) 290; Hurley v. City of West St. Paul, 83 Minn. 401, 86 N. W. 427; Vossen v. Dautel, 116 Mo. 379, 23 S. W. 734; Field v. Mark, 125 Mo. 502, 28 S. W. 1004; Rube v. Sullivan, 23 Neb. 779, 37 N. W. 666; Oyler v. Ross, 48 Neb. 211, 66 N. W. 1099; Kelsey v. Burgess, 58 Hun, 608, 12 N. Y. Supp. 169; Carpenter v. Gwynn, 35 Barb. (N. Y.) 395; Frankford & S. P. City Pass. R. Co. v. City of Philadel-

vation,[100] claims and assertions that it is private in its character [101] and opposition to the public authorities in their attempts to improve or regulate the property in dispute,[102] are some of these. The intent or lack of intent is to be established not altogether by what the owner may testify to at the time the question is raised, but from competent acts and declarations made previously,[103] and while an intention to dedicate must be clearly shown it need not be proven by direct and positive testimony but is to be determined upon the peculiar facts and circumstances of each case.[104]

phia, 175 Pa. 120, 34 Atl. 577; Jones v. Davis, 35 Wis. 376. But see Bannister v. O'Connor, 113 Iowa, 541, 85 N. W. 767; Bridges v. Wyckoff, 67 N. Y. 130; Rudolph v. Ackerman, 58 App. Div. 596, 69 N. Y. Supp. 68, reversing 30 Misc. 698, 64 N. Y. Supp. 460; Burkitt v. Battle (Tenn. Ch. App.) 59 S. W. 429.

[100] Irwin v. Dixon, 9 How. (U. S.) 10; Smith v. Glenn, 62 Pac. 180, 129 Cal. XVIII; Waggeman v. Village of North Peoria, 42 Ill. App. 132; Bell v. City of Burlington, 68 Iowa, 296; Monaghan v. Memphis Fair & Exp. Co., 95 Tenn. 108, 31 S. W. 497; Trerice v. Barteau, 54 Wis. 99.

[101] Quinn v. State, 49 Ala. 353; City of Eureka v. Fay, 107 Cal. 166, 40 Pac. 235; City of Peoria v. Johnston, 56 Ill. 45; Waggeman v. Village of North Peoria, 155 Ill. 545, 40 N. E. 485; Gray v. Haas, 98 Iowa, 394, 67 N. W. 502; Lippincott v. Harvey, 72 Md. 572, 19 Atl. 1041; Village of White Bear v. Stewart, 40 Minn. 284; Whyte v. City of St. Louis, 153 Mo. 80, 54 S. W. 478; O'Neill v. Annett, 27 N. J. Law (3 Dutch.) 290; City of Buffalo v. Delaware, L. & W. R. Co., 68 App. Div. 488, 74 N. Y. Supp. 343; Daniels v. Almy, 18 R. I. 244, 27 Atl. 330; Reuter v. Lawe, 94 Wis. 300, 68 N. W. 955, 34 L. R. A. 733.

[102] Cook v. Sudden, 94 Cal. 443, 29 Pac. 949, following People v. Reed, 81 Cal. 70, 22 Pac. 474; Swift v. City of Lithonia, 101 Ga. 706; Town of Gate City v. Richmond, 97 Va. 337, 33 S. E. 615.

[103] Bessemer Land & Imp. Co. v. Jenkins, 111 Ala. 135, 18 So. 565; Helm v. McClure, 107 Cal. 199; Chapin v. State, 24 Conn. 236; Atlanta R. & P. Co. v. Atlanta R. T. Co., 113 Ga. 481, 39 S. E. 12; Fossion v. Landrey, 123 Ind. 136, 24 N. E. 96; City of Columbus v. Dahn, 36 Ind. 330; Reno v. City of Iola, 63 Kan. 885, 65 Pac. 678; Bogard v. O'Brien, 14 Ky. L. R. 648, 20 S. W. 1097; Armistead v. Vicksburg, S. & P. R. Co., 47 La. Ann. 1381, 17 So. 888; Downer v. St. Paul & C. R. Co., 23 Minn. 271; Field v. Mark, 125 Mo. 502; Brown v. Manning, 6 Ohio, 298; Burnett v. Harrington, 70 Tex. 213, 7 S. W. 812; Scott v. Rockwall County (Tex. Civ. App.) 49 S. W. 932; Buchanan v. Curtis, Wis. 99; Lawe v. City of Kaukauna, 25 Wis. 306, 35 N. W. 561. But see City of Shreveport v. Drouin, 41 La. 867, 6 So. 656; Smith v. City of Navasota, 72 Tex. 422, 10 S. W. 414.

[104] London & San Francisco Bank v. City of Oakland (C. C. A.) 90 Fed. 691, affirming 86 Fed. 30; Quinn v. Anderson, 70 Cal. 454; Ward v. Farwell, 6 Colo. 66; City of Hartford v. New York & N. E. R.

§ 732. The intent to dedicate as evidenced by user.

Mere user will not of itself establish an intent to dedicate or a dedication.[105] If a thoroughfare is used by the public under necessary conditions and for the required length of time, rights enuring to the public may be created by the doctrine of prescription

Co., 59 Conn. 250, 22 Atl. 37; Bennett v. Mitchell County, 111 Ga. 847, 36 S. E. 461. It is not error to exclude the testimony of a witness as to what "the public understood" in reference to an alleged dedication.

O'Connell v. Bowman, 45 Ill. App. 654. A landowner should be permitted to state his intenttion in performing acts claimed as a dedication. Pittsburgh, C., C. & St. L. R. Co. v. Noftsger, 26 Ind. 614, 60 N. E. 372; Sheen v. Stothart, 29 La. Ann. 630; McNeil v. Hicks, 34 La. Ann. 1090; Rowland v. Bangs, 102 Mass. 299; Morse v. Zeize, 34 Minn. 35; Hurley v. Missouri & R. R. Boom Co., 34 Minn. 143. The leaving of a blank open space on a plat is not sufficient to show a dedication of a public landing or wharf.

Ellsworth v. Lord, 40 Minn. 337, 42 N. W. 389; Perkins v. Fielding, 119 Mo. 149, 24 S. W. 444, 27 S. W. 1100; Baker v. Squire, 143 Mo. 92, 44 S. W. 792; Moore v. Hawk, 57 Mo. App. 495. The proof of a common-law dedication must be so persuasive, cogent and full as to leave no reasonable doubt of the owner's intent. Pott v. School Directors, 42 Pa. 132; City of Morristown v. Cain (Tenn. Ch. App.) 44 S. W. 471.

Acts not held sufficient on the part of the land owner to constitute a dedication. See City of Pella v. Scholte, 21 Iowa, 463; Bachelder v. Wakefield, 62 Mass. (8 Cush.) 243; Tegarden v. McBean, 33 Miss. 283; Holdan v. Village of Cold Spring, 21 N. Y. 474.

[105] Hoole v. Attorney General, 22 Ala. 190; Tutwiler v. Kendall, 113 Ala. 664; City of San Francisco v. Scott, 4 Cal. 114; Cohn v. Parcels, 72 Cal. 367, 14 Pac. 26; Hibberd v. Mellville (Cal.) 33 Pac. 201; City & County of San Francisco v. Grote, 120 Cal. 59, 52 Pac. 127, 41 L. R. A. 335; Prescott v. Edwards, 117 Cal. 298; Kyle v. Logan, 87 Ill. 64; Herhold v. City of Chicago, 108 Ill. 467; Laughlin v. City of Washington, 63 Iowa, 652. Three weeks' use of a road is not evidence of a dedication. Johnson v. City of Burlington, 95 Iowa, 197; City of Topeka v. Cowee, 48 Kan. 345, 29 Pac. 560; Morgan v. Lombard, 26 La. Ann. 463; Bigelow v. Hillman, 37 Me. 52; State v. Inhabitants of Calais, 48 Me. 456; Cyr v. Madore, 73 Me. 53; City of Baltimore v. Broumel, 86 Md. 153; Motherway v. Wall, 168 Mass. 333; Irving v. Ford, 65 Mich. 241, 32 N. W. 601; Montana Ore & Purchasing Co. v. Butte & B. Consol. Min. Co., 25 Mont. 427, 65 Pac. 420; In re Hand St., 5 N. Y. Supp. 158; Strong v. City of Brooklyn, 68 N. Y. 1; Matter of Rhinelander, 68 N. Y. 105; Boyden v. Achenbach, 79 N. C. 539; Penquite v. Lawrence, 11 Ohio St. 274.

Com. v. Barker, 140 Pa. 189, 21 Atl. 243. The construction of a sidewalk for the owner's convenience does not amount to a dedication of the land to the public. Borough of

but this is different from the dedication.[106] User by the public without objection on the part of the owner will, however, be regarded as evidence of an intent on his part to dedicate the property in question to a public use [107] and the presumption arises from its user for a length of time which may be insufficient to establish a right by prescription of the existence of such an intent.[108] Where the

Verona v. Alleghany R. Co., 152 Pa. 368, 25 Atl. 518; Sweatman v. City of Deadwood, 9 S. D. 380; Russell v. State, 43 Tenn. (3 Cold.) 119; Jackson v. State, 46 Tenn. (6 Cold.) 532; Ramthun v. Halfman, 58 Tex. 551; Worthington v. Wade, 82 Tex. 26, 17 S. W. 520; State v. Dry Fork R. Co., 50 W. Va. 235, 40 S. E. 447; Robinson v. Cowpen Local Board, 9 Rep. (Eng.) 858.

[106] Talbott v. Grace, 30 Ind. 389; Weiss v. Borough of South Bethlehem, 136 Pa. 294, 20 Atl. 801; Com. v. Philadelphia & R. R. Co., 135 Pa. 256.

[107] District of Columbia v. Robinson, 14 App. D. C. 512; Kennedy's Ex'rs v. Jones, 11 Ala. 63; Cabbell v. Williams, 120 Ala. 320, 28 So. 405. Twenty years. Helm v. McClure, 107 Cal. 199, 40 Pac. 437; Brunswick & W. R. Co. v. City of Waycross, 88 Ga. 68, 13 S. E. 835; Davidson v. Reed, 111 Ill. 167; Town of Marion v. Skillman, 127 Ind. 130, 26 N. E. 676, 11 L. R. A. 55; Gerberling v. Wunnenberg, 51 Iowa, 125, 49 N. W. 861; Dodge v. Hart, 113 Iowa, 685, 83 N. W. 1063; Hanger v. City of Des Moines, 109 Iowa, 480, 80 N. W. 549; Madison Tp. of Greenwood County v. Scott, 9 Kan. App. 871, 61 Pac. 967; Louisville & N. R. Co. v. Sonne, 21 Ky. L. R. 848, 53 S. W. 274; Wright v. Willis, 23 Ky. L. R. 565, 63 S. W. 991; Armistead v. Vicksburg, S. & P. R. Co., 47 La. Ann. 1381, 17 So. 888; Holbrook v. McBride, 70 Mass. (4 Gray) 215; Case v. Favier, 12 Minn. 89 (Gil. 48); Klenk v. Town of Walnut Lake, 51 Minn. 381, 53 N. W. 703; Porter v. Village of Attica, 33 Hun (N. Y.) 605; Pomfrey v Village of Saratoga Springs, 34 Hun (N. Y.) 607. The dedication of a street may be presumed from the construction of a sidewalk by the owner. Ivory v. Town of Deerpark, 116 N. Y. 476, 22 N. E. 1080; Schenley v. Com., 36 Pa. 28. To avoid the presumption of a grant from lapse of time, the disability of coverture cannot be added to that of infancy. Pittsburgh, Ft. W. & C. R. Co. v. Dunn, 56 Pa. 280; Hughes v. Providence & W. R. Co., 2 R. I. 493. Dedication of a highway may be proved by the use of land with the willingness or acquiescence of the owner for so long that the public convenience and private rights will be materially affected by the interruption of the enjoyment. Schettler v. Lynch, 23 Utah, 305, 64 Pac. 955; Colbert v. Shepherd, 89 Va. 401, 16 S. E. 246; State v. Woodward, 23 Vt. 92; Witter v. Damitz, 81 Wis. 385, 51 N. W. 575.

[108] Howard v. State, 47 Ark. 431, 2 S. W. 331; Johnson v. Stayton, 3 Har. (Del.) 448; Cotter v. City Council of Augusta, 80 Ga. 425, 6 S. E. 180; Habersham v. Savannah & O. Canal Co., 26 Ga. 665; Green v. Oakes, 17 Ill. 249; State v. Hill, 10 Ind. 219; Pittsburgh, C., C. & St. L. R. Co. v. Town of Crown

intent to dedicate has been established by the act or acts of the owner, no user by the public for a definite time is necessary.[109]

The public rights are created and become fixed immediately upon the establishment of the intent to dedicate. If, as in the greater number of instances, the dedication is definite and unequivocal, the rights of the public begin at once.[110]

Nonuser as evidence against dedication. A nonuser of property claimed to have been dedicated or an abandonment of it does not necessarily establish conclusively the fact of no dedication or abandonment,[111] although where nonuser is accompanied by acts of the owner which show an intent to maintain his personal rights to disputed property, it will be strong proof that no dedication was intended.

§ 733. The estate acquired.

The estate acquired by the public through a donation of property to a public use by private individuals is dependent upon the character of the dedication, whether statutory or common law, and

Point, 150 Ind. 536, 50 N. E. 741; Mauck v. State, 66 Ind. 177; Carr v. Kolb, 99 Ind. 53; Davenport v. Buffington, 1 Ind. T. 424, 45 S. W. 128; Stevens v. Nashua, 46 N. H. 192; In re Hunter, 28 Misc. 314, 59 N. Y. Supp. 874; Mason v. City of Sioux Falls, 2 S. D. 640, 51 N. W. 770; Prouty v. Bell, 44 Vt. 72; Smith v. Cornelius, 41 W. Va. 59, 30 L. R. A. 747; Lemon v. Hayden, 13 Wis. 159; Wyman v. State, 13 Wis. 663.

[109] Hiner v. Jeanpert, 65 Ill. 428; Summers v. State, 51 Ind. 201. "Highways may be established, in this state, by the order of the board of commissioners of the county, by express grant, and by dedication presumed upon continued user as a public highway for a considerable period of time with the knowledge of, and without objection by, the owner of the land; and it is not necessary, in proof of acceptance by the public of a dedication, that the road should have been worked by public authority, or that the user, with knowledge and without the objection of the owner, should have been for twenty years. Twenty years' user, as aforesaid, is a complete bar to an action by the owner; but a dedication by the owner and acceptance by the public are to be presumed from such user for a much shorter period, dependent upon the peculiar facts of each case." Ross v. Thompson, 78 Ind. 90; Dwinell v. Barnard, 28 Me. 554; State v. Marble, 26 N. C. (4 Ired.) 318; State v. Trask, 6 Vt. 355; Connehan v. Ford, 9 Wis. 240.

[110] Zearing v. Raber, 74 Ill. 409; Borough of South Amboy v. New York & L. B. R. Co., 66 N. J. Law, 623, 50 Atl. 368.

[111] Prince v. McCoy, 40 Iowa, 533; Bannister v. O'Connor, 113 Iowa, 541, 85 N. W. 767; Chicago, R. I. & P. R. Co. v. City of Council Bluffs,

further upon the extent of the estate which may be acquired in a particular state or locality by the public. In the case of a statutory dedication, in some states, the statutes provide that the filing and record of the map or plat and in the form as prescribed shall be considered in law as a conveyance in fee of the property marked upon the map or plat and dedicated to a public use.[112] Ordinarily, a common-law dedication does not convey a fee but an

109 Iowa, 425; Giffin v. City of Olathe, 44 Kan. 342, 24 Pac. 470; Browne v. Trustees of M. E. Church, 37 Md. 108; Richardson v. Davis, 91 Md. 390, 46 Atl. 964; Village of Grandville v. Jenison, 86 Mich. 567, 49 N. W. 544; Spencer v. Peterson, 41 Or. 257, 68 Pac. 519; City of Dallas v. Gibbs, 27 Tex. Civ. App. 275, 65 S. W. 81; Reilly v. City of Racine, 51 Wis. 526.

[112] Lorie v. North Chicago City R. Co., 32 Fed. 270; Gebhardt v. Reeves, 75 Ill. 301; Shirk v. City of Chicago, 195 Ill. 298, 63 N. E. 193; Day v. Schroeder, 46 Iowa, 546; Randal v. Elder, 12 Kan. 257; Hurd v. Harvey County Com'rs, 40 Kan. 92, 19 Pac. 325; Harden v. Metz, 10 Kan. App. 341, 58 Pac. 281; Brown v. City of Carthage, 128 Mo. 10, 30 S. W. 312. The plat of a city certified and recorded as provided by Mo. Rev. St. 1889, § 7313, vests a fee of the lands dedicated to public use in the municipality and the effect of the statute is not impaired by a reservation on the plat of "trees and hedges" on the streets and alleys.

May v. City of Anaconda, 26 Mont. 140, 66 Pac. 759; Weeping Water v. Reed, 21 Neb. 261; Lindsay v. City of Omaha, 30 Neb. 512, 46 N. W. 627; Jaynes v. Omaha St. R. Co., 53 Neb. 631, 74 N. W. 67, 39 L. R. A. 751; Kane v. New York El. R. Co., 125 N. Y. 164, 26 N. E. 278, 11 L. R. A. 640; Watson v. City of New York, 67 App. Div. 573, 73 N. Y. Supp. 1027. An abutting property owner does not acquire title to an abandoned strip of a highway adjoining his premises. Kopf v. Utter, 101 Pa. 27; Ott v. Kreiter, 110 Pa. 370, 1 Atl. 724; Dobson v. Hohenadel, 148 Pa. 367; Clarke v. City of Providence, 16 R. I. 337, 15 Atl. 763, 1 L. R. A. 725; Mitchell v. Bass, 33 Tex. 259. Under the civil law, the title to the roadbed of a highway is in the sovereign and upon an abandonment the land becomes vacant public domain and does not belong as it would at common law to the adjoining proprietors. Roanoke City v. Berkowitz, 80 Va. 616. In condemnation proceedings for acquiring highways the fee must be taken. Page v. Belvin, 88 Va. 985.

In other states through operation of the statutes authorizing the platting of land and dedication to a public use, the municipality only acquires a qualified fee in the land to those dedicated in trust for the public if the ordinary and necessary purposes to which the streets of a city or town are usually subjected. See the following cases: Denver Circle R. Co. v. Nestor, 10 Colo. 403, 15 Pac. 714; Rich v. City of Minneapolis, 37 Minn. 423, 35 N. W. 2. Where an easement only is acquired, the soil and minerals necessarily belong to the owner and a city is justified only in taking

easement only,[113] restricted in extent by the limits as marked or established by public user [114] and where these are indefinite, then will the land be dedicated only to the extent necessary to accomplish the purpose in view, namely, a means of ingress and egress from particular lots or property.[115] If the laws of the state or custom and usage do not permit of the acquirement of an estate in fee by the public in a highway but only an easement, the estate acquired through dedication, whether statutory or common law, will be limited in this respect.[116] The estate granted by the owner

and removing such material as the construction or repair of that particular street requires.

[113] Barclay v. Howell's Lessee, 6 Pet. (U. S.) 498; City & County of San Francisco v. Calderwood, 31 Cal. 585; Town of Chatham v. Brainerd, 11 Conn. 60; Read v. Leeds, 19 Conn. 182; Hanbury v. Woodward Lumber Co., 98 Ga. 54, 26 S. E. 477; Thomsen v. McCormick, 136 Ill. 135, 26 N. E. 373; Clark v. McCormick, 174 Ill. 164, 51 N. E. 215; Vaughn v. Stuzaker, 16 Ind. 338; Magee v. Overshiner, 150 Ind. 127, 49 N. E. 951, 40 L. R. A. 370. The public are not limited in the use of a street legally dedicated to the particular use prevailing at the time of its dedication but such use will include all the improved and modern methods of attaining the same objects and enjoying the same privileges. A general or a substantial interference with the interest of the abutting property owner will not be permitted. City of Dubuque v. Malony, 9 Iowa, 450; Mendez v. Dugart, 17 La. Ann. 171; Adams v. Emerson, 23 Mass. (6 Pick.) 57; Perley v. Chandler, 6 Mass. 454; Hamlen v. Keith, 171 Mass. 77; Williams v. Natural Bridge Plank Road Co., 21 Mo. 580; Makepeace v. Worden, 1 N. H. 16; Copp v. Neal, 7 N. H. 275; Jaynes v. Omaha St. R. Co., 53 Neb. 631, 39 L. R. A. 751; Bryant's Lessee v. McCandless, 7 Ohio (pt. 2) 135; Meier v. Portland C. R. Co., 16 Or. 500, 19 Pac. 610, 1 L. R. A. 856.

[114] Inhabitants of Franklin v. Fisk, 95 Mass. (13 Allen) 211.

[115] Long v. Gill, 80 Ala. 408; Hanbury v. Woodward Lumber Co., 98 Ga. 54, 26 S. E. 477; Burlington Gaslight Co. v. Burlington, C. R. & N. R. Co., 91 Iowa, 470; City of Baltimore v. Frick, 82 Md. 77, 33 Atl. 435; Coleman v. Flint & P. M. R. Co., 64 Mich. 160, 31 N. W. 47; Speir v. Town of Utrecht, 121 N. Y. 420, 24 N. E. 692; Burrows v. Guest, 5 Utah, 91, 12 Pac. 847.

[116] Florida So. R. Co. v. Brown, 23 Fla. 104; First Nat. Bank v. Tyson, 133 Ala. 459, 32 So. 144, 59 L. R. A. 399; Olin v. Denver & R. G. R. Co., 25 Colo. 177, 53 Pac. 454. Upon the vacation of a street the land included within it reverts to the abutting owners. Peck v. Smith, 1 Conn. 103; Champlin v. Pendleton, 13 Conn. 23; City of Chicago v. Wright, 69 Ill. 318; Postal Tel. Cable Co. v. Eaton, 170 Ill. 513, 49 N. E. 365, 39 L. R. A. 722; Decker v Evansville S. & N. R. Co., 133 Ind. 349, 33 N. E. 349; Cox v. Louisville, N. A. & C. R. Co., 48 Ind. 178; Huffman v. State, 21 Ind. App. 449, 52 N. E. 713; Bradley v. Pharr, 45 La. Ann. 426, 12 So. 618,

is further and always limited by the terms of a conditional grant if one is made.[117] The establishment of a building line is a con-

19 L. R. A. 647; Johnson v. Anderson, 18 Me. 76; Farnsworth v. City of Rockland, 83 Me. 508, 22 Atl. 394; Rice v. Worcester County, 77 Mass. (11 Gray) 283; City of Boston v. Richardson, 95 Mass. (13 Allen) 146. The right of the public in a highway is ordinarily limited to an easement for the purpose of travel.

Inhabitants of Franklin v. Fisk, 95 Mass. (13 Allen) 211. The public easement does not extend beyond the immediate location of the highway. Kane v. City of Baltimore, 15 Md. 240; Cuming v. Prang, 24 Mich. 514; Patterson v. City of Duluth, 21 Minn. 493; Sanborn v. City of Minneapolis, 35 Minn. 314; Ellsworth v. Lord, 40 Minn. 337, 42 N. W. 389. The public acquire an easement only in a highway, and the abutting landowner retains the right to use it for any lawful purpose not inconsistent or incompatible with its full enjoyment by the public as a public way. Campbell v. Kansas City, 102 Mo. 326, 13 S. W. 897, 10 L. R. A. 593; Thomas v. Hunt, 134 Mo. 392, 35 S. W. 581, 32 L. R. A. 857; Hershfield v. Rocky Mountain Bell Tel. Co., 12 Mont. 102, 29 Pac. 883; Chamberlain v. Enfield, 43 N. H. 356; Petrie v. Kansas, etc. R. Co., 19 N. J. Eq. 276; Methodist Episcopal Church v. City of Hoboken, 33 N. J. Law, 13; Knox v. City of New York, 55 Barb. (N. Y.) 404; Daily v. State, 51 Ohio St. 348, 37 N. E. 710, 24 L. R. A. 724; Kinnear Mfg. Co. v. Beatty, 65 Ohio St. 264, 62 N. E. 341.

Hobson v. Monteith, 15 Or. 251, 14 Pac. 740. The city of Astoria by act of the legislature of Oregon was vested with "the fee of all streets now within the city recorded between high and low water of the Columbia river." Huddleston v. City of Eugene, 34 Or. 343, 55 Pac. 868, 43 L. R. A. 444; Lumber Tp. v. Cameron County, 134 Pa. 105; Witter v. Harvey, 1 McCord (S. C.) 67; Iron Mountain R. Co. v. Bingham, 87 Tenn. 522, 11 S. W. 705, 4 L. R. A. 622.

State v. Taylor, 107 Tenn. 455, 64 S. W. 766. A municipality owns a nontransferable easement only in land dedicated to its use as a street and a conveyance by it will pass no title. Cole v. Drew, 44 Vt. 49; Holden v. Shattuck, 34 Vt. 336; Page v. Belvin, 88 Va. 985, 14 S. E. 843; Western Union Tel. Co. v. Williams, 86 Va. 700, 11 S. E. 106; Andrews v. Youmans, 78 Wis. 56; City of Madison v. Mayers, 97 Wis. 399, 40 L. R. A. 635.

[117] Savannah, A. & G. R. Co. v. Shiels, 33 Ga. 601; Conkling v. City of Springfield, 39 Ill. 98; Town of Princeton v. Templeton, 71 Ill. 68; City of Dubuque v. Benson, 23 Iowa, 248; Scott v. City of Des Moines, 64 Iowa, 438; Agne v. Seitsinger, 104 Iowa, 482, 73 N. W. 1048; Sinclair v. Comstock, Harr. Ch. (Mich.) 404; Plumb v. City of Grand Rapids, 81 Mich. 381, 45 N. W. 1024; Plumer v. Johnston, 63 Mich. 165, 29 N. W. 687; Patrick v. Y. M. C. A. of Kalamazoo, 120 Mich. 185, 79 N. W. 208.

Gregory v. City of Ann Arbor, 127 Mich. 454, 86 N. W. 1013. The dedication may be conditional upon the making by the city of certain improvements and if this is not done the dedication will be invalid.

dition commonly imposed [118] and the dedication of lands upon the making of specified improvements or the construction of certain buildings is another. The principle holds, established beyond controversy, that land dedicated to a public use whether by statute or common law can only be used for this purpose.[119] If it is purchased or acquired by a public corporation without any limitation upon its use or in respect to its disposition,[120] the corporation is

City of St. Louis v. Meier, 77 Mo. 13; Kemper v. Collins, 97 Mo. 644, 11 S. W. 245; Ayres v. Pennsylvania R. Co., 52 N. J. Law, 405, 20 Atl. 54; Methodist Episcopal Church v. City of Hoboken, 33 N. J. Law, 13; Tallon v. City of Hoboken, 60 N. J. Law, 212, 37 Atl. 895; City of Atlantic City v. Atlantic City Steel Pier Co., 62 N. J. Eq. 139, 49 Atl. 822. The conditional dedication of land is valid, the conditions being that the city council should not grant a right of way over land dedicated to any railway company or permit structures to be erected on the ocean side of the way granted. City of Buffalo v. Delaware, L. & W. R. Co., 39 N. Y. Supp. 4; Hughes v. Bingham, 135 N. Y. 347, 32 N. E. 78, 17 L. R. A. 454; Mark v. Village of West Troy, 151 N. Y. 453, 45 N. E. 842; Lownsdale v. City of Portland, 1 Or. 381; Peck v. Providence Steam Engine Co., 8 R. I. 353; State v. Spokane St. R. Co., 19 Wash. 518, 53 Pac. 719, 41 L. R. A. 515; Raleigh County Sup'rs v. Ellison, 8 W. Va. 308; Boughner v. Town of Clarksburg, 15 W. Va. 394; Fischer v. Laack, 76 Wis. 313; 45 N. W. 104; Lownsdale v. Portland, Deady, 1, Fed. Cas. No. 8,578. But see City of Des Moines v. Hall, 24 Iowa, 234.

[118] Simpson v. Mikkelsen, 196 Ill. 575, 63 N. E. 1036.

[119] Illinois & St. L. R. & C. Co. v. City of St. Louis, 2 Dill. 70, Fed. Cas. No. 7,007. Land under the bank of a navigable river dedicated to the public for wharfage purposes may be used by the consent and under the regulation of the municipal authorities as a site for the erection of a grain elevator for facilitating the handling of grain at the wharf.

California Academy of Sciences v. City and County of San Francisco, 107 Cal. 334, 40 Pac. 426. Land dedicated to a public use cannot be granted to a corporation of limited membership and formed purely for scientific purposes; this use under such circumstances not being a public one. Taft v. Tarpey, 125 Cal. 376, 58 Pac. 24; Home for Care of Inebriate v. City & County of San Francisco, 119 Cal. 534, 51 Pac. 950; Pierce v. Roberts, 57 Conn. 31, 17 Atl. 275; Cromer v. State, 21 Ind. App. 502; Attorney General v. Vineyard Grove Co., 181 Mass. 507, 64 N. E. 75; Kansas City v. Scarritt, 169 Mo. 471, 69 S. W. 283; Baker v. Squire, 143 Mo. 92; Callen v. Columbus Edison Elec. L. Co., 66 Ohio St. 166, 64 N. E. 141, 58 L. R. A. 782; Kopf v. Utter, 101 Pa. 27. The title of a municipal corporation to the sale of its streets is paramount and exclusive and not private.

[120] Taylor v. Armstrong, 24 Ark. 102; Town of Prestonburg v. Floyd County, 23 Ky. L. R. 1157, 64 S. W. 907; Llano County v. Knowles (Tex. Civ. App.) 29 S. W. 549.

free in all these respects, but property acquired through dedication is given to be devoted to the use of a highway for the purpose of passing and repassing by the public. Property may also be dedicated for public parks or pleasure grounds [121] and will be limited in its use to these purposes.[122] A public corporation will not be allowed to change this use or divest itself in such a way as to per-

[121] Tyne Imp. Com'rs v. Imrie, 81 Law T. (N. S.) 174; Baker v. Johnston, 21 Mich. 319. See, also, cases cited §§ 724, 725.

[122] United States v. City of Chicago, 7 How. (U. S.) 185; Barclay v. Howell's Lessee, 6 Pet. (U. S.) 498; United States v. Illinois Cent. R. Co., 2 Biss. 174, Fed. Cas. No. 15,437; Arkansas River Packet Co. v. Sorrels, 50 Ark. 466, 8 S. W. 683; McIntyre v. El Paso County Com'rs, 15 Colo. App. 78, 61 Pac. 237. It is not disputed, either, that the City of Colorado Springs acquired, and has the right to control and regulate the use of this square, as trustee for the people of the city, and is bound to perform the duty. In such case, it is well settled by the universal current of authority that the municipality holds the dedicated ground for the use and benefit of its citizens, for the purposes only of its dedication. The trustee cannot impose upon it any servitude or burden inconsistent with these purposes, or tending to impair them; neither can it alienate the ground, nor relieve itself from the authority and duty to regulate its use. We cite a few of the very many authorities to this effect. Warren v. Lyons City, 22 Iowa, 351; City of Llano v. Llano County, 5 Tex. Civ. App. 132, 23 S. W. 1008; City of Jacksonville v. Jacksonville R. Co., 67 Ill. 541; McCullough v. Board of Education, 51 Cal. 418; Village of Princeville v. Auten, 77 Ill. 327; Harris County v. Taylor, 58 Tex. 690; Rutherford v. Taylor, 38 Mo. 315; Church v. City of Portland, 18 Or. 73, 22 Pac. 528, 6 L. R. A. 259; Kreigh v. City of Chicago, 86 Ill. 410; City of Alton v. Illinois Transp. Co., 12 Ill. 54; Le Clercq v. Town of Gallipolis, 7 Ohio (pt. 1) 217." California Nav. & Imp. Co. v. Union Transp. Co., 126 Cal. 433, 58 Pac. 936, 46 L. R. A. 825; Godfrey v. City of Alton, 12 Ill. 29. Davis v. Nichols, 39 Ill. App. 610. "In the case at bar, however, the public square of the village of Tremont is held in trust for the public use, and it cannot be appropriated to any other use inconsistent with or destructive of the first; that the building of a school house upon the public square of a village, whether such square be left open for public travel across it, or inclosed and used as a park, would be inconsistent with the original use, cannot be doubted.

"Suppose the voters of a school district were to select as a site for a new school house, the middle of a public street or the court house of the county, would it seriously be contended that such site could be enforced? Village of Princeville v. Auten, 77 Ill. 326; City of Jacksonville v. Jacksonville R. Co., 67 Ill. 541."

City of Jacksonville v. Jacksonville R. Co., 67 Ill. 540. "The power of the legislature to repeal

the charters of municipal corporations cannot be extended to the right to divert property given to the public for one use, to a wholly different and inconsistent use. The power cannot exist to divert property from the purpose for which it was donated. This plat was a solemn dedication of the ground to the corporation, to be held in trust for the use of the public. The donation was made for a certain specific and defined purpose. That purpose is unmistakable. As soon as the plat is recorded the statute declares the trust, that the property shall be held for the uses intended, and for no other. The city has accepted the trust. It must be preserved, or the land must revert to the original proprietors. The city has acted in good faith. It has inclosed, planted with trees and improved and embellished the ground dedicated, and thus maintained the purpose of the donor. Lots abutting upon the square have been purchased and built upon with reference to it. They have also been made more valuable by this open ground in front of them.* * * It would scarcely be contended that the city, holding the property merely as trustee, could divert the trust, divide the square into lots, and sell and convey them to private individuals, to be appropriated to such purposes as they might desire. The conveyance would be an absolute nullity, and the act would be abhorrent to every principle of right. It would be a gross perversion of a trust, which should be prevented by the interposition of a court of equity. If the municipality could not divert the property, neither could the legislature. The power of the latter is not unlimited, and cannot be exercised to interfere with trust estates and vested rights.

"In Price v. Thompson, 48 Mo. 361, the trustees of the town were about to open a public park, and run streets through it. The original owner of the land, upon the plat of the town, designated four acres as a park. The language of the statute of Missouri, in declaring the effect of the plat, is identical with our own. The court enjoined the trustees, and held that the park should ever remain public, and in the condition in which it was donated.

"In Warren v. Lyons City, 22 Iowa, 351, it was held that neither the municipal authorities nor the legislature could divert ground dedicated as a public square to uses foreign to those for which the dedication was made, and that such an act of the legislature would be unconstitutional.

"In this case the attempted use of the public square by the railway company for the track of its road, is a manifest perversion of the trust created and declared; would operate injuriously to the public and the abutting lot owners; would mar the beauty of the ground, destroy it as a place of public recreation, and cannot be justified."

Village of Princeville v. Auten, 77 Ill. 325. "Where there is no express grant to the county, it certainly cannot erect public buildings on the public square, unless authorized so to do by a custom of the country or usage to which all citizens are as willing to submit as to a positive enactment. A county has no inherent right to appropriate the exclusive use of property not dedicated expressly to it, but to the citizens or public generally. It has no

more right than an individual to prevent or disturb the enjoyment of the inhabitants in any public grounds dedicated to their use.

"We are not aware that a custom or usage prevails anywhere, even in states where the usage as to court houses obtains, that city or village authorities may erect a town hall, or other public buildings, upon public grounds donated to public use, in the absence of any special declaration conferring the privilege. This is not a country town, and we are not authorized to assume it was in the contemplation of the dedicators this block of ground was to be for a site for public buildings for the use of the municipal officers. It is a more reasonable conclusion it was dedicated with a view to park purposes, to be ornamented, and made a pleasure ground in the midst of the village. If we are permitted to draw any conclusion, we think the latter is more consistent with the acts of the parties, and more in harmony with such usages as have obtained in the country."

Village of Hyde Park v. Oakwoods Cemetery Ass'n, 119 Ill. 141; Chicago & N. W. R. Co. v. City of Chicago, 151 Ill. 348; Lake Shore & M. S. R. Co. v. City of Chicago, 151 Ill. 359; City of Chicago v. Ward, 169 Ill. 392, 48 N. E. 927, 38 L. R. A. 849. "It is plain the city repudiated the privilege granted it by the legislature, and never accepted the act as binding on it. It may be said, in passing, that the Supreme Court of the United States, in Illinois Cent. R. Co. v. Illinois, 146 U. S. 387, denied the right of the legislature to make this extensive grant of the submerged lands in the harbor of Chicago, and held the grant to the railroad company to be ineffective, with certain exceptions. As we have already seen, all the rights in regard to Lake Park had long previously been fixed by the acts of dedication by the original owners, the acceptance of the city and the acquiescence and acts of the public and abutting property owners. It was beyond the power of the legislature to change the legal result of these acts, as it would be an impairment of vested rights which are protected by the constitution."

Shirk v. City of Chicago, 195 Ill. 298; Guttery v. Glenn, 201 Ill. 275. "Under the law the board of trustees had a right to enclose the square, so that teams and wagons should not be allowed to pass through it, if the whole of the space, marked on the plat as 'Public Square,' was dedicated by the owners as such, and if Union street did not by the dedication cross the public square, so as to divide it into two parts. The board of trustees also had a right to set out trees in the square, so as to beautify the same, and to set out trees in the space alleged by appellee to have been included in Union street, if Union street did not cross the square."

Warren v. Lyons City, 22 Iowa, 351; Fisher v. Beard, 32 Iowa, 346; Coe College v. City of Cedar Rapids (Iowa) 87 N. W. 444; Youngerman v. Polk County Sup'rs, 110 Iowa, 731, 81 N. W. 166; Franklin County Com'rs v. Lathrop, 9 Kan. 453; Board of Education v. Kansas City, 62 Kan. 374, 63 Pac. 600. Here it was held that a plat designating part of a tract marked "Public Grounds" as "Seminary Place," was a dedication of the latter property to public school purposes and that resolutions of the common council could not affect the rights given

by dedication. West Boston Bridge v. Middlesex County Com'rs, 27 Mass. (10 Pick.) 270; Attorney General v. Vineyard Grove Co., 181 Mass. 507, 64 N. E. 75. The right to an unobstructed view of the ocean may be acquired by dedication.

City of St. Paul v. Chicago, M. & St. P. R. Co., 63 Minn. 330, 63 N. W. 267, 65 N. W. 649, 68 N W. 458, 34 L. R. A. 184. "We shall, without further discussion, take as settled that the premises in question were dedicated by the owner, Hopkins, to public use, as a 'levee' or 'landing.' The word 'levee' has a well-understood meaning in the West and South. It is a place, on a river or other navigable water, for lading or unlading goods, or for the reception and delivery of passengers. It is either the bank, or the wharf, to or from which persons or things may go from or to some vessel in the contiguous waters. State v. Randall, 1 Strob. (S. C.) 110; State v. Graham, 15 Rich. Law (S. C.) 310; Coffin v. City of Portland, 27 Fed. 412, 418. It means the land contiguous to a river or other navigable water, used as a landing place for water craft, and for the transfer of freight and passengers to and from such craft. In a general way, this is at once the definition and limitation of the particular and specific public use to which this land was dedicated by the owner. It is elementary and fundamental law that, if a grant is made for a specific, limited, and definite public use, the subject of the grant cannot be used for another and different use. Its use must be restricted to that for which it was dedicated. Even the legislature itself has no power to destroy the trust, or to divert, or to authorize a municipality to divert, its subject to any other purpose, either public or private, inconsistent with the particular use to which it was granted. Neither the state nor the municipality within which the property is situated has any proprietary interest in it which either of them can sell or divert to any use inconsistent with the purpose of the dedication or grant. The state holds such land merely in its sovereign capacity, in trust for the public for the purposes for which it was dedicated. If the legislature should attempt to divert it, or to authorize its diversion, the property would not revert to the donor, or the public easement be extinguished. The act of the legislature would be a mere nullity. The cases relied on by defendant's counsel decide nothing inconsistent with these propositions. See Portland & W. V. R. Co. v. City of Portland, 14 Or. 188, 12 Pac. 265; Illinois & St. L. R. & C. Co. v. City of St. Louis, 2 Dill. 70, Fed. Cas. No. 7,007."

Rowzee v. Pierce, 75 Miss. 846, 23 So. 307, 40 L. R. A. 402. Land was dedicated as a public ornamental park exclusively. The municipality gave leave to erect a public school house thereon and was enjoined at the suit of the donors and lot owners.

Price v. Thompson, 48 Mo. 361. The trustees of the village passed an order to extend a street through a dedicated park. Suit brought by property owners to enjoin. "The proprietor of the town in his plat, laid off, set aside and dedicated the four acres for the purposes of a public park. The statute declares that the plat, when recorded, shall vest the title of the property in the town 'in trust for the uses therein named, expressed, or intended, and

mit a change of use.[123] However, in a recent case in the supreme

for no other use or purpose.' * * * Nothing, I think, can be clearer than if a grant is made for a specific, limited and definite purpose, the subject of the grant cannot be used for another and a different purpose. The town took the premises as a trustee with the obligations attached, as well as the privileges conferred, and it was not competent for it to divert them to a use or purpose foreign to the expressed intention of the grantor."

Regents for Normal School Dist. No. 3 v. Painter, 102 Mo. 464, 14 S. W. 938, 10 L. R. A. 493. Land was conveyed to the inhabitants of a town for the establishment of a public school to remain forever affected and appropriated to the public use intended. The town proposed to locate a state normal school thereon, applicants for which were required to declare intention to teach in state public schools. Held, a perversion of use. City of Bayonne v. Ford, 43 N. J. Law, 292; Atlantic City v. Atlantic City Steel Pier Co., 62 N. J. Eq. 139, 49 Atl. 822; Village of Watertown v. Cowen, 4 Paige (N. Y.) 510; Cady v. Conger, 19 N. Y. 256; People v. Vanderbilt, 38 Barb. (N. Y.) 282; Armstrong v. Village of St. Marys, 21 Ohio Circ. R. 16.

Church v. City of Portland, 18 Or. 73, 22 Pac. 528, 6 L. R. A. 259. By plat accepted by the city, tracts of land were dedicated as public squares and by the city planted with trees and improved as public parks and plazas. Subsequently, the city attempted to build a city hall and jail on the land, but was enjoined at the suit of a property owner. Rees v. West Pa. Exposition Soc., 2 Pa. Co. Ct. R. 385; Pott v. School Directors of Pottsville, 42 Pa. 132; Clark v. City of Providence, 16 R. I. 337, 15 Atl. 763, 1 L. R. A. 725. A general assembly has power to authorize the discontinuance of a park, the fee of which is in the city, and the sale of the lands. City of Llano v. Llano County, 5 Tex. Civ. App. 132, 23 S. W. 1008; Harris County v. Taylor, 58 Tex. 690. But see Dickerson v. City of Detroit, 99 Mich. 498, 58 N. W. 645. Also note citing and reviewing cases in 31 Am. & Eng. Corp. Cas. 294.

[123] Young v. Mahoning County Com'rs, 51 Fed. 585. The rule also precludes the sale of land dedicated to a special use and the application of the proceeds to a similar use. Holmes v. Cleveland, C. & C. R. Co., 93 Fed. 100. When a city makes use of a street by express legislative authority, the use will be presumed to be a public one. Holladay v. City & County of San Francisco, 124 Cal. 352, 57 Pac. 146; Cummings v. City of St. Louis, 90 Mo. 259, 2 S. W. 130; Murray v. City of Butte, 7 Mont. 61, 14 Pac. 656, considering Rev. St. U. S. § 2477; Hanes v. West End Hotel & Land Co., 129 N. C. 311, 40 S. E. 114. A block designated on a plat as "hotel site" is not an appropriation of such land to this exclusive use. Com. v. Rush, 14 Pa. 186. Where there has been in laying out a town a dedication of land for "court house, jail and market, for places of public worship and for burying the dead," it cannot be sold for any other purpose.

Mahon v. Luzerne County, 197 Pa. 1, 46 Atl. 894. But see Bennett v. Chicago, M. & St. P. R. Co., 73 Fed. 696, where it is held that under a grant by the government of a strip of land running with the Miss-

court of the United States,[123a] it was held that where the United States has laid out a piece of public land in Chicago into streets and lots and public ground and recorded a plat thereof and has sold all the lots to individuals, its interest ceases and it cannot afterwards maintain a suit to restrain the diversion of such public ground from the purposes to which it was so donated to private uses but such public ground passed by the state law to the city. If the government charged with the duty of disposing of a tract of public land within a state chooses to proceed under the provisions of a particular statute of that state, the same legal effect should be given to its proceeding as in the case of an individual proprietor; the effect of the recording of the plat in this case was, therefore, to vest in the City of Chicago the legal title to the streets, alleys and public ground in Ft. Dearborn addition and after its execution and record and a sale of abutting property, the United States retained no interest, legal or equitable; that interest was as completely extinguished as if made by an unconditional conveyance and in the ordinary form. The United States possesses no jurisdiction to control or regulate within a state the execution of trusts or uses created for the benefit of the public or of particular communities or bodies therein. The jurisdiction in such cases is with the state or its subordinate agencies. But see the dissenting opinion of Justice Brewer and Brown in which it is said: "I agree that the only rights which the United States have are those which any other owner of real estate would have under a like dedication; but I think the law is that he who grants property to a trustee, to be held in trust for a specific purpose, retains such an interest as gives him a right to invoke the interposition of a court of equity to prevent the use of that property for any other purpose. Can it be that, if the government, believing that the Congressional Library has become too large for convenient use in this city, donates half of it to the city of Chicago, to be kept and maintained as a public library, that city can, after accepting the donation for the purposes named, give away the books to the various

issippi river for use as a way and for other public uses, the state of Iowa cannot itself or any of its subordinate agencies forbid the erection of a railway along the strip or impose burdens upon the proper use of the strip by requiring damages to be paid owners of abutting lots. The use of the strip for a railway is consistent with the purposes for which it was originally dedicated.

[123a] United States v. Illinois Cent. R. Co., 154 U. S. 225.

lawyers for their private libraries, and the government be powerless to restrain such disposition? Do the donors of libraries or the grantors of real estate in trust for specific purposes, though parting with the title, lose all right to invoke the aid of a court of equity to compel the use of their donations and grants for the purposes expressed in the gift or deed? I approve the opinion of the supreme court of Iowa, in the case of Warren v. Lyon City, 22 Iowa, 351, 355, 357. In that case the plaintiffs had years before platted certain land as a site for a city, and on the plat filed by them there was a dedication of a piece of ground as a 'public square.' After the city had been built up on that site, the authorities, for the purposes of gain, and under the pretended authority of an act of the legislature, attempted to subdivide the public square into lots and to lease them to individuals for private uses. A bill was filed by the dedicators to restrain such diversion of the use, and a decree in their favor was affirmed by the supreme court. I quote from the opinion: 'Nothing can be clearer than that if a grant is made for a specific, limited, and defined purpose, the subject of the grant cannot be used for another, and that the grantor retains still such an interest therein as entitles him in a court of equity to insist upon the execution of the trust as originally declared and accepted. Williams v. First Presbyterian Soc., 1 Ohio St. 478; Barclay v. Howell's Lessee, 6 Pet. (U. S.) 498; Webb v. Moler, 8 Ohio, 548; Brown v. Manning, 6 Ohio, 298, 27 Am. Dec. 255.'

"And again, after picturing the injustice which in many cases would result by permitting such a diversion, the court adds: 'Such a doctrine would enable the state at pleasure to trifle with the rights of individuals, and we can scarcely conceive of a doctrine which would more effectually check every disposition to give for public or charitable purposes. No, if it must be, that if the right vested in the city for a particular purpose the legislature cannot vest it for another; that when the dedicator declared his purpose by the plat, the land cannot be used or sold for another and different one; that while the corporation took the premises as trustee, it took them with the obligations attached as well as the rights conferred; that while the legislature might give the control and management of these squares and parks to the several municipal corporations, it cannot authorize their sale and use for a purpose foreign to the object of the grant.' "

Property dedicated to a public use cannot be occupied

or used by private individuals or for private purposes. The subject embraced in this section will be further considered in those sections discussing the control of a public corporation over its property since such control is restricted by the character of ownership. In some cases property is dedicated by an individual to a public corporation for a special use other than those of a highway and pleasure grounds. Grants of lands for sites of public buildings or educational institutions must remain devoted to the use named.[124] In these instances, the estate acquired by the public

[124] Carpenteria School Dist. v. Heath, 56 Cal. 478. McIntyre v. El Paso County Com'rs, 15 Colo. App. 78, 61 Pac. 237. A county cannot erect a county court house upon a block included within the limits of a city as platted and which is marked reserved for public buildings and park purposes. The words "public buildings" refer solely to city public buildings.

Youngerman v. Polk County Sup'rs, 110 Iowa, 731, 81 N. W. 166; Armstrong v. Portsmouth Blg. Co., 57 Kan. 62, 45 Pac. 67. Where property has been dedicated on a town plat to church purposes, a suit in equity to enjoin and restrain a change in the use of such lot from religious to secular purposes cannot be maintained by one who is not a member of the congregation holding services in the church erected upon such property.

Board of Education of Kansas City v. Kansas City, 62 Kan. 374, 63 Pac. 600. A tract of ground on a town plat marked "seminary place" will be presumed in the absence of sufficient evidence to the contrary, to have been dedicated to public school purposes. Campbell County Court v. Town of Newport, 51 Ky. (12 B. Mon.) 538; City of Maysville v. Wood, 19 Ky. L. R. 1292, 43 S. W. 403, 39 L. R. A. 93. A square designated on a plat as "meeting house square" will be held dedicated to religious purposes.

Patrick v. Y. M. C. A. of Kalamazoo, 120 Mich. 185, 79 N. W. 208. The right to hold lands under a dedication to a special use cannot be transferred by the original grantee of this right to some other association or denomination. Sinclair v. Comstock, Harr. Ch. (Mich.) 404; Village of Weeping Water v. Reed, 21 Neb. 261, 31 N. W. 797; Potter v. Chapin 6 Paige (N. Y.) 639; Baird v. Rice, 63 Pa. 489; Mowry v. City of Providence, 10 R. I. 52; State v. Travis County, 85 Tex. 435, 21 S. W. 1029. Reversing 21 S. W. 119. The marking on the plat of a certain block as "court house" and "jail" operates as a dedication to the public of the land for the purpose of constructing and keeping on it the buildings named so long as it should be used for such purposes. That public corporation alone which should require and could construct such buildings will take the easement.

City of Llano v. Llano County, 5 Tex. Civ. App. 132, 23 S. W. 1008. A tract of land dedicated as a public square with a right reserved in the act to use it for court house purposes gives to the county no right to erect upon it a jail and a cess pool. City of Norfolk v. Nottingham, 96 Va. 34; Daniels v. Wil-

is limited. The owner donating property may also make reservations of mineral or other rights and they will be considered valid.[125] The rights of the public in property dedicated by whatever manner to a public use will also depend upon the title a public corporation obtains in the property thus dedicated. If the fee remain in the owner of the abutting property of which it is a part, subject only to the public easement, the public can acquire no title to minerals, wood, soil or gravel except as may be necessary to use in the improvement of the highway at that particular point,[126] though some authorities hold that such material may be used for the improvement of the highway at any point within a reasonable distance.[127] Where the public corporation acquires the fee to the property dedicated for a public use it will retain all of the rights which accompany that ownership in the state in question.[128] These questions will be further discussed under those sections relating to the power of a public corporation to improve its highways and other public property.

son, 27 Wis. 492. Where the words "reserved public square" were written upon a block in a record plat of the village, it may be shown that it was the purpose to dedicate this to one particular public use.

[125] Webb v. City of Demopolis, 95 Ala. 116, 21 L. R. A. 62; City of Dubuque v. Benson, 23 Iowa, 248; Snoddy v. Bolen, 122 Mo. 479, 24 S. W. 142, 24 L. R. A. 507; Vossen v. Dautel, 116 Mo. 379; State v. Paine Lumber Co., 84 Wis. 205.

[126] Smith v. City of Rome, 19 Ga. 89; West Covington v. Freking, 71 Ky. (8 Bush) 121; Bradley v. Pharr, 45 La. Ann. 426, 12 So. 618, 19 L. R. A. 647; Cuming v. Prang, 24 Mich. 514; Schurmeier v. St. Paul & P. R. Co., 10 Minn. 82 (Gil. 59); Rich v. City of Minneapolis, 37 Minn. 423, 35 N. W. 2; Baker v. Shephard, 24 N. H. 208; Gidney v. Earl, 12 Wend. (N. Y.) 98.

[127] Woodruff v. Neal, 28 Conn. 165; City of New Haven v. Sargent, 38 Conn. 50, but compare Peckham v. Town of Lebanon, 39 Conn. 231. There is an implied power vested in the public authorities to remove material from place to place on highways for purposes of construction, improvements or repair. Bundy v. Catto, 61 Ill. App. 209; Overman v. May, 35 Iowa, 89. Stone within the limits of a highway may be used in a reasonable and proper manner for the purpose of its repair but this will not authorize the municipal authorities to quary stone in the body of a river spanned by a bridge constituting the highway in question, to repair other streets. Shawnee County Com'rs v. Beckwith, 10 Kan. 603; Bissell v. Collins, 28 Mich. 277; Thom v. Dodge County, 64 Neb. 845, 90 N. W. 763.

[128] City of La Salle v. Matthiessen & Hegeler Zinc Co., 16 Ill. App. 69; Id., 117 Ill. 411.

Commencement of public use. In the dedication of property the rule holds that as it is primarily a gift, the donor has the privilege of determining when the dedication shall take effect and the rights of the public in its use of the property commence and, therefore, a dedication may be made in praesenti to be accepted or used by the public in the future.[129] It is not necessary to effect a common-law dedication that a public corporation should be in existence at the time of the dedication so long as one is subsequently organized. It is sufficient if property is offered, sold and bought with the understanding that designated portions are public parks or commons.[130] The public corporation upon its subsequent organization becomes the trustee of the public to the extent of the dedication and it is then estopped both by the original dedication and its own conduct from denying that the tracts are public tracts or grounds.[131]

[129] Hoyt v. Gleeson, 65 Fed. 685; City of Denver v. Clements, 3 Colo. 472; Waggeman v. Village of North Peoria, 160 Ill. 277, 43 N. E. 347. A dedication of land for a public highway may, prior to the corporate existence of a municipality vest in it on its organization. Marsh v. Village of Fairbury, 163 Ill. 401, 45 N. E. 236; Hommel v. Lewis, 23 Ky. L. R. A. 2298, 66 S. W. 1041; Neal v. Hopkins, 87 Md. 19; Creamer v. McCune, 7 Mo. App. 91; City of Llano v. Llano County, 5 Tex. Civ. App. 132, 23 S. W. 1008; Gillean v. City of Frost, 25 Tex. Civ. App. 371, 61 S. W. 345.

[130] United States v. City of Chicago, 7 How. (U. S.) 185; United States v. Illinois Cent. R. Co., Fed. Cas. No. 15,437; Stone v. Brooks, 35 Cal. 501; Conkling v. Village of Mackinaw City, 120 Mich. 67, 79 N. W. 6. Lands were platted and portions designated as "Public Park." Copies of the maps were circulated and lots sold. It was said in a learned opinion: "If, however, there was not a valid statutory dedication, then I think the plat may operate as a common-law dedication, in which case the fee of the land would remain in the proprietors, but the use for the purposes designated would be in the public of the locality indicated. But there must be an acceptance by the public before the dedication would take effect. If in a village which is incorporated, and has a legal existence as a municipal corporation, the acceptance must be by the public authorities of such village. If, however, the public of the locality is not incorporated as a city or village, then I think the acceptance may be shown by acts in pais of the people of the locality." Jersey City v. Morris Canal & Banking Co., 12 N. J. Eq. (1 Beasl.) 553.

[131] City of Cincinnati v. White's Lessee, 6 Pet. (U. S.) 431; City of New Orleans v. United States, 10 Pet. (U. S.) 662; Waggeman v. Village of North Peoria, 160 Ill. 277. Here it was said: "It is wholly immaterial that the village of North Peoria had not been organized at the time of the dedication. If there is a common-law dedication of a public

§ 734. Title to alluvium and accretions.

The title to lands bordering on navigable waters when derived from the general government stops at the margin,[132] the public securing no title to lands under water. In a recent case in the supreme court of the United States[133] it was held that under the riparian laws of New Jersey, lands below high-water mark constituting the shores and submerged lands of the navigable waters of the state was the property of the state as sovereign and that its title and interest in such shore lands was a distinct and separate estate to be dealt with and disposed of in accordance with the terms of state statutes either by a sale to the riparian owner or to a stranger, who, succeeding to the state's title, has no relation to the land of the adjacent riparian owner except that of a common boundary. The court further held that under such a grant the land conveyed was held by the grantee on the same terms on which all other lands are held by private persons under absolute title and that every previous right of the state, whether proprietary or sovereign, was transferred or extinguished except such sovereign rights as the state could lawfully exercise over all other private property. That under such a grant the grantee had rightful and exclusive possession of the premises conveyed against

highway or street to public use prior to the existence of a municipal corporation, then, upon such corporation coming into being, the use of the highway or street, in trust for the public, at once vests in it." McDonald v. Stark, 176 Ill. 456; City of Sullivan v. Tichenor, 179 Ill. 97; Evansville & T. H. R. Co. v. State, 149 Ind. 276, 49 N. E. 2; Conkling v. Village of Mackinaw City, 120 Mich. 67, 79 N. W. 6; Bates v. City of Beloit, 103 Wis. 90, 78 N. W. 1102.

[132] City of Mobile v. Emanuel, 1 How. (U. S.) 99; Pollard's Lessee v. Files, 2 How. (U. S.) 591; Yates v. Milwaukee, 77 U. S. (10 Wall.) 497; Seabury v. Field, 1 McAllister, 1, Fed. Cas. No. 12,574; Friedman v. Goodwin, 1 McAllister, 142, Fed. Cas. No. 5,119; Walker v. Marks, 2 Sawyer, 152 Fed. Cas. No. 17,078. The history of the title of San Francisco to the tide lands or lands between high and low water mark in the bay of San Francisco reviewed. Harris v. McGovern, 2 Sawyer, 515, Fed. Cas. No. 6,125; Wood v. City of San Francisco, 4 Cal. 190; Ruge v. Apalachicola Oyster Canning & Fish Co., 25 Fla. 656, 6 So. 489; Allen v. Munn, 55 Ill. 486; Furman v. City of New York, 10 N. Y. 567; Dry Dock, E. B. & B. Co. v. New York & H. R. Co., 30 How. Pr. (N. Y.) 39. But see Holmes v. Cleveland, C. & C. R. Co., 93 Fed. 100.

[133] City of Hoboken v. Pennsylvania R. Co., 124 U. S. 656; Florida Southern R. Co. v. Brown, 23 Fla. 104, 1 So. 512; Cincinnati & G. R. Co. v. Mims, 71 Ga. 240.

an adverse claim to an easement or right of way upon and over them even against a municipality whose claim was based upon an original dedication of streets to high-water mark.

Under ordinary circumstances where land dedicated to a public use is bounded by a stream, the rights and privileges of the public as a riparian owner are the same as those of a private individual and it acquires the same title in alluvial accretions made by the changes in the shifting of the stream which constitutes the boundary of its possessions as in the property already held.[134]

§ 735. Acceptance of lands dedicated necessary.

As already stated, in order to effect a dedication of lands to a public use, not only must the intent of the owner to dedicate property appear by acts or words showing it conclusively and clearly,[135] but there must also be on the part of the public authorities an acceptance of the grant.[136] This is held necessary not

[134] Davenport & R. I. Bridge R. Terminal Co. v. Johnson, 188 Ill. 472, 59 N. E. 497.

[135] See section 728, ante.

[136] Arkansas River Packet Co. v. Sorrels, 50 Ark. 466; Stallard v. Cushing, 76 Cal. 472, 18 Pac. 427; Stone v. Brooks, 35 Cal. 489. Land dedicated to a public use as a street under the Street Act of 1862, p. 391, §§ 1 and 3, becomes such without the formal acceptance of the proper authorities. People v. Williams, 64 Cal. 498. Before acceptance, a proprietor of land may recall his offer of dedication. City of Anaheim v. Langenberger, 134 Cal. 608, 66 Pac. 855; Hayward v. Manzer, 70 Cal. 476; Taft v. Tarpey, 125 Cal. 376; City & County of San Francisco v. Sharp, 125 Cal. 534; Trine v. City of Pueblo, 21 Colo. 102, 39 Pac. 330; New York, N. H. & H. R. Co. v. City of New Haven, 46 Conn. 257; Curtiss v. Hoyt, 19 Conn. 154; City of Chicago v. Gosselin, 4 Ill. App. 570; O'Connell v. Bowman, 45 Ill. App. 654; Town of Dayton v. Town of Rutland, 84 Ill. 279; Lee v. Town of Mound Station, 118 Ill. 304; Hamilton v. Chicago, B. & Q. R. Co., 124 Ill. 235, 15 N. E. 854; Jordan v. City of Chenoa, 166 Ill. 530, 47 N. E. 191; Westfall v. Hunt, 8 Ind. 174. A lot is not to be considered public property merely because the owner on a plat pleases to name it "public square," the mere offer to dedicate does not create a right unless accepted. Lightcap v. Town of North Judson, 154 Ind. 43, 55 N. E. 952; City of Huntington v. Townsend, 29 Ind. App. 269, 63 N. E. 36; Spurrier v. Bland, 20 Ky. L. R. 1340, 49 S. W. 467; Johnson v. City of Burlington, 95 Iowa, 197, 63 N. W. 694; Incorporated Town of Cambridge v. Cook, 97 Iowa, 599, 66 N. W. 884; Burlington, C. R. & N. R. Co. v. City of Columbus Junction, 104 Iowa, 110, 73 N. W. 501. Iowa Code of 1873, § 527, in respect to the acceptance by special ordinance of streets dedicated to a public use does not apply to towns. Uptagraff v. Smith, 106

only on account of the legal nature of the transaction, but also because through the legal establishment of a highway, boulevard or pleasure ground, a duty is imposed upon a public corporation to improve and care for the property to the extent rendered necessary by the frequency of its use. The performance of this duty requires the expenditure of public funds and it may become, because of this, a burden upon the community and one which should not at least be created without its consent.[137] The further duty is imposed on municipal corporations proper to maintain in a rea-

Iowa, 385, 76 N. W. 733; City of Osage City v. Larkin, 40 Kan. 206, 19 Pac. 658, 2 L. R. A. 56. The dedication to the public of the alleys of a city require no formal action by the city. Wilkins v. Barnes, 79 Ky. 323; David v. Municipality No. 2, 14 La. Ann. 872; Muzzey v. Davis, 54 Me. 361; Slater v. Gunn, 170 Mass. 509, 49 N. E. 1017, 41 L. R. A. 268; Moffatt v. Kenny, 174 Mass. 311, 54 N. E. 850. The acceptance of a street dedicated to a public use under Pub. St. c. 49, § 94, cannot be established by evidence of public use alone on the failure to lay out a street as required by statute. Attorney General v. Tarr, 148 Mass. 309, 19 N. E. 358, 2 L. R. A. 87; Nichols v. New England Furniture Co., 100 Mich. 230; Baker v. City of St. Paul, 8 Minn. 491 (Gil. 436). Where a plat is executed and recorded in conformity with the statute, no formal acceptance by the public is necessary. De Mers v. Daniels, 39 Minn. 158; Buschmann v. City of St. Louis, 121 Mo. 523; Warren v. Brown, 31 Met. 8, 47 N. W. 633; Close v. Swanson, 64 Neb. 389, 89 N. W. 1043; Beasley v. Town of Belvidere, 59 N. J. Law, 408, 35 Atl. 797; Booraem v. North Hudson County R. Co., 39 N. J. Eq. 465; Pennsylvania R. Co. v. Ayres, 50 N. J. Law, 660; Niagara Falls Suspension Bridge Co. v. Bachman, 66 N. Y. 261; Meier v. Portland C. R. Co., 16 Or. 500, 1 L. R. A. 856; Ex parte Pittsburgh Alley, 104 Pa. 622; Remington v. Millerd, 1 R. I. 93; Gardiner v. Town Council of Johnston, 16 R. I. 94, 12 Atl. 888; Stone v. Langworthy, 20 R. I. 602, 40 Atl. 832; Chafee v. City of Aiken, 57 S. C. 507, 37 S. E. 800. No formal acceptance of a street dedicated to a public use is necessary. Mathis v. Parham, 1 Tenn. Ch. 533; French v. Scheuber, 6 Tex. Civ. App. 617, 26 S. W. 133; City of Galveston v. Williams, 69 Tex. 449, 6 S. W. 860; Jefferson County v. Plummer (Tex. Civ. App.) 53 S. W. 711; Gilder v. City of Brenham, 67 Tex. 345, 3 S. W. 309; Frederick County Com'rs v. City of Winchester, 84 Va. 467.

[137] Pennsylvania Co. v. Plotz, 125 Ind. 26; Burlington, C. R. & N. R. Co. v. City of Columbus Junction, 104 Iowa, 110, 73 N. W. 501; Incorporated Town of Cambridge v. Cook, 97 Iowa, 599; Bryant v. Inhabitants of Biddeford, 39 Me. 193; City of Detroit v. Detroit & M. R. Co., 23 Mich. 173; Alton v. Meenwenberg, 108 Mich. 629, 66 N. W. 571; Moore v. City of Cape Girardeau, 103 Mo. 470, 15 S. W. 755; Downend v. Kansas City, 71 Mo. App. 529; Beasley v. Town of Belvidere, 59 N. J. Law, 408; Rozell v. Andrews, 103 N. Y. 150.

sonably safe condition the highways and public places within its limits, for public use or travel by those rightfully and lawfully using these places for a proper and public purpose.[138] A failure to perform this duty will result in a liability to those who may be injured by reason of such a failure and this consideration is also a reason for the maintenance of the principle that an acceptance of lands dedicated is necessary in order that the corporation may be able to protect itself against this liability[139] by controlling and limiting the extent of its public ways.

§ 736. How shown.

An acceptance of property dedicated to a public use may be either express or implied. Express, when by some instrument in writing executed by the proper authorities an acknowledgment of the dedication and the acceptance of it on behalf of the public for the public uses named in the dedication is made.[140] An implied acceptance is shown either by public user for that length of time from which will be presumed a proper acceptance[141] or through

[138] Beach v. Frankenberger, 4 W. Va. 712. See post, sections on municipal liability for torts.

[139] City of Rock Island v. Starkey, 189 Ill. 515, 59 N. E. 971; Manderschid v. City of Dubuque, 29 Iowa, 73; City of Louisville v. Snow's Adm'r, 21 Ky. L. R. 1268, 54 S. W. 860; Kennedy v. City of Cumberland, 65 Md. 514, 9 Atl. 234. A resolution to repair a street sometime after an accident caused by its defective condition creates no liability where, prior to the accident, it had never been accepted as a public street. Guild v. Shed, 150 Mass. 255, 22 N. E. 896, construing Pub. St. Mass. c. 49, § 94, as a re-enactment of statutes of 1846, c. 203, § 1.

[140] City of Little Rock v. Wright, 58 Ark. 142, 23 S. W. 876; Parsons v. Atlanta University, 44 Ga. 529; City of Keokuk v. Cosgrove, 116 Iowa, 189, 89 N. W. 983. The acceptance of a street or alley as provided by Iowa Code of 1873, § 527, is not exclusive. Central R. of N. J. v. City of Elizabeth, 35 N. J. Law, 359; Wisby v. Bonte, 19 Ohio St. 238; Albert v. Gulf, C. & S. F. R. Co., 2 Tex. Civ. App. 664, 21 S. W. 779. An instruction to the jury on the question of acceptance is erroneous which requires proof of affirmative action on the part of the city authorities. An acceptance may be either express or implied. Reilly v. City of Racine, 51 Wis. 526. When the state by authority of law makes a city plat of its own land and dedicates to a public use the streets and other public grounds marked thereon, this act is in itself an acceptance. See, also, authorities cited under last note in this section.

[141] London & San Francisco Bank v. City of Oakland (C. C. A.) 90 Fed. 691. Affirming 86 Fed. 30; Stewart v. Conley, 122 Ala. 179; Los Angeles Cemetery Ass'n v. City of Los Angeles (Cal.) 32 Pac. 240;

the improvement and repair of the property dedicated by duly authorized authorities.[142] The opening or grading of a street,[143]

Hall v. Kauffman, 106 Cal. 451, 39 Pac. 756; People v. Davidson, 79 Cal. 166, 21 Pac. 538; City of Eureka v. Croghan, 81 Cal. 524, 22 Pac. 693; Id., 19 Pac. 485; Logan v. Rose, 88 Cal. 263, 26 Pac. 106; City of Sacramento v. Clunie, 120 Cal. 29; Green v. Canaan, 29 Conn. 157; Guthrie v. Town of New Haven, 31 Conn. 308. The law presumes an acceptance by the public where a highway is shown to be a common convenience and necessity and therefore beneficial. Town of Lake View v. Le Bahn, 120 Ill. 92, 9 N. E. 269; City of Waterloo v. Union Mill Co., 72 Iowa, 437, 34 N. W. 197; State v. Birmingham, 74 Iowa, 407, 38 N. W. 121; Abbott v. Inhabitants of Cottage City, 143 Mass. 521; Moffatt v. Kenny, 174 Mass. 311.

City of Detroit v. Detroit & M. R. Co., 23 Mich. 173. User by the public so far as it relates to the question of acceptance of a dedication of public highways is but evidence tending to prove acceptance and does not of itself constitute an acceptance. Kennedy v. Le Van, 23 Minn. 513; Klenk v. Town of Walnut Lake, 51 Minn. 381, 53 N. W. 703; Holdane v. Trustees of Cold Spring, 23 Barb. (N. Y.) 103; Requa v. City of Rochester, 45 N. Y. 129; Com. v. Moorehead, 118 Pa. 344, 12 Atl. 424; City of Scranton v. Scranton Steel Co., 154 Pa. 171, 26 Atl. 1; Hill v. Hoffman (Tenn. Ch. App.) 58 S. W. 929; Bellar v. City of Beaumont (Tex. Civ. App.) 55 S. W. 410; Shanks v. Whitney, 66 Vt. 405, 29 Atl. 367; Jarvis v. Town of Grafton, 44 W. Va. 453; Buchanan v. Curtis, 25 Wis. 99. But see Com. v. Barker, 140 Pa. 189, 21 Atl. 243.

[142] Steele v. Sullivan, 70 Ala. 589; Stewart v. Conley, 122 Ala. 179, 27 So. 303; Evans v. Blankenship, 4 Ariz. 307, 39 Pac. 812; City of Durango v. Davis, 13 Colo. App. 285, 57 Pac. 733; Forbes v. Balenseifer, 74 Ill. 183; City of Rock Island v. Starkey, 91 Ill. App. 592; Fairbury Union A. Board v. Holly, 169 Ill. 9, 48 N. E. 149; Town of Fowler v. Linquist, 138 Ind. 566, 37 N. E. 133; Evansville & T. H. R. Co. v. State, 149 Ind. 276, 49 N. E. 2; Marratt v. Deihl, 37 Iowa, 250; Devoe v. Smeltzer, 86 Iowa, 385, 53 N. W. 287; Drury v. Inhabitants of Worcester, 38 Mass. (21 Pick.) 44; Nichols v. New England Furniture Co., 100 Mich. 230, 59 N. W. 155; Bates v. City of Beloit, 103 Wis. 90, 78 N. W. 1102; Conkling v. Mackinaw City, 120 Mich. 67, 79 N. W. 6; Shartle v. City of Minneapolis, 17 Minn. 308 (Gil. 284); State v. Walters, 69 Mo. 463; Du Bois Cemetery Co. v. Griffin, 165 Pa. 81, 30 Atl. 840; Remington v. Millerd, 1 R. I. 93. The repairs must not only be made at the expense of the public authorities but must be ordered and made by those legally competent to bind the corporation. But see Exterkamp v. Covington Harbor Co., 20 Ky. L. R. 966, 47 S. W. 1086.

[143] Hall v. Kauffman, 106 Cal. 451; Town of Fowler v. Linquist, 138 Ind. 566; Kaime v. Harty, 73 Mo. 316; Smith v. City of Buffalo, 90 Hun, 118, 35 N. Y. Supp. 635; Orrick v. City of Ft. Worth (Tex. Civ. App.) 32 S. W. 443; City of Dallas v. Gibbs, 27 Tex. Civ. App. 275, 65 S. W. 81.

the construction of sewers or sidewalks [144] or the expenditure of public moneys duly voted for this purpose by the public authorities will constitute an acceptance.[145] An implied acceptance of the offer to dedicate will also be shown by refraining from the levy of taxes upon the land in question [146] and affirmative claims of its character as public property by public authorities,[147] such as the bringing of an action of ejectment or suit to quiet title.[148] Resolutions or ordinances passed by public legislative bodies referring to lands dedicated and recognizing them as public property will be considered evidence of an acceptance.[149]

[144] In re Hunter, 163 N. Y. 542, 57 N. E. 735. Rehearing denied 164 N. Y. 365, 58 N. E. 288; City of Philadelphia v. Thomas' Heirs, 152 Pa. 494, 25 Atl. 873. But see City of San Antonio v. Sullivan, 4 Tex. Civ. App. 451, 23 S. W. 307.

[145] Waring v. City of Little Rock, 62 Ark. 408; State v. Eisele, 37 Minn. 256, 33 N. W. 785; Rosenberger v. Miller, 61 Mo. App. 422; Stapleton v. City of Newburgh, 9 App. Div. 39, 41 N. Y. Supp. 96.

[146] City of Sacramento v. Clunie, 120 Cal. 29, 52 Pac. 44. The converse of the principle is also true and the fact that taxes were levied upon land is evidence of an absence of both dedication and acceptance. Town of Lake View v. Le Bahn, 120 Ill. 92, 9 N. E. 269; City of Chicago v. Borden, 190 Ill. 430, 60 N. E. 915. The failure of public officials and assessors to levy taxes upon a private alley will not change its character into a public way and the owner cannot be deprived of his title in this manner. W. N. Eisendrath & Co. v. City of Chicago, 192 Ill. 320, 61 N. E. 419; City of Keokuk v. Cosgrove, 116 Iowa, 189, 89 N. W. 983.

[147] Steele v. Sullivan, 70 Ala. 589; Palmer v. City of Clinton, 52 Ill. App. 67; Cochran v. Town of Shepherdsville, 19 Ky. L. R. 250, 43 S. W. 250. An implied acceptance of dedication cannot be inferred from a mere extension of town limits. City of Louisville v. Snow's Adm'r, 21 Ky. L. R. 1268, 54 S. W. 860; People v. Underhill, 144 N. Y. 316, 39 N. E. 333, reversing 69 Hun, 86, 23 N. Y. Supp. 388. An acceptance of a dedication is not shown by the fact that along a portion of the street water pipes and sidewalks were laid.

[148] City of Anaheim v. Langenberger, 134 Cal. 121, 66 Pac. 855. An action to establish title to land dedicated nearly twenty years before will not constitute an acceptance. Cass County Sup'rs v. Banks, 44 Mich. 467. The bringing of an action of ejectment for land offered by the owners nearly fifty years before and never accepted by the public authorities will not be considered an acceptance of the offer. City of Atlantic City v. Groff, 64 N. J. Law, 527, 45 Atl. 916, citing New Jersey cases. Inhabitants of Hohokus Tp. v. Erie R. Co., 65 N. J. Law, 353, 47 Atl. 566; Atlantic City v. Snee, 68 N. J. Law, 39, 52 Atl. 372.

[149] City & County of San Francisco v. Sharp, 125 Cal. 534, 58 Pac. 173; Hoadley v. City & County of San Francisco, 70 Cal. 320, 12 Pac. 125; City of Eureka v. Armstrong,

§ 737. Time of acceptance.

It is not necessary to constitute a valid acceptance that it be made immediately following the act of the owner indicating his intent to dedicate.[150] If the grant is accepted at any time before the dedication is withdrawn, this is usually held sufficient,[151] al-

83 Cal. 623, 23 Pac. 1085, affirming 83 Cal. 623, 22 Pac. 928; City of Rock Island v. Starkey, 91 Ill. App. 592; Shirk v. City of Chicago, 195 Ill. 298, 63 N. E. 193; Laughlin v. City of Washington, 63 Iowa, 652. Under Iowa Code 1873, § 527, which provides that before a dedicated street or alley shall be deemed public, the city council must accept and confirm the dedication by special ordinance. A mere adoption of the report of a committee recommending an acceptance and confirmation is not sufficient.

Scheafer v. Selvage, 19 Ky. L. R. 797, 41 S. W. 569; Michigan Cent. R. Co. v. City of Bay City, 129 Mich. 264, 88 N. W. 638. A resolution authorizing the construction of a railroad over land dedicated as a street constitutes an acceptance by the public authorities of an offer to dedicate. Baker v. Vanderburg, 99 Mo. 378; State v. City of Bayonne, 53 N. J. Law, 299, 20 Atl. 69; City of Buffalo v. Delaware, L. & W. R. Co., 39 N. Y. Supp. 4; City of Dallas v. Gibbs, 27 Tex. Civ. App. 275, 65 S. W. 81. But see

People v. Reed, 81 Cal. 70, 22 Pac. 474. An ordinance is insufficient as an acceptance which, without referring to the owner of land or the alleged dedication declares that certain land "be and the same is hereby dedicated and set apart to public use as a street." City of Chicago v. Drexel, 141 Ill. 89, 30 N. E. 774; Barker v. Wyandotte County Com'rs, 45 Kan. 681; Thompson v. Ocean City R. Co. (N. J. Eq.) 37 Atl. 129; City of Baltimore v. Broumel, 86 Md. 153, 37 Atl. 648; Valentine v. City of Hagerstown, 86 Md. 486, 38 Atl. 831; Depriest v. Jones (Va.) 21 S. E. 478; Jarvis v. Town of Grafton, 44 W. Va. 453, 30 S. E. 178.

[150] London & San Francisco Bank v. City of Oakland, 33 C. C. A. 237, 90 Fed. 691; Sarver v. Chicago, B. & Q. R. Co., 104 Iowa, 59; Burlington, C. R. N. R. Co. v. City of Columbus Junction, 104 Iowa, 110; Uptagraff v. Smith, 106 Iowa, 385; City of Baltimore v. Frick, 82 Md. 77, 33 Atl. 435; Valentine v. City of Hagerstown, 86 Md. 486; Slater v. Gunn, 170 Mass. 509, 41 L. R. A. 268; Methodist Episcopal Church v. City of Hoboken, 33 N. J. Law, 13; City of Niagara Falls v. New York Cent. & H. R. R. Co., 41 App. Div. 93, 58 N. Y. Supp. 619; Williams v. City of Galveston (Tex. Civ. App.) 58 S. W. 551.

[151] John Mouat Lumber Co. v. City of Denver, 21 Colo. 1, 40 Pac. 237; White v. Smith, 37 Mich. 291; Sanford v. City of Meridian, 52 Miss. 383. A revocation of an offer to dedicate will be presumed where, before an acceptance, a plat establishing streets at a certain width is withdrawn and another plat substituted upon which the streets are of a less width. Price v. Town of Breckenridge, 92 Mo. 378, 5 S. W. 20; Lee v. Village of Sandy Hill, 40 N. Y. 442; Eckerson v. Village of Haverstraw, 162 N. Y. 652, 57 N.

though some authorities hold that an acceptance of a dedication of lands for a street by the public authorities must take place within a reasonable time.[152] The acceptance of a part of property dedicated by a plat will be considered as an acceptance of the whole.[153]

Time of user. Neither is it essential to a valid dedication that the user of the property appropriated be immediate upon the dedication or acceptance.[154] Public necessity will determine the time and extent of use.[155] The reasonableness of this principle is established through well known conditions which exist in every town or city. Streets, public ways and pleasure grounds, are constantly dedicated far in advance of the existence of population necessary to their public use even to a slight extent.

E. 1109; Iselin v. Starin, 144 N. Y. 453, 39 N. E. 488; State v. Fisher, 117 N. C. 733, 23 S. E. 158; Simmons v. Cornell, 1 R. I. 519; City of Ashland v. Chicago & N. W. R. Co., 105 Wis. 398, 80 N. W. 1101.

[152] Forsyth v. Dunnagan, 94 Cal. 438, 29 Pac. 770; Guthrie v. Town of New Haven, 31 Conn. 308; Schmitz v. Village of Germantown, 31 Ill. App. 284; Sarvis v. Caster, 116 Iowa, 707, 89 N. W. 84. The conditions and circumstances in which particular cases will determine what is a reasonable time for acceptance. Field v. Village of Manchester, 32 Mich. 279; Village of Grandville v. Jenison, 84 Mich. 54, 47 N. W. 600; Chaffee v. City of Aiken, 57 S. C. 507, 35 S. E. 800.

[153] Town of Derby v. Alling, 40 Conn. 410; Attorney General v. Tarr, 148 Mass. 309, 19 N. E. 358, 2 L. R. A. 87. The acceptance of the whole of land dedicated to a public use as a landing place will be presumed from the actual use of portions of it. Raynor v. Syracuse University, 35 Misc. 83, 71 N. Y. Supp. 293. But see Jordan v. City of Chenoa, 166 Ill. 530, 47 N. E. 191; Com. v. Royce, 152 Pa. 88, 25 Atl. 162, where it is held that an acceptance of a street through its improvements is only an acceptance of so much as is actually opened and used.

The opening and working of a part of a street is considered evidence of an acceptance of the entire street. See the following: City of Racine v. Chicago & N. W. R. Co., 92 Wis. 118, 65 N. W. 857, citing many Wisconsin cases, and City of Ashland v. Chicago & N. W. R. Co., 105 Wis. 398, 80 N. W. 1101.

[154] Village of Augusta v. Tyner, 197 Ill. 242, 64 N. E. 378; Attorney General v. Tarr, 148 Mass. 309, 19 N. E. 358, 2 L. R. A. 87.

[155] London & San Francisco Bank v. City of Oakland (C. C. A.) 90 Fed. 691, affirming 86 Fed. 30; Taraldson v. Town of Lime Springs, 92 Iowa, 187, 60 N. W. 658; Village of Grandville v. Jenison, 86 Mich. 567, 49 N. W. 544; Downend v. Kansas City, 71 Mo. App. 529; Methodist Episcopal Church v. City of Hoboken, 33 N. J. Law, 13; Reilly v. City of Racine, 51 Wis. 530.

§ 738. Acceptance usually a question for a jury.

It has already been stated that the question of the owners intent to dedicate is one for a jury to determine,[156] and the same rule holds with reference to the acceptance of a grant; it is for a jury to determine from all the conditions and circumstances surrounding each particular case the question of acceptance.[157] In some instances it has been held, however, to be a mixed question of law and fact[158] and it is clearly a question of law where the facts are undisputed.[159]

§ 739. Acquirement of property by prescription.

Rights may be acquired through the operation of the statutes of limitation as they exist in the different states and a public corporation may, in the same manner as an individual, acquire for its own proper use as an agency of the public, property through the operation of the doctrine of prescription and by virtue of such statutes. The continuous and adverse possession of property for the statutory period presupposes and assumes the existence prior to that time of an affirmative record granting the rights or title in question. The property usually obtained by a public corporation through prescription is a highway or tract of land used either as a common or pleasure ground or as the site for the erection of public buildings. Land devoted to these purposes may be acquired either through the operation of some statute providing the manner in which private property may be set aside for a public use,[160] through what is called a common-law dedication, where the grant is implied through the acts of the owner affirmative or negative in their character,[161] or by prescription.[162] Whether a high-

[156] See § 728, ante.

[157] Hartford v. New York & N. E. R. Co., 59 Conn. 250, 22 Atl. 37; Grube v. Nichols, 36 Ill. 92; Flack v. Village of Green Island, 122 N. Y. 107.

[158] Downend v. Kansas City, 71 Mo. App. 529.

[159] Kennedy v. City of Cumberland, 65 Md. 514, 9 Atl. 234.

[160] See § 724, ante.

[161] Gwynn v. Homan, 15 Ind. 201; State v. Lane, 26 Iowa, 223. See § 710 et seq. ante.

[162] Ely v. Parsons, 55 Conn. 83, 10 Atl. 499; Daniels v. People, 21 439; Brown v. Hines, 16 Ind. App. 1, 44 N. E. 655; Blumenthal v. State, 21 Ind. App. 665, 51 N. E. 496; Greene County Com'rs v. Huff, 91 Ind. 333; Kyle v. Kosciusko County Com'rs, 94 Ind. 115; Taft v. Commonwealth, 158 Mass. 526, 32 N. E. 1046. If a small portion of the travel over a way claimed by prescription is public in its character, it will be sufficient.

Gould v. City of Boston, 120 Mass.

way is established by one or the other of these three methods, it is equally a public way. The law accords no preference in strength of title to either; nor are any of the methods exclusive ones.[163] The distinction between the establishment of a highway or public ground by what is termed statutory dedication, and prescription, is clearly understood. The difference between a dedication by common law and prescription is not so clear and is at times apparently confusing. The doctrine of prescription rests upon an open, notorious, exclusive and adverse possession and use under claim of right for the length of time prescribed by statute.[164] A common-law dedication is based upon the existence of an intent on the part of the owner to appropriate certain of his property to a public use, its acceptance by the public, and this intent and acceptance are not dependent in any measure upon the length of time which the property may have been used by the

300; Weld v. Brooks, 152 Mass. 297. A private way opened by individuals made through adverse use by the public becomes a public highway by prescription. Vier v. City of Detroit, 111 Mich. 646, 70 N. W. 139; Maus v. City of Springfield, 101 Mo. 613, 14 S. W. 630; Stephens v. Murray, 132 Mo. 468, 34 S. W. 56; City of Steubenville v. King, 23 Ohio St. 610; Hall v. City of Austin, 20 Tex. Civ. App. 59, 48 S. W. 53; Galveston, H. & S. A. R. Co. v. Baudat, 21 Tex. Civ. App. 236, 51 S. W. 541.

[163] Mosier v. Vincent, 34 Iowa, 478; Ball v. Cox, 29 W. Va. 407, 1 S. E. 673.

[164] Western R. of Ala. v. Alabama G. T. R. Co., 96 Ala. 272, 11 So. 483, 17 L. R. A. 474. Twenty years. City of New Haven v. New York, N. H. & H. R. Co., 72 Conn. 225, 44 Atl. 31. Forty years. Town of Lewiston v. Proctor, 27 Ill. 414. Twenty years. O'Connell v. Chicago Terminal & Transfer R. Co., 184 Ill. 308, 56 N. E. 355; State v. Welpton, 34 Iowa, 144. State v. Tucker, 36 Iowa, 485. To establish a highway by prescription there must be an open, uninterrupted use by the public under a claim of right for a period equal to that for the limitation of real actions.

Kelsey v. Furman, 36 Iowa, 614. A deviation in travel caused by an obstacle in a road originally established will, if continued in for the statutory period, create a prescriptive right. Ten years. McAllister v. Pickup, 84 Iowa, 65; Kentucky Cent. R. Co. v. City of Paris, 16 Ky. L. R. 170, 27 S. W. 84. Thirty-five years. Bassett v. Inhabitants of Harwich, 180 Mass. 585, 62 N. E. 974. Twenty years. Taft v. Commonwealth, 158 Mass. 526; Schroeder v. Village of Onekama, 95 Mich. 25; Elfelt v. Stillwater St. R. Co., 53 Minn. 68; Warren County v. Mastronardi, 76 Miss. 273; State v. Auchard, 22 Mont. 14; Bryant v. Town of Tamworth, 68 N. H. 483; State v. Wolf, 112 N. C. 889; State v. Lucas, 124 N. C. 804, 32 S. E. 553; Bayard v. Standard Oil Co., 38 Or. 438, 63 Pac. 614; Moore v. City of Waco, 85 Tex. 206.

public.[165] A recent text book[166] states, "prescription refers the right to the highway to the presumption that it was originally established pursuant to law by the proper authority, while a dedication refers it to a contract either express or implied. Dedication implies a conveyance and an acceptance, while prescription requires an unbroken possession or user under claim of right." In the case of a way by prescription, the presumption exists that it was at some anterior period laid out and established by competent authority. "The true basis of the claim is not a grant, but a record presumed to have been made according to law."

§ 740. Prescription; what necessary.

User is the essential element in the acquirement of a prescriptive right and questions naturally follow with respect to its length and character. The length of time necessary for the possession and use may be determined either by the general statutes of limitation respecting actions concerning real property,[167] or spe-

[165] Western R. of Ala. v. Alabama G. T. R. Co., 96 Ala. 272, 17 L. R. A. 474. See § 723 et seq., ante.

[166] Elliott, Roads & Streets (2d Ed.) § 172.

[167] Whaley v. Wilson, 120 Ala. 502; Howard v. State, 47 Ark. 431, 2 S. W. 331; Patton v. State, 50 Ark. 53, 6 S. W. 227; Schwerdtle v. Placer County, 108 Cal. 589, 41 Pac. 448. Thirty years. Starr v. People, 17 Colo. 458; Black v. O'Hara, 54 Conn. 17. Fifteen years. Shugart v. Halliday, 2 Ill. App. 45. Twenty years. Toof v. City of Decatur, 19 Ill. App. 204. Twenty-six years. City of Chicago v. Town of Wright, 69 Ill. 318. Twenty years. Hays v. State, 8 Ind. 425. Fifteen years. Hart v. Bloomfield Tp. Trustees, 15 Ind. 226. Twenty years. Louisville, N. A. & C. R. Co. v. Etzler, 3 Ind. App. 562, 30 N. E. 32; Blumenthal v. State, 21 Ind. App. 665, 51 N. E. 496. Twenty years. Cromer v. State, 21 Ind. App. 502, 52 N. E. 239. Twenty years. Waltman v. Rund, 109 Ind. 366. Twenty years. Bales v. Pidgeon, 129 Ind. 548, 29 N. E. 34. Fifty years. Keyes v. Tait, 19 Iowa, 123. Ten years. Casey v. Tama County, 75 Iowa, 655, 37 N. W. 138; McAllister v. Pickup, 84 Iowa, 65, 50 N. W. 556. Forty years. If a highway has been used under the proper conditions for a term equal to the period prescribed by the statute of limitations, a prescriptive right is acquired although the commencement of such use may have been permissive.

Oliphant v. Atchison County Com'rs, 18 Kan. 386. Five years. City of Topeka v. Cowee, 48 Kan. 345; Wickliffe v. Magruder, 12 Ky. L. R. 24, 13 S. W. 523; Witt v. Hughes, 23 Ky. L. R. 1836, 66 S. W. 281. Twenty years. State v. Bigelow, 34 Me. 243. Thirty years. Brock v. Chase, 39 Mo. 300. Thirty years. Hinks v. Hinks, 46 Me. 423. Forty years. Plumer v. Brown, 49 Mass. (8 Metc.) 578; White v. Inhabitants of Foxborough, 151 Mass.

cial and local statutes of limitations such as are found in Illinois,[168] Indiana,[169] Missouri,[170] Michigan,[171] California,[172] Minnesota,[173] New York,[174] North Dakota,[175] and Rhode Island,[176] which provide for the acquirement of a prescriptive right in a highway under the conditions named in some cases in less time than that which applies generally to actions in respect to real estate.

Though in Michigan it is held that user for ten years will not of itself make a road a public highway if proceedings have not been taken to establish it as such, the statute does not make a user for that length of time sufficient unless a road has been laid out.[177]

(a) Character of the use and possession. The character of the use or possession must be adverse and exclusive; that is, known to the owner and against his interest.[178] Prescriptive rights can never

28, 23 N. E. 652; Campau v. City of Detroit, 104 Mich. 560; McLemore v. Neley, 56 Mo. App. 556; Hill v. City of Sedalia, 64 Mo. App. 494; Longworth v. Sedevic, 165 Mo. 221, 65 S. W. 260. Fourteen years. State v. Wells, 70 Mo. 635. Ten years adverse occupancy of a road acquiesced in by the owner of the land vested in the public to an easement therein for highway purposes. State v. Proctor, 90 Mo. 334; Schaffer v. Stull, 32 Neb. 94; Langdon v. State, 23 Neb. 509, 37 N. W. 79. Ten years. City of Beatrice v. Black, 28 Neb. 263, 44 N. W. 189. Ten years. Lydick v. State, 61 Neb. 309, 85 N. W. 70; Haywood v. Charlestown, 34 N. H. 23. Twenty years. Campton's Petition, 41 N. H. 197. Twenty years. Ward v. Folly, 5 N. J. Law, 554. Forty years. Colden v. Thurbar, 2 Johns. (N. Y.) 424; Iselin v. Starin, 71 Hun, 164, 24 N. Y. Supp. 748. Fifty years. Devenpeck v. Lambert, 44 Barb. (N. Y.) 596. Twenty years. State v. Marble, 26 N. C. (4 Ired. Law) 318; State v. Wolf, 112 N. C. 889, 17 S. E. 528. A road is not made a public highway by mere user for the period of twenty years. Wabash R. Co. v. Defiance County, 52 Ohio St. 262; Com. v. Marshall, 137 Pa. 170, 20 Atl. 580. Forty years. Com. v. Cole, 26 Pa. 187. Thirty years. Pennsylvania R. Co. v. Greensburg, J. & P. St. R. Co., 176 Pa. 559, 36 L. R. A. 839; Rusterholtz v. New York, C. & St. L. R. Co., 191 Pa. 390, 43 Atl. 208; Heyward v. Chisolm, 11 Rich. Law (S. C.) 253; Hutto v. Tindall, 6 Rich. Law (S. C.) 396. Twenty years. Kirby v. Southern R. Co., 63 S. C. 494, 41 S. E. 765; Woolard v. Clymer (Tenn. Ch. App.) 35 S. W. 1086. Fifty years. Wilson v. Acree, 97 Tenn. 378, 37 S. W. 90; Galveston, H. & S. A. R. Co. v. Baudat, 21 Tex. Civ. App. 236, 51 S. W. 541. Forty years. Ward v. State, 42 Tex. Cr. R. 435, 60 S. W. 757. Fifteen years. Race v. State, 43 Tex. Cr. R. 438, 66 S. W. 560; Wilson v. Hull, 7 Utah, 90, 24 Pac. 799. Eighteen years. Smith v. Cornelius, 41 W. Va. 59, 23 S. E. 599, 30 L. R. A. 747. One hundred and nineteen years. Sturmer v. Randolph County Court, 42 W. Va. 724, 26 S. E. 523, 36 L. R. A. 300. Eighty years. City of Chippewa Falls v. Hopkins, 109 Wis. 611, 85 N. W. 553.

[168] Town of Canoe Creek v. McEniry, 23 Ill. App. 227. Twenty years. Elmira Highways Com'rs v. Osceola Highway Com'rs, 74 Ill. App. 185; Madison Tp. v. Gallagher, 159 Ill. 105, 42 N. E. 316. Twenty years.

[169] Louisville, N. A. & C. R. Co. v. Etzler, 3 Ind. App. 562, 30 N. E. 32; Brown v. Hines, 16 Ind. 1, 44 N. E. 655. Twenty years. Strong v. Makeever, 102 Ind. 578. Twenty years. Rev. St. Ind. 1881, § 5053; Burns' Rev. St. Ind. 1894, § 6762.

[170] State v. Scott, 27 Mo. App. 541. Ten years. State v. Davis, 27 Mo. App. 624. Ten years. State v. Bradley, 31 Mo. App. 308; State v. Warner, 51 Mo. App. 174. Ten years. State v. Wells, 70 Mo. 635; State v. Macy, 72 Mo. App. 427. Ten years. Zimmerman v. Snowden, 88 Mo. 218.

[171] Ellsworth v. Grand Rapids, 27 Mich. 250. Ten years. Village of Grandville v. Jenison, 86 Mich. 567, 49 N. W. 544, affirming 84 Mich. 54, 47 N. W. 600. Ten years. Campau v. City of Detroit, 104 Mich. 560, 62 N. W. 718; Alton v. Meenwenberg, 108 Mich. 629, 66 N. W. 571.

[172] Bequette v. Patterson, 104 Cal. 455, 37 Pac. 917; Bolger v. Foss, 65 Cal. 250. Five years. Patterson v. Munyan, 93 Cal. 128, 29 Pac. 250; Plummer v. Sheldon, 94 Cal. 533, 29 Pac. 947; Freshour v. Hihn, 99 Cal. 443, 34 Pac. 87; Cooper v. Monterey County, 104 Cal. 437, 38 Pac. 106. The act of March 30, 1874, repealed political code, § 2619, providing that all roads used as such for a period of five years became public highways.

[173] Elfelt v. Stillwater St. R. Co., 53 Minn. 68, 55 N. W. 116. Six years. Rogers v. Town of Aitkin, 77 Minn. 539, 80 N. W. 702. Laws of 1891, c. 21, p. 98, provide that user of the right of way of a railroad company of a highway shall not be lawfully constituted as such. Hansen v. Town of Verdi, 83 Minn. 44, 85 N. W. 906. Six years.

[174] Corbett v. City of Troy, 53 Hun, 228, 6 N. Y. Supp. 381; Alpaugh v. Bennett, 59 Hun, 45, 12 N. Y. Supp. 398; Zwack v. New York, L. E. & W. R. Co., 8 App. Div. 483, 40 N. Y. Supp. 821; James v. Sammis, 132 N. Y. 239, 30 N. E. 502, affirming 56 Hun, 647, 10 N. Y. Supp. 143.

[175] Walcott Tp. v. Skauge, 6 N. D. 382, 71 N. W. 544.

[176] Simmons v. City of Providence, 12 R. I. 8.

[177] Potter v. Safford, 50 Mich. 46.

[178] Waring v. City of Little Rock, 62 Ark. 408, 36 S. W. 24; Cooper v. Monterey County, 104 Cal. 437, 38 Pac. 106. Evidence of user alone will not justify a finding of a highway by prescription since such use may have been permissive. Green v. Stevens, 49 Ill. App. 24; Landers v. Town of Whitefield, 154 Ill. 630, 39 N. E. 656; Louisville, N. A. & C. R. Co. v. Miller, 12 Ind. App. 414, 40 N. E. 539; Baltimore & O. S. W. R. Co. v. City of Seymour, 154 Ind. 17, 55 N. E. 953; Daniels v. Chicago & N. W. R. Co., 35 Iowa, 129; State v. Mitchell, 58 Iowa, 567. A landowner, under the Iowa statute relative to adverse possession, must have express notice of the adverse use and this is not established by user alone.

State v. Teeters, 97 Iowa, 458, 66 N. W. 754. The fact that an owner of land lived thereon while a road was being used for thirteen years by the public and that he himself traveled the road is sufficient to prove knowledge on his part to warrant the establishment of a highway by prescription. Gray v. Haas, 98 Iowa, 502, 67 N. W. 394;

be acquired through what may be termed permissive use.[179] The authorities quite generally hold, and with reason, that ways by prescription cannot be acquired over wild or uncultivated land

Zigefoose v. Zigefoose, 69 Iowa, 391; Burlington, C. R. & N. R. Co. v. City of Columbus Junction, 104 Iowa, 110, 73 N. W. 501; Kentucky Cent. R. Co. v. City of Paris, 95 Ky. 627; State v. Kent County Com'rs, 83 Md. 377, 35 Atl. 62, 41 L. R. A. 268; Slater v. Gunn, 170 Mass. 509, 49 N. E. 1017, 33 L. R. A. 291. One hundred years. Bassett v. Inhabitants of Harwich, 180 Mass. 585, 63 N. E. 974; Hall v. City of St. Paul, 56 Minn. 428; Engle v. Hunt, 50 Neb. 358, 69 N. W. 970; Hill v. McGinnis, 64 Neb. 187, 89 N. W. 783; Barker v. Clark, 4 N. H. 380; Boyden v. Achenbach, 86 N. C. 397; Stewart v. Frink, 94 N. C. 487; Moore v. City of Waco, 85 Tex. 206, 20 S. W. 61; City of San Antonio v. Sullivan, 4 Tex. Civ. App. 451, 23 S. W. 307; Lutcher & Moore Lumber Co. v. Dyson (Tex. Civ. App.) 30 S. W. 61; State v. Joyce, 19 Wis. 90.

[179] District of Columbia v. Robinson, 180 U. S. 92. "The use must be adverse to the owner of the fee. The rule is correctly stated in 2 Greenleaf on Evidence. The learned author, after defining prescription and the period of possession which constituted it, and explaining the modern practice which has introduced 'a new kind of title, namely, the presumption of a grant, made and lost in modern times, which the jury are advised or directed to find, upon evidence of enjoyment for sufficient length of time,' says, 'in the United States grants have been very freely presumed, upon proof of an adverse, exclusive and uninterrupted enjoyment for twenty years.' And after stating the quality of presumption which arises, he continues: 'In order, however, that the enjoyment of an easement in another's land may be conclusive of the right, it must have been adverse, that is, under a claim of title, with the knowledge and acquiescence of the owner of the land, and uninterrupted; and the burden of proving this is on the party claiming the easement. If he leaves it doubtful, whether the enjoyment was adverse, known to the owner, and uninterrupted, it is not conclusive in his favor.' Under a different rule licenses would grow into grants of the fee and permissive occupations of land become conveyances of it. 'It would shock that sense of right,' Chief Justice Marshall said in Kirk v. Smith, 9 Wheat. (U. S.) 286, 6 Law Ed. 91, 'which must be felt equally by legislators and judges, if a possession which was permissive, and entirely consistent with the title of another, should silently bar that title.'" Jones v. Phillips, 59 Ark. 35, 26 S. W. 386; Huffman v. Hall, 102 Cal. 26, 36 Pac. 417; Green v. Bethea, 30 Ga. 896; City of Chicago v. Chicago, R. I. & P. R. Co., 152 Ill. 561, 38 N. E. 768; City of Chicago v. Borden, 190 Ill. 430, 60 N. E. 915; Baltimore & O. S. W. R. Co. v. City of Seymour, 154 Ind. 17, 55 N. W. 953; Breneman v. Burlington, C. R. & N. R. Co., 92 Iowa, 755; Sprow v. Boston & A. R. Co., 163 Mass. 330, 39 N. E. 1024; McCearley v. Lemennier, 40 La. Ann. 253, 3 So. 649. Thirty years. Cox v. Forrest, 60 Md. 74. The burden of proving

where the owner or those representing him are absent.[180] Occasional travel on a way which has never been laid out, recorded or worked as a public road, will not constitute it a public highway by prescription.[181]

(b) User must be continuous. The user or the possession must also be continuous for the length of time required either by gen-

a permissive use is on the owner of the land asserting permission. State v. Kent County Com'rs, 83 Md. 377, 33 L. R. A. 291; Durgin v. City of Lowell, 85 Mass. (3 Allen) 398. Twenty years. Fall River Print Works v. City of Fall River, 110 Mass. 428. Twenty years. Inhabitants of Deerfield v. Connecticut River R., 144 Mass. 325; Moffatt v. Kenny, 174 Mass. 311, 54 N. E. 850; Homer Highway Com'rs v. Riker, 79 Mich. 551, 44 N. W. 955; Leonard v. City of Detroit, 108 Mich. 599, 66 N. W. 488; Wood v. Hurd, 34 N. J. Law, 87. Twenty years. Riley v. Brodie, 22 Misc. 374, 50 N. Y. Supp. 347; Hamilton v. Village of Owego, 42 App. Div. 312, 59 N. Y. Supp. 103; State v. Gross, 119 N. C. 868, 26 S. E. 91; Walcott Tp. v. Skague, 6 N. D. 382; Lewis v. City of Portland, 25 Or. 133, 35 Pac. 256, 22 L. R. A. 736; Ferdinando v. City of Scranton, 190 Pa. 321, 42 Atl. 692; Miles v. Postal Tel. Cable Co., 55 S. C. 403, 33 S. E. 493; Whitesides v. Earles (Tenn Ch. App.) 61 S. W. 1038; Cunningham v. San Saba County, 11 Tex. Civ. App. 557; Worthington v. Wade, 82 Tex. 26, 17 S. W. 520; Smith v. State (Tex. Cr. R.) 40 S. W. 736; Megrath v. Nickerson, 24 Wash. 235, 64 Pac. 163; Shaver v. Edgell, 48 W. Va. 502, 37 S. E. 664; Dicken v. Liverpool Salt & Coal Co., 41 W. Va. 511; Frye v. Village of Highland, 109 Wis. 292, 85 N. W. 351.

[180] Friel v. People, 4 Colo. App. 259, 35 Pac. 676; Duncombe v. Powers, 75 Iowa, 185, 39 N. W. 261; State v. Horn, 35 Kan. 717, 12 Pac. 148; Graham v. Hartnett, 10 Neb. 517, 7 N. W. 280; Rathman v. Norenberg, 21 Neb. 467, 32 N. W. 305; Shaffer v. Stull, 32 Neb. 94, 48 N. W. 882; Engle v. Hunt, 50 Neb. 358, 69 N. W. 970; Harriman v. Howe, 78 Hun, 280, 28 N. Y. Supp. 858; People v. Osborn, 84 Hun, 441, 32 N. Y. Supp. 358; State v. Floyd, 39 S. C. 23, 17 S. E. 505; Cunningham v. San Saba County, 1 Tex. Civ. App. 480, 20 S. W. 941; Raven v. Travis County (Tex. Civ. App.) 53 S. W. 355. But the rule will not apply where the road is fenced on both sides. Marshfield Land & Lumber Co. v. John Week Lumber Co., 108 Wis. 268, 84 N. W. 434. But see Kirby v. Southern R. Co., 63 S. C. 494, 41 S. E. 765; Hall v. City of Austin, 20 Tex. Civ. App. 59, 48 S. W. 53.

[181] Coburn v. San Mateo County, 75 Fed. 520; Sutton v. Nicolaisen (Cal.) 44 Pac. 805; Breneman v. Burlington, C. R. & N. R. Co., 92 Iowa, 775, 60 N. W. 176; Fairchild v. Stewart, 117 Iowa, 734, 89 N. W. 1075; Schroeder v. Village of Onekama, 95 Mich. 25, 54 N. W. 642; State v. Auchard, 22 Mont. 14, 55 Pac. 361. Evidence that one person had traveled a road "off and on for several years" is not sufficient proof for the acquirement of a prescriptive right. But see Warren County Sup'rs v. Mastronardi, 76 Miss. 273, 24 So. 199. Ten years.

eral or special statutes.[182] Acts of the owner which interrupt possession and use by the public will destroy any claim for proportionate time and the prescription must commence anew.[183] They must, however, be done by the owner of the property or those acting in his behalf.[184]

[182] City of Chicago v. Howe, 169 Ill. 260, 48 N. E. 408. Twenty years. State v. Green, 41 Iowa, 693. Ten years. State v. Waterman, 79 Iowa, 360, 44 N. W. 677. Ten years. State v. Teeters, 97 Iowa, 458; Gray v. Haas, 98 Iowa, 502; Coakley v. Boston & M. R. Co., 159 Mass. 32, 33 N. E. 930; Stockwell v. Inhabitants of Fitchburg, 110 Mass. 305. Twenty years. Com. v. Coupe, 128 Mass. 63; Wayne County Sav. Bank v. Stockwell, 84 Mich. 586, 48 N. W. 174; Leonard v. City of Detroit, 108 Mich. 599; State v. Young, 27 Mo. 259; Louisville, H. & St. R. Co. v. Com., 20 Ky. L. R. 371, 46 S. W. 207. Fifteen years. State v. Auchard, 22 Mont. 14, 55 Pac. 361. Eighteen or nineteen years. Engle v. Hunt, 50 Neb. 358; Lewis v. City of Lincoln, 55 Neb. 1, 75 N. W. 154; Hill v. McGinnis, 64 Neb. 187, 89 N. W. 783; Eames v. City of Northumberland, 44 N. H. 67. Twenty years. White v. Wiley, 59 Hun, 618, 13 N. Y. Supp. 205; Walcott Tp. v. Skauge, 6 N. D. 382; Le Roy v. Leonard (Tenn. Ch. App.) 35 S. W. 884. Thirty years. Shell v. Poulson, 23 Wash, 535, 63 Pac. 204; McGrath v. Nickerson, 24 Wash. 235, 64 Pac. 163.

[183] Whaley v. Wilson, 120 Ala. 502, 24 So. 855; Harper v. State, 109 Ala. 66, 19 So. 901; Jones v. Phillips, 59 Ark. 35; Huffman v. Hall, 102 Cal. 26; O'Connell v. Bowman, 45 Ill. App. 654. The construction of a fence which changes the direction of travel is a substantial interruption to permissive use. Town of Brushy Mound v. McClintock, 150 Ill. 129; Shellhouse v. State, 110 Ind. 509, 11 N. E. 484. Twenty years. Mills & Allen v. Evans, 100 Iowa, 712, 69 N. W. 1043, 38 L. R. A. 128; Weld v. Brooks, 152 Mass. 297, 25 N. E. 719. In the absence of evi- with respect to the putting up of a fence or barrier across the way, such action will not constitute, as a matter of law, an interruption of a permissive use.

Campau v. City of Detroit, 104 Mich. 560, 62 N. W. 718. The listing of land used as a highway and the levy of taxes upon it will not affect the rights of the public where an easement has already been acquired by prescription. Kansas City, C. & S. R. Co. v. Woolard, 60 Mo. App. 631; In re Howland Bridge, 60 Hun, 581, 14 N. Y. Supp. 845; Lewis v. City of Portland, 25 Or. 133, 22 L. R. A. 736; Cunningham v. San Saba County, 11 Tex. Civ. App. 557, 32 S. W. 928, 33 S. W. 892; Hall v. City of Austin, 20 Tex. Civ. App. 59, 48 S. W. 53.

[184] Madison Tp. v. Gallagher, 159 Ill. 105, 42 N. E. 316; Hynes v. Police Jury of Madison Parish, 22 La. Ann. 71; Elliott, Roads & Streets, § 174. "If the right to the way depends solely upon the user, then the width of the way and the extent of the servitude is measured by the character of the user, for the easement cannot be broader than the user."

§ 741. Physical extent of prescriptive right.

In the determination of cases which involve the question of a prescriptive right, the law favors the owner of the property. This principle applies and controls the physical extent of the highway claimed to have been acquired through the prescription.[185] Travel generally across a tract of land will not create prescriptive rights;[186] there must be well defined lines of travel[187] and only the tract so used and the adjacent land absolutely necessary for ordinary repairs will pass.[188] The principle suggested at the first

[185] Marchand v. Town of Maple Grove, 48 Minn. 271, 51 N. W. 606; Alpaugh v. Bennett, 59 Hun, 45, 12 N. Y. Supp. 398. See, also, cases cited in last note.

[186] Cheney v. O'Brien, 69 Cal. 199. The making of a way by prescription will not be prevented, however, by the fact that when on certain occasions certain portions were soft and muddy, the adverse users avoided the places by turning out. Friel v. People, 4 Colo. App. 259, 35 Pac. 676; Town of Brushy Mound v. McClintock, 150 Ill. 129, 36 N. E. 976; O'Connell v. Chicago T. T. R. Co., 184 Ill. 308, 56 N. E. 335; State v. Auchard, 22 Mont. 14; Ferdinando v. City of Scranton, 190 Pa. 321; Hall v. City of Austin, 20 Tex. Civ. App. 59; Galveston, H. & S. A. R. Co. v. Baudat, 21 Tex. Civ. App. 236.

[187] District of Columbia v. Robinson, 180 U. S. 92. "The right to an easement of common and public highway acquired by a prescriptive use or long use of the road is confined to the lines and width of the road as actually used for and at the end of the period of twenty years, and does not extend to a greater width beyond the width of the road so actually used." City of Ottawa v. Yentzer, 160 Ill. 509, 43 N. E. 601; State v. Auchard, 22 Mont. 14, 55 Pac. 361; Nelson v. Jenkins, 42 Neb. 133, 60 N. E. 311. A slight deviation at times from the common way will not interfere with the acquirement of prescriptive rights. Engle v. Hunt, 50 Neb. 358, 69 N. W. 970; South. Branch R. Co. v. Parker, 41 N. J. Eq. 489; Bayard v. Standard Oil Co., 38 Or. 438, 63 Pac. 614; Hart v. Town of Red Cedar, 63 Wis. 634.

[188] District of Columbia v. Robinson, 180 U. S. 92. "The right to take gravel within the limits of the road which might be established by the evidence, and in the exercise of grading, was conceded. The right to take gravel outside the limits of the road or not for the purpose of grading it, was denied, and properly denied. It was an easement in the land, not the fee to the land, which the public acquired by the road, and the measure of the easement was the width of the road. The right to grade and improve was incident to the easement, but the easement gave no other right in the soil or to the soil. The right to remove soil from one part of a road to another part may be conceded. And it has been decided such right extends to other streets forming parts of the same system. Of this, however, we are not required to express an opinion, as it is not in-

of this section also results in throwing the burden of proof on those claiming the highway by prescription.[189] The elements of a prescriptive right must clearly and unequivocally appear and by a preponderance of the evidence.[190] Mere user of a road over private land by the public will not make it a public road.[191]

Evidence. Parol evidence of use is competent in proving or attempting to prove the establishment of a highway by prescription,[192] and evidence is competent respecting the lines and corners of ways, streets and blocks indicated by old fences or old buildings, the highway itself as used for many years, and stakes and monuments established by former surveyors.[193] The fact that a

volved in the prayer." Epler v. Niman, 5 Ind. 459. Twenty years. Taegar v. Riepe, 90 Iowa, 484, 57 N. W. 1125; Davis v. City of Clinton, 58 Iowa, 389; Tilton v. Inhabitants of Wenham, 172 Mass. 407, 52 N. E. 514; Wayne County Sav. Bank v. Stockwell, 84 Mich. 586, 48 N. W. 174. Forty years. Marchand v. Town of Maple Grove, 48 Minn. 271, 51 N. W. 606; Bayard v. Standard Oil Co., 38 Or. 438, 63 Pac. 614; Walsh v. Hopkins, 22 R. I. 418, 48 Atl. 390. The rule is different with respect to streets legally laid out where the limits of the streets are determined by the record of the lay out and not by the line of the street as actually used. State v. Caldwell, 2 Speer (S. C.) 162; Dodson v. State (Tex. Cr. App.) 49 S. W. 78; Whitesides v. Green, 13 Utah, 341, 44 Pac. 1032; Gaines v. Merryman, 95 Va. 660. But see Pillsbury v. Brown, 82 Me. 450, 19 Atl. 858, 9 L. R. A. 94n. Twenty years. Yakima County v. Conrad, 26 Wash. 155, 66 Pac. 411.

[189] District of Columbia v. Robinson, 14 App. D. C. 512. Twenty years. Cooper v. Monterey County, 104 Cal. 437, 38 Pac. 106; Mills v. Evans, 100 Iowa, 712; Adams v. Iron Cliffs Co., 78 Mich. 271; State v. Fisher, 117 N. C. 733, 23 S. E. 158; Cunningham v. San Saba County, 11 Tex. Civ. App. 557; Shaver v. Edgell, 48 W. Va. 502, 37 S. E. 664. But see Cox v. Forrest, 60 Md. 74.

[190] Louisville, N. A. & C. R. Co. v. Miller, 12 Ind. App. 414, 40 N. E. 539; Richardson v. Davis. 91 Md. 390, 46 Atl. 964.

[191] Sprow v. Boston & A. R. Co., 163 Mass. 330; Dicken v. Liverpool Salt & Coal Co., 41 W. Va. 511, 23 S. E. 582. See, also, cases cited under 2nd paragraph of preceding section.

[192] Fowler v. Savage, 3 Conn. 90; Blumenthal v. State, 21 Ind. App. 665; McKenn v. Porter, 134 Ind. 483, 34 N. E. 223; Mosier v. Vincent, 34 Iowa, 478; State v. Davis, 27 Mo. App. 624; Moore v. Hawk, 57 Mo. App. 495; Cherokee Strip Live Stock Ass'n v. Cass Land & Cattle Co., 138 Mo. 394; Lewis v. City of Lincoln, 55 Neb. 1; Speir v. Town of New Utrecht, 121 N. Y. 420, 24 N. E. 692. Mere proof of use is not sufficient to establish a highway by prescription where there is no evidence of the circumstances under which the public used it or that the public authorities kept it in repair or recognized it in any way. Kirby v. Southern R. Co., 63 S. C. 494, 41 S. E. 765; Race v. State, 43 Tex. Cr. R. 438, 66 S. W. 560.

road has been worked as a public highway and recognized as such is evidence, but not always the best, of its establishment by prescription.[194] Where statutes require the expenditure of money and labor during the period of limitation in order to acquire title by adverse user, it is not necessary that the whole of the highway be improved; if money or labor are expended on any part of it, it is sufficient.[195]

§ 742. The acquirement of prescriptive rights against persons under disability.

The cases vary in regard to the acquirement of prescriptive rights as against infants, lunatics, married women, or others protected from the running of the statute of limitations with respect to their property rights. Some authorities hold that even a public corporation cannot acquire as against these persons any rights by prescription[196] but the better doctrine, as sustained by the greater number of decisions, is that prescriptive rights may be acquired against persons under disability.[197] If the law permits a public corporation to acquire highways or public property through the doctrine of prescription, in order that the right be of a substantial value it should be acquired against all having an adverse claim. Property is acquired by a public corporation un-

[193] Illinois Cent. R. Co. v. City of Bloomington, 167 Ill. 9, 47 N. E. 318. Evidence is admissible against a claim by prescription that the state during a portion of the prescriptive time levied and collected assessments on the land in question for local improvements. Stetson v. Faxon, 26 Mass. (19 Pick.) 147. Sixty years. Bagley v. New York, N. H. & H. R. R. Co., 165 Mass. 160, 42 N. E. 571; Webster v. Boscawen, 67 N. H. 111, 29 Atl. 670. One hundred years. State v. Van Derveer, 47 N. J. Law, 259; Nosler v. Coos Bay R. Co., 39 Or. 331, 64 Pac. 644. Rehearing denied 40 Or. 305, 64 Pac. 855. The proceedings of a county court though irregular are admissible for the location of a highway in an action for injury where a public highway has been used by the public for ten years or more and as originally located by the county court. City of Madison v. Mayers, 96 Wis. 399, 73 N. W. 43.

[194] Township of Madison v. Gallagher, 159 Ill. 105, 42 N. E. 316; State v. Alstead, 18 N. H. 59; Folsom v. Town of Underhill, 36 Vt. 580; Brown v. Town of Swanson, 69 Vt. 53, 37 Atl. 280. But see Hall v. City of St. Paul, 56 Minn. 428, 57 N. W. 928; Raht v. Southern R. Co., (Tenn. Ch. App.) 50 S. W. 72.

[195] Gross v. McNutt (Idaho) 38 Pac. 935; State v. Macy, 72 Mo. App. 427. See, also, Scribner v. Blute, 28 Wis. 148.

[196] State v. Macy, 67 Mo. App. 326.

[197] Prudden v. Lindsley, 29 N. J. Eq. 615. Twenty years.

der the doctrine of prescription on the theory that at some antecedent time, its rights were secured through legal proceedings binding all those whose rights were affected by the taking of the real property in question and that a lapse of time has strengthened the validity of the proceedings. In accord with this principle is the fact that all special and modern statutes providing that user for a certain period, generally less than general statutes of limitations, of a tract of land constitutes a highway, make no exception in favor of any class or person.

§ 743. Property acquired through eminent domain.

A public corporation may acquire property by purchase [198] or gift [199] which includes that secured by dedication [200] and prescription,[201] and also through the exercise of the power of eminent domain. This is one of the great and inherent sovereign powers and it has been defined by Judge Cooley,[202] "and as there is not often occasion to speak of the eminent domain except in reference to those cases in which the government is called upon to appropriate property against the will of the owners, the right itself is generally defined as if it were restricted to such cases, and is said to be that superior right of property pertaining to the sovereignty by which the private property acquired by its citizens under its protection may be taken or its use controlled for the public benefit without regard to the wishes of its owners. More accurately, it is the rightful authority, which exists in every sovereignty, to control and regulate those rights of a public nature which pertain to its citizens in common, and to appropriate and control individual property for the public benefit, as the public safety, necessity, convenience or welfare may demand." The other governmental powers already discussed, namely, the police power,[203] the power of taxation,[204] are each, in their essential characteristics, entirely different from that now under consideration. The police power is one of regulation; the individual as a member of society is bound to use his property and exercise his rights in such a manner as not to injure others. The state possesses the continuing, inalienable and irrevocable right to compel from the individual

198 See § 722, ante.
199 See § 717.
200 See §§ 723 et seq., ante.
201 See §§ 739 et seq., ante.
202 Cooley, Const. Lim. (7th Ed.) p. 753.
203 See §§ 115–139, ante.
204 See §§ 300 et seq.

within its jurisdiction, conduct of this character.[205] The nature of the power and the limitations on its exercise have been already fully considered. Taxation is the power the sovereign possesses of taking upon a uniform and just basis an involuntary contribution from persons and property for the maintenance of its organization and the carrying out of its governmental and public functions and duties.[206] Taxation is an appropriation of individual property without the payment of direct compensation. Local assessments as a species of taxation are based, however, upon the idea, though illusory at times, of a direct, substantial and equal return for the taxes paid, in the benefits received by property from the construction of the local improvement for which the assessment is levied to pay.[207]

The individual holds all his property and exercises his rights subject in their use to the regulation of the state for the good of society at large; he also holds his property, both real and personal, subject to a seizure by the state or its delegated agencies in those cases where a great and urgent public necessity requires this course of action. The power of eminent domain is a taking of property but one that in its legal exercise must be accompanied by the payment of just compensation to the owner which, it has been held, must be full, ample and complete.[208] The police power is

[205] See §§ 115 et seq.

[206] People v. City of Brooklyn, 4 N. Y. 419. "Taxation exacts money, or services, from individuals, as and for their respective shares of contribution to any public burthen. Private property taken for public use by right of eminent domain, is taken, not as the owner's share of contribution to a public burthen, but as so much beyond his share. Special compensation is therefore to be made in the latter case, because the government is a debtor for the property so taken; but not in the former, because the payment of taxes is a duty and creates no obligation to repay, otherwise than in the proper application of the tax. Taxation operates upon a community or upon a class of persons in a community and by some rule of apportionment. The exercise of the right of eminent domain operates upon an individual, and without reference to the amount, or value exacted from any other individual, or class of individuals." Cooley, Taxation, p. 1; Burroughs, Taxation, c. 1. See, also, §§ 300 et seq., ante.

[207] Norwood v. Baker, 172 U. S. 269; French v. Barber Asphalt Pav. Co., 181 U. S. 324, reviewing many cases. City of Raleigh v. Peace, 110 N. C. 32, 14 S. E. 521, 17 L. R. A. 330. See, also, §§ 337 et seq., ante.

[208] Earl Highway Com'rs v. People, 4 Ill. App. 391. The fact that the quantity of land proposed to be taken is very small is no excuse for a failure to compensate the owner

one of regulation; the power of taxation is that of taking; eminent domain is a taking, but one based upon the idea of a payment of compensation to the one deprived of his property.[209] This statement eliminates the forcible seizure of private property by the state, in cases of overwhelming public necessity, for the preservation of the public health, of private property or the organization of the state itself as a governmental and political agent. These are illustrated by the seizure and destruction of private property in an epidemic of disease,[210] an uncontrollable conflagration [211] or the arbitrary seizure or use of private property without compensation during times of war by a government.[212]

or appropriate the property without legal proceedings. State v. Graves, 19 Md. 351; Bradshaw v. Rodgers, 20 Johns. (N. Y.) 103. "The act under consideration contains no provision to compensate, at any time, those whose lands may be taken as a substitute for a public road or highway, altered or discontinued by the principal engineer, for the damages they sustain. This is directly opposed to the fifth article of the amendments of the constitution of the United States, which forbids the taking of private property for public use, without just compensation. The same inhibition to the power of the legislature, is contained in the late amendments to the constitution of this state. I do not rely upon either, as having a binding constitutional force upon the act under consideration. The former related to the powers of the national government, and was intended as a restraint on that government; and the latter is not yet operative. But they are both declaratory of a great and fundamental principle of government; and any law violating that principle must be deemed a nullity, as it is against natural right and justice."

[209] Hollingsworth v. Parish of Tensas, 17 Fed. 109; Bass v. State, 34 La. Ann. 494; Philadelphia v. Scott, 81 Pa. 80; Davenport v. Richmond City, 81 Va. 636.

[210] Russell v. City of New York, 2 Denio (N. Y.) 461.

[211] Bowditch v. City of Boston, 101 U. S. 16; Dunbar v. Alcalde & Ayuntamiento, 1 Cal. 355; Field v. City of Des Moines, 39 Iowa, 575; Taylor v. Inhabitants of Plymouth,

[212] Harrison v. Myer, 92 U. S. 111; Lamar v. Browne, 92 U. S. 187; Burbank v. Conrad, 96 U. S. 291; Branch v. United States, 100 U. S. 673; Kirk v. Lynd, 106 U. S. 315; Hawkins v. Nelson, 40 Ala. 553; City of Chicago v. Chicago League Ball Club, 196 Ill. 54, 63 N. E. 695. The same rule applies where regiments of militia present for the purpose of suppressing a mob or riot, occupy private property for camping purposes. There is no liability to the owner for the use of his property or for any injury caused to it by such occupation. It is a question for the state in its sovereign capacity to determine whether any remuneration shall be made for its use. Beck v. Ingram, 64 Ky. (1 Bush) 355. See, also, 13 Am. Law Reg. (N. S.) 401.

§ 744. Purposes for which property may be acquired.

A public corporation may acquire property for use in its sovereign capacity and which it holds for the construction and maintenance of governmental aids, public buildings, grounds, forts, arsenals, fortifications and the like. Its control and use of the property acquired for these purposes is absolute.[213] It may also acquire and hold property in its capacity as a sovereign but for the use and the benefit of the public or the community at large: public highways, parks, and pleasure grounds. Its control of these is not absolute; they are affected with the character of a public use and they cannot be deprived or divested of this. The nominal control may be transferred from one agency of government to another but the character of the use must ever remain the same.[214] A public corporation may further acquire and hold

49 Mass. (8 Metc.) 465; McDonald v. City of Red Wing, 13 Minn. 38 (Gil. 25); American Print Works v. Lawrence, 21 N. J. Law (1 Zab.) 248. "I am of opinion, therefore, that the destruction of buildings to prevent the spread of a conflagration, is not the taking of property for public use within the meaning of the constitution." American Print Works v. Lawrence, 23 N. J. Law (3 Zab.) 615. "The right of eminent domain is a public right; it arises from the laws of society, and is vested in the state or its grantee, acting under the right and power of the state, and is the right to take or destroy private property for the use or benefit of the state, or of those acting under and for it. The right of necessity arises under the law of nature; it is older than the laws of society or society itself. It is the right of self-defense, or self preservation, whether applied to persons or to property. It is a private right vested in every individual, and with which the rights of the state or state necessity has nothing to do.".

Russell v. City of New York, 2 Denio (N. Y.) 461. The court in answer to the contention that the destruction of property was a taking for public use said: "And the property was not taken 'for public use,' but it was destroyed to prevent the spreading of a conflagration, and thus saving the property of other persons in the immediate neighborhood. It was taken for private use." Senator Sherman also said: "The best elementary writers lay down the principle, and adjudications upon adjudications have for centuries sustained, sanctioned and upheld it, that in the case of actual necessity, to prevent the spreading of a fire, the ravages of a pestilence, or other great public calamity, the private property of any individual may be lawfully destroyed for the relief, protection or safety of the many, without subjecting the actors to personal responsibility for the damages which the owner has sustained." Mouse's Case, 12 Coke, 63.

213 See § 718, ante. See, also, Lewis, Em. Dom. § 2, discussing generally the subject of this section.

214 Simon v. Northup, 27 Or. 487,

property as a trustee for public or quasi public purposes. Bequests and grants of property from private individuals for the construction and maintenance of hospitals, educational or eleemosynary institutions. The control of such property is not only limited to a general use, as in the last instance, for objects of a public character, but to a specific use for the particular and special purpose for which the property was devised. The management of the trust is limited not only by its nature or character but also by those who are to receive its benefits.[215] A public corporation may still further, according to modern authorities, acquire property in a strictly private or personal capacity.[216]

The purpose for which property may be thus acquired and held will determine the method of its acquisition. The power of eminent domain is only available for the acquirement of property for a public use or purpose and this statement naturally suggests the question of what is a public use or purpose, which will be considered later.

§ 745. Eminent domain; definitions.

One definition of eminent domain has already been given in a previous section and the nature of the power can be best illustrated, perhaps, by referring to others.[217] Lewis in his work on

40 Pac. 560, 30 L. R. A. 171. See, § 733, ante.

[215] See § 719, ante.

[216] See § 720, ante.

[217] Pollard v. Hagan, 3 How. (U. S.) 223; Lake Merced Water Co. v. Cowles, 31 Cal. 215; Todd v. Austin, 34 Conn. 78. "The right to take private property for public use, or of eminent domain, is a reserved right attached to every man's land, and paramount to his right of ownership. He holds his land subject to that right, and cannot complain of injustice when it is lawfully exercised." Lewis, Em. Dom. (2d Ed.) § 1. "Eminent domain is the right or power of a sovereign state to appropriate private property to particular uses, for the purpose of promoting the general welfare. It embraces all cases where, by authority of the state and for the public good, the property of the individual is taken, without his consent, for the purpose of being devoted to some particular use, either by the state itself or by a corporation, public or private, or by a private citizen. Apart from constitutional considerations, it is not essential, in order to constitute an act of eminent domain, that the use for which the property is taken should be of a public nature." Dillon, Mun. Cor. (4th Ed.) § 584. "The right of every government to appropriate, otherwise than by taxation and its police authority, private property for public use." 1 Redfield, Railways (5th Ed.) p. 245. "It is defined to be that dominion eminens,

"Eminent Domain" quotes[218] and criticises the definition of Judge Cooley given above, and says: "No court has ever referred either the control and regulation of rights of a public nature or of individual property to the power of eminent domain, and Judge Cooley himself treats of these matters, not under the head of eminent domain, but under the head of the police power. This enlarged definition finds sanction in the works of many theoretical writers and in the dicta of various judicial opinions, but, however well sanctioned, it is certainly objectionable; first, because it does not correspond to the practical application of the term, and, second, because it invests the term with a certain vagueness and elasticity, that preclude the formation of any definite conception. All exercises of sovereign power over private property, which have been judicially determined to fall under the right of eminent domain, have been cases in which there has been an appropriation of such property to particular uses." The modern definitions as given by the courts embody the idea that the power of eminent domain is a right of the state as sovereign to take private property for a public use upon making just compensation. Lewis in his definition does not limit the use to a public one but uses the phrase "particular uses." The use of the term "public use" is undoubtedly due to the constitutional provisions found in nearly every state of the Union which forbid the taking of private property, except for a public use, and upon the payment of just compensation.[219] The power is one to appropriate

or superior right, which of necessity resides in the sovereign power, in all governments, to apply private property to public use, in those great public emergencies which can reasonably be met in no other way." Vattel, Law Nat. Bk. 1, c. 20. "The right which belongs to the society, or to the sovereign, of disposing, in case of necessity, and for the public safety, of all the wealth contained in the state, is called the eminent domain." Mills, Em. Dom. § 1. "The power of the sovereign to condemn private property for public use."

[218] Lewis, Em. Dom. § 2.

[219] Const. U. S. 5th Amend. "Nor shall private property be taken for public use, without just compensation." Ala. Const. 1875, art. 1, § 24; art. 13, § 7; Ark. Const. 1874, art. 2, § 22; art. 12; § 9; Cal. Const. 1879, art. 1, § 14; Colo. Const. 1876, art. 2, §§ 14 and 15; Conn. Const. 1818, art. 1, § 11; Del. Const. 1897, art. 1, § 8: Nor shall any man's property be taken or applied to public use without the consent of his representatives, and without compensation being named. Fla. Const. 1886, art. 16, § 29; Ga. Const. 1877, art. 1, § 3, par. 1. "Private property shall not be taken, or damaged, for public purposes, without just and adequate compensation being first paid."

private property as the public necessities may require upon the payment of just compensation to the individual and it pertains to

Idaho Const. 1899, art. 1, § 14; Ill. Const. 1870, art. 2, § 14; Ind. Const. 1851, art. 1, § 21. "No man's particular services shall be demanded without just compensation. No man's property shall be taken by law without just compensation, nor, except in cases of the state, without such compensation first assessed and tendered." Iowa Const. 1857, art. 1, § 18; Kan. Const. 1859, art. 12, § 4; Ky. Const. 1891, § 242. "Municipal and other corporations, and individuals invested with the privilege of taking private property for public use, shall make just compensation for property taken, injured or destroyed by them." La. Const. 1879, art. 156. Civ. Code, art. 489. "No one can be deprived of his property unless for some purpose of public utility, and on consideration of an equitable and previous indemnity and in a manner previously prescribed by law." Me. Const. 1819, art 1, § 21; Md. Const. 1867, art. 3, § 40; Mass. Const. 1780, part 1st, art. 10 "But no part of the property of any individual can, with justice, be taken from him, or applied to public uses, without his own consent, or that of the representative body of the people." Mich. Const. 1850, art. 15, §§ 9 and 15; Minn. Const. 1857, art. 1, § 13; art. 10, § 4; Miss. Const. 1890, art. 3, § 17. "Private property shall not be taken or damaged for public use, except on due compensation being first made to the owner or owners thereof, in a manner to be prescribed by law; and whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be public shall be a judicial question, and, as such, determined without regard to legislative assertion that the use is public." Mo. Const. 1875, art. 2, § 20; Mont. Const. 1889, art. 3, § 14; Neb. Const. 1875, art. 1, § 21; Nev. Const. 1864, art. 1, § 8. "Nor shall private property be taken for public use without just compensation having first been made or secured, except in cases of war, riot, fire, or great public peril, in which case compensation shall be afterwards made." New Hampshire Const. 1792, part 1, art. 12. "No part of a man's property shall be taken from him or applied to public uses, without his own consent or that of the representative body of the people." New Jersey Const. 1844, art. 1, § 16; New York Const. 1894, art. 1, §§ 6 and 7; N. D. Const. 1889, art. 1, § 14; Ohio Const. 1851, art. 1, § 19; Or. Const. 1857, art. 1, § 19; art. 11, § 4; Pa. Const. 1873, art. 1, § 10; art. 16, § 8; R. I. Const. 1842, art. 1, § 16; S. C. Const. 1868, art. 1, § 23; S. D. Const. 1889, art, 6, § 13; art. 17, § 18; Tenn. Const. 1870, art. 1, § 21; Tex. Const. 1876, art. 1, § 17; Vt. Const. 1793, c. 1, art. 2; Va. Bill of Rights, 1870, art. 1, § 8; Utah Const. 1895, art. 1, § 22; Wash. Const. art. 1, § 16; W. Va. Const. 1872, art. 3, § 9; Wis. Const. art. 1, § 13; art. 11, § 2. No municipal corporation shall take private property for public use against the consent of the owner without the necessity thereof being first established by the verdict of a jury. Wyo. Const. art. 1, § 32. The Const. of North Carolina has no provision relative to the subject.

sovereignty as an inherent, necessary, continuing and inalienable right.[220]

§ 746. The power exercised; by what agencies.

Since the power of eminent domain belongs to sovereignty as a constant, necessary and inextinguishable right, it necessarily follows that the federal government[221] and each of the different

[220] United States v. Jones, 109 U. S. 513; United States v. Cooper, 20 D. C. (9 Mackey) 104. "The exercise of the right of eminent domain by a sovereign cannot be the creation of a grant or compact. It inheres in the existence of an independent government, and comes into being eo instanti with its establishment, and continues as long as the government endures." Steele v. Madison County Com'rs, 83 Ala. 304; West Chicago Park Com'rs v. McMullen, 134 Ill. 170, 25 N. E. 676, 10 L. R. A. 215; Shool v. German Coal Co., 118 Ill. 427; Kansas City v. Marsh Oil Co., 140 Mo. 458; Sigler v. Fuller, 34 N. J. Law, 227; Heyward v. City of New York, 7 N. Y. 314; Matter of Furman St., 17 Wend. (N. Y.) 649; Matter of Deansville Cemetery, 66 N. Y. 569; Kramer v. Cleveland & P. R. Co., 5 Ohio St. 140. "Whatever may be the theoretical foundation of the right of eminent domain, it is certain that it attaches as an incident to every sovereignty, and constitutes a condition upon which all property is holden. When the public necessity requires it, private rights to property must yield to this paramount right of the sovereign power." McQuillen v. Hatton, 42 Ohio St. 102; Lindsay v. Charleston St. Com'rs, 2 Bay. (S. C.) 38; Tyler v. Beacher, 44 Vt. 648; 1 Redfield, Railways (5th Ed.) p. 229. "This is a right in the sovereignty which seems indispensible to the maintenance of civil government, and which seems to be rather a necessary attribute to the sovereign power in a state, than any reserved right in a grant of property to the subject or to the citizen." See, also, cases cited generally in the three preceding sections.

[221] Kohl v. United States, 91 U. S. 367. Mr. Justice Strong in delivering the opinion of the court said: "But it is more necessary for the exercise of the powers of a state government than it is for the exercise of the conceded powers of the Federal Government. That government is as sovereign within its sphere as the states are within theirs. True, its sphere is limited. Certain subjects only are committed to it; but its power over those subjects is as full and complete as is the power of the states over the subjects to which their sovereignty extends. The power is not changed by its transfer to another holder.

"But, if the right of eminent domain exists in the Federal Government, it is a right which may be exercised within the states, so far as is necessary to the enjoyment of the powers conferred upon it by the constitution. In Ableman v. Booth, 21 How. (U. S.) 523 (21 How. [U. S.] XVI., 175), Chief Justice Taney described in plain language the

states [222] possesses the power to the fullest extent and may exercise it for all legitimate purposes. In the leading case upon the right of the Federal government to condemn property within the United States irrespective of the sovereignty of the different

complex nature of our government, and the existence of two distinct and separate sovereignties within the same territorial space, each of them restricted in its powers, and each, within its sphere of action prescribed by the constitution of the United States, independent of the other. Neither is under the necessity of applying to the other for permission to exercise its lawful powers. Within its own sphere, it may employ all the agencies for exerting them which are appropriate or necessary, and which are not forbidden by the law of its being. When the power to establish postoffices and to create courts withing the states was conferred upon the Federal Government, included in it was authority to obtain sites for such offices and for court houses, and to obtain them by such means as were known and appropriate. The right of eminent domain was one of those means well known when the Constitution was adopted, and employed to obtain lands for public uses. Its existence, therefore, in the grantee of that power, ought not to be questioned. The Constitution itself contains an implied recognition of it beyond what may justly be implied from the express grants. The fifth Amendment contains a provision that private property shall not be taken for public use without just compensation. What is that but an implied assertion, that, on making just compensation it may be taken?" United States v. Jones, 109 U. S. 513; Cherokee Nation v. Southern Kan. R. Co., 135 U. S. 641; United States v. Gettysburg Elec. R. Co., 160 U. S. 668. Mr. Justice Peckham in delivering the opinion of the court said on the question of the power of the government of the United States to condemn lands: "It (the United States) has authority to do so whenever it is necessary or appropriate to use the land in the execution of any of the powers granted to it by the Constitution. * * * And also in our judgment, the government has the constitutional power to condemn the land for the proposed use. It is, of course, not necessary that the power of condemnation for such purpose be expressly given by the constitution. The right to condemn at all is not so given. It results from the powers that are given, and it is implied because of its necessity, or because it is appropriate in exercising those powers." Chappell v. United States, 160 U. S. 499; Matter of United States, 96 N. Y. 227; Petition of U. S. for Appointment of Viewers, 24 Pittsb. Leg. J. 105; Trombley v. Humphrey, 23 Mich. 471; Darlington v. United States, 82 Pa. 382; Cooley, Const. Lim. (7th

[222] Pollard v. Hagan, 3 How. (U. S.) 212. Upon the admission of a state formed from former territory of the United States, the right of eminent domain passes to the state. But see United States v. City of Chicago, 7 How. (U. S.) 185.

states,[222a] Mr. Justice Strong in delivering the opinion of the court said: "It has not been seriously contended during the argument that the United States government is without power to appropriate lands or other property within the states for its own uses, and to enable it to perform its proper functions. Such an authority is essential to its independent existence and perpetuity. These cannot be preserved if the obstinacy of a private person, or if any other authority, can prevent the acquisition of the means or instruments by which alone governmental functions can be performed. The powers vested by the Constitution in the General Government demand for their exercise the acquisition of lands in all states. These are needed for forts, armories, and arsenals, for navy yards and light houses, for custom houses, postoffices, and court houses, and for other public uses. If the right to acquire property for such uses may be made a barren right by the unwillingness of property holders to sell, or by the action of a state prohibiting a sale to the Federal Government the constitutional grants of power may be rendered nugatory, and the government is dependent for its practical existence upon the will of a state, or even upon that of a private citizen. This cannot be. No one doubts the existence in the state governments of the right of eminent domain,—a right distinct from and paramount to the right of ultimate ownership. It grows out of the necessities of their being, not out of the tenure by which lands are held. It may be exercised, though the lands are not held by grant from the government, either mediately or immediately, and independent of the consideration whether they would escheat to the Government in case of a failure of heirs. The right is the off-spring of political necessity;

Ed.) p. 755. "So far, however, as the general government may deem it important to appropriate lands or other property for its own purposes, and to enable it to perform its functions,—as must sometimes be necessary in the case of forts, lighthouses, military posts or roads, and other conveniences and necessities of government,—the general government may still exercise the authority, as well within the states as within the territory under its exclusive jurisdiction, and its right to do so may be supported by the same reasons which support the right in any case; that is to say, the absolute necessity that the means in the government for performing its functions and perpetuating its existence should not be liable to be controlled or defeated by the want of consent of private parties, or of any other authority."

[222a] Kohl v. United States, 91 U. S. 367.

and it is inseparable from sovereignty, unless denied to it by its fundamental law."

Constitutional provisions alone restrain congress or the state legislatures in the adoption of legislation relative to the subject. Unlike some governmental powers, it is one which, in its exercise, can be granted to such agencies as the sovereign may select, limited alone by constitutional provisions. The nature of the agency selected determines the character of the use and as nearly all of the states limit the taking of private property for a public use only, it follows that only such corporations or individuals can be granted the power as are either public or public quasi corporations, quasi public corporations or those engaged in an occupation, the character of which will enable them to exercise the power under the application of the words "a public use." [223] Municipal corporations and public quasi corporations being subordinate agencies of government and an integral part of the sovereign are usually vested with the power.[224] Other agencies of the state competent to exercise eminent domain need not be considered here.

[223] Varner v. Martin, 21 W. Va. 534. See Lewis, Em. Dom. (2d Ed.) § 242.

[224] City of Atlanta v. Central R. & B. Co., 53 Ga. 120. A municipal corporation has no power or authority to appropriate the property of the state for the purpose of a public street. Alexander v. City of Baltimore, 6 Gill. (Md.) 391; Brimmer v. Protestant Church of City of Baltimore, 6 Gill (Md.) 391; Brimm v. City of Boston, 102 Mass. 19. State v. Rapp, 39 Minn. 65. "Condemnatory proceedings in the exercise of the right of eminent domain are not civil actions or causes within the meaning of the constitution, but special proceedings, only quasi judicial in their nature, whether conducted by judicial or non judicial officers or tribunals. The propriety of the exercise of the right of eminent domain is a political or legislative, and not a judicial question. The manner of the exercise of this right is, except as to compensation, unrestricted by the constitution, and addresses itself to the legislature as a question of policy, propriety, or fitness, rather than of power. They are under no obligation to submit the question to a judicial tribunal, but may determine it themselves, or delegate it to a municipal corporation, to a commission, or to any otner body or tribunal they see fit. Neither are they bound to submit the question of compensation incident to the exercise of the right of eminent domain to a judicial tribunal." Cross v. City of Morristown, 18 N. J. Eq. (3 C. E. Green) 305; State v. Clarke, 25 N. J. Law (1 Dutch.) 54; Bodine v. City of Trenton, 36 N. J. Law, 198; In re Thompson, 57 Hun (N. Y.) 419; Spring City Gaslight Co. v. Pennsylvania S. V. R. Co., 167 Pa. 6. See, also, those authorities generally

§ 747. Power must be expressly given.

To all subordinate public corporations the principle applies that to legally exercise the power of eminent domain, it must be expressly given.[225] It cannot come by any ordinary construction under implied powers of either class: those implied because essential to the life of the corporation or those implied because absolutely necessary and essential to carry into effect some power already expressly granted. Some authorities hold that even with the state itself the power lies dormant[226] until the legislative branch prescribes the method and the manner by which it can be exercised; designating the procedure which must be followed in order to legally exercise the power; providing a tribunal for the determination of the questions naturally involved and fixing the mode in which the amount of compensation is to be determined and the manner and the time in which it shall be paid. All this legislation is to be construed strictly, for the taking of private property, even upon the payment of just compensation, is one of the highest attributes of sovereignty and when its exercise is delegated to a subordinate, the strict rule of interpretation will apply and the right to exercise the power withheld unless clearly given.[227]

cited under sections relative to the subject of eminent domain in which one of the parties is a public corporation.

[225] Butler v. City of Thomasville, 74 Ga. 570; Sanitary Dist. of Chicago v. Lee, 79 Ill. App. 159; Protzman v. Indianapolis & C. R. Co., 9 Ind. 467; Allen v. Jones, 47 Ind. 438. A city has no implied power in the nature of eminent domain to condemn private property for local improvements. The exercise of this right is originally wholly in the state and can be exercised by a city through the virtue of some express legislative grant. Knowles v. City of Muscatine, 20 Iowa, 248; Glover v. City of Boston, 80 Mass. (14 Gray) 282; Brimmer v. City of Boston, 102 Mass. 19; Woodruff v. Town of Glendale, 23 Minn. 537; Schmidt v. Densmore, 42 Mo. 225; People v. City of Rochester, 50 N. Y. 525; Miami Coal Co. v. Wigton, 19 Ohio St 560. But see Inhabitants of Easthampton v. Hampshire County Com'rs, 154 Mass. 424, 28 N. E. 298, 13 L. R. A. 157. Linton v. Sharpsburg Bridge Co., 1 Grant's Cas. (Pa.) 414. Where a statute authorizes a highway to be established, it impliedly grants the power to appropriate lands needed for the purpose. City of Memphis v. Wright, 14 Tenn. (6 Yerg.) 497.

[226] Cooley, Const. Lim. (7th Ed.) pp. 759, 760.

[227] Spring Valley Water Works v. San Mateo Water Works, 64 Cal. 123; Durant v. Jersey City, 25 N. J. Law (1 Dutch.) 309; Currier v. Marietta & C. R. Co., 11 Ohio St. 228. "There is no rule more fam-

§ 748. Manner of the exercise of the power.

Not only must the power as granted to a subordinate corporation be expressly given but before it can be legally exercised, the authority for its exercise must pass successfully constitutional tests determining its validity. Nearly all constitutions, state as well as Federal, provide for the exercise of the power only upon payment of just compensation first had or secured except in specific cases.[228] The payment of just compensation is thus made one test for a legal exercise of the power. The Federal Constitution contains the further provision that no state shall make or enforce any law which shall deprive any person of life, liberty or property without due process of law,[229] and by this means the constitutionality of all laws relating to the taking of private property under the power of eminent domain is made a Federal question,[230] and the further test is to be applied of whether legislation granting the right and providing for the manner of its exercise is due process of law within the meaning of the Federal Constitution. It might be further said that state constitutions contain substantially the same provision with reference to due process of law and this universal provision at least, therefore, exists. What is the law of the land or its equivalent phrase "due process of law."[231] It

iliar or better settled than this, that grants of corporate power, being in derogation of common right, are to be strictly construed, and this is especially the case where the power claimed is a delegation of the right of eminent domain—one of the highest powers of sovereignty pertaining to the state itself, and interfering most seriously, and often vexatiously, with the ordinary rights of property."

228 See § 745 and authorities cited under note 219.

229 United States Const. XIVth Amendment.

230 Davidson v. City of New Orleans, 96 U. S. 97; Mugler v. Kansas, 123 U. S. 623.

231 Den d. Murray v. Hoboken Land & Imp. Co., 18 How. (U. S.) 272. "That the warrant now in question is legal process is not denied. It was issued in conformity with an Act of Congress. But is it 'due process of law?' The Constitution contains no description of those processes which it was intended to allow or forbid. It does not even declare what principles are to be applied to ascertain whether it be due process. It is manifest that it was not left to the legislative power to enact any process which might be devised. The article is a restraint on the legislative as well as on the executive and judicial powers of the government, and cannot be so construed as to leave Congress free to make any process 'due process of law,' by its mere will. To what principles, then, are we to resort to ascertain whether

has been held to include notice to the one whose rights are affected;[232] the existence of an impartial tribunal of competent jurisdiction; a regular, orderly and uniform method of procedure

this process, enacted by Congress is due process? To this the answer must be two-fold. We must examine the Constitution itself, to see whether this process be in conflict with any of its provisions. If not found to be so, we must look to those settled usages and modes of proceeding existing in the common and statute law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country."

Trustees of Dartmouth College v. Woodward, 4 Wheat. (U. S.) 581. "By the law of the land is most clearly intended the general law; a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is, that every citizen shall hold his life, liberty, property, and immunities, under the protection of the general rules which govern society. Everything which may pass under the form of an enactment, is not, therefore, to be considered the law of the land." Cooley, Const. Lim. (7th Ed.) pp. 502 et seq.

[232] Davidson v. City of New Orleans, 96 U. S. 97; Eddy v. People, 15 Ill. 386; Weimer v. Bunbury, 30 Mich. 201; City of Boonsville v. Ormrod's Adm'r, 26 Mo. 193. "A violation of that rule, recognized and enforced in all civil governments that no one shall be injuriously affected in his rights by a judgment or decree resulting from a proceeding of which he had no notice and against which he could make no defense. Nothing would so much impair that just self-respect arising from the ownership of property, fairly acquired, as the reflection that it is subject to be defeated by others without notice to the possessor."

Happy v. Mosher, 48 N. Y. 313; Stuart v. Palmer, 74 N. Y. 183. "It must be conceded that property cannot be taken by the right of eminent domain, without some notice to the owner, or some opportunity on the part of the owner, at some stage of the proceeding, to be heard, as to the compensation to be awarded him. An act of the legislature, arbitrarily taking property for the public good, and fixing the compensation to be paid could not be upheld. There would in such case be the absence of that 'due process of law' which both the federal and state constitutions guarantee to every citizen."

Neeld's Road Case, 1 Pa. 353. "The law abhors all ex parte proceedings without notice. Notice in this case to the owners of property was absolutely necessary. To take a man's property and assess his damages without notice of it, is repugnant to every principle of justice, and such a proceeding is utterly void."

City of Philadelphia v. Miller, 49 Pa. 440. "Notice, or at least the means of knowledge, is an essential element of every just proceeding which affects rights of persons or property." Lewis, Em. Dom. (2d. Ed.) § 365.

for the determination of the questions involved,[233] with an opportunity to be heard on the part of the landowner;[234] and a final decision. The substance of it all is that the essentials of due process of law must first exist and further, whenever an individual is to be divested of his property through an exercise of the power of eminent domain, all the provisions of law enacted for his benefit are to be strictly followed or the proceedings will be ineffectual.

§ 749. What can be taken.

The word commonly used in connection with the exercise of the power of eminent domain is "property" and this suggests the question—what is property? A correct determination of the meaning of the word is important for if the thing taken be not legally considered property, clearly the owner is not entitled to compensation and an exercise of the power is not necessary.[235] The most satisfactory definition of property is that given by Jeremy Bentham in which he says: "The integral or entire right of property includes four particulars: 1, right of occupation; 2,

[233] Davidson v. City of New Orleans, 96 U. S. 97. "In judging what is 'due process of law,' respect must be had to the cause and object of the taking, whether under the taxing power, the power of eminent domain, or the power of assessments for local improvements, or none of these; and if found to be suitable or admissible in the special case, it will be adjudged to be 'due process of law;' but if found to be arbitrary, oppressive, and unjust, it may be declared to be not 'due process of law.'"

Weimer v. Bunbury, 30 Mich. 201; Westervelt v. Gregg, 12 N. Y. (2 Kern.) 209; Stuart v. Palmer, 74 N. Y. 183. "It may however be stated generally that due process of law requires an orderly proceeding adapted to the nature of the case in which the citizen has an opportunity to be heard, and to defend, enforce, and protect his rights. A hearing or an opportunity to be heard, is absolutely essential. We cannot conceive of due process of law without this."

[234] Stuart v. Palmer, 74 N. Y. 183.

[235] Lewis, Em. Dom. § 56. "If property, then, consists, not in tangible things themselves but in certain rights in and appurtenant to those things, it follows that, when a person is deprived of any of those rights, he is to that extent deprived of his property, and hence, that his property may be taken, in the constitutional sense though his title and possession remain undisturbed; and it may be laid down as a general proposition based upon the nature of property itself, that, whenever the lawful rights of an individual to the possession, use or enjoyment of his land are in any degree abridged or destroyed by reason of the exercise of the power of eminent domain, his property is, pro tanto, taken, and he is entitled to compensation."

right of excluding others; 3, right of disposition or the right of transferring the integral right to other persons; 4, right of transmission in virtue of which the integral right is often transmitted after the death of the proprietor without any disposition on his part to those in whose possession he would have wished to place it."[236] Or, summarized, the rights of occupation, exclusion, disposition and transmission. Property, therefore, consists not in the thing or the subject of a right itself but of rights in things created, sanctioned and protected by law.[237] Formerly, a narrow and restricted meaning was attached to the word "property" and the property owner was, therefore, restricted in the amount of compensation which he might recover.[238] The modern tendency is towards a liberal construction of the word and the right of compensation is correspondingly enlarged. It must be understood, however, that though an individual may recover compensation for all the damages or injuries to his property as defined in the liberal way, there are injuries for which no compensation can be recov-

[236] Bentham's Works, p. 182 (1843 Edinburg).

[237] City of Denver v. Bayer, 7 Colo. 113. "Property, in its broader and more appropriate sense, is not alone a chattel or land itself, but the right to freely possess, use and alienate the same; and many things are considered property which have no tangible existence, but which are necessary to the satisfactory use and enjoyment of that which is tangible." Selden v. City of Jacksonville, 28 Fla. 558, 14 L. R. A. 370; Ritchie v. People, 155 Ill. 98, 29 L. R. A. 79; Chicago & W. I. R. Co. v. Englewood Connecting R. Co., 115 Ill. 375. Property itself in a legal sense is nothing more than the exclusive right of possession, enjoying and disposing of a thing which of course includes the use of a thing.

City of St. Louis v. Hill, 116 Mo. 527, 21 L. R. A. 226; Jackson v. Housel, 17 Johns. (N. Y.) 281. Property is defined as "the highest right a man can have to any thing; being used for that right which one hath to land or tenements, goods or chattels, which no way depend on another man's courtesy." Morrison v. Semple, 6 Binn. (Pa.) 94. "Property signifies the right or interest which one has in land or chattels. In this sense it is used by the learned and unlearned; by men of all ranks and conditions."

City of Janesville v. Carpenter, 77 Wis. 288, 8 L. R. A. 808. Dillon Mun. Corp. (4th Ed.) § 587b. "Property is that congeries of rights secured by law in and over land or other things which in the aggregate constitute the owner's title thereto, his ownership, his right of user and enjoyment ,and his right of disposition, as against competing claims on the part of others." See, also, Lewis Eminent Domain (2d Ed.) §§ 54, 55, for a very full and lucid discussion of the term.

[238] Austin, Jur., § 1051.

ered.[239] The right may be one which a person enjoys in common with others and for an injury to these there can be no recovery; the damage must be special and personal to the one claiming compensation. This question will be considered more fully in a succeeding section.

§ 750. Concrete illustrations.

Where the necessity exists for an exercise of the power, all property including personal may be taken [240] including portions of real property; rock, gravel or soil; [241] the necessities of the oc-

[239] City of Chicago v. Rumsey, 87 Ill. 348; Randall v. Christiansen, 76 Iowa, 169, 40 N. W. 703; Wehn v. Gage County Com'rs, 5 Neb. 494; Ely v. City of Rochester, 26 Barb. (N. Y.) 133; Burwell v. Vance County Com'rs, 93 N. C. 73.

[240] Burnett v. City of Sacramento, 12 Cal. 76. Money excluded. Emery v. San Francisco Gas Co., 28 Cal. 345; Christy's Adm'rs v. City of St. Louis, 20 Mo. 143; City of Galveston v. Brown, 28 Tex. Civ. App. 274, 67 S. W. 156.

In respect to the right of a state to authorize the appropriation of property of the United States, see United States v. City of Chicago, 7 How. (U. S.) 185; United States v. Railroad Bridge Co., Fed. Cas. No. 16,114; Pratt v. Brown, 3 Wis. 603.

In respect to an exercise of power over property belonging to the state itself, see City of Atlanta v. Central R. & Banking Co., 53 Ga. 120; St. Louis, J. & C. R. Co. v. Institution for Education of the Blind, 43 Ill. 303. The grant of the power to appropriate state lands must be considered as applying only to those vacant and unappropriated—not to such as have been already devoted to a special use on behalf of the state.

St. Paul & N. P. R. Co. v. State, 34 Minn. 227, 25 N. W. 345. Lots belonging to a state university not used or held for public purposes by the state and not contiguous to the university grounds are subject to appropriation under eminent domain. Attorney General v. Hudson Tunnel R. Co., 27 N. J. Eq. 176; In re Alexander Avenue, 63 Hun (N. Y.) 630; In re City of Utica, 73 Hun 256, 26 N. Y. Supp. 564. The grant of the right to exercise the power of eminent domain does not authorize the grantee to condemn land owned by the state since the statute is not binding on the state unless it is expressly named or included in it by necessary implication. Seattle & M. R. Co. v. State, 7 Wash. 150, 34 Pac. 551, 22 L. R. A. 217.

[241] Lewis, Em. Dom. (2d Ed.) § 61a. In speaking of the rights of other riparian owners, the author says: "The principal uses to which the water of a stream may be put are for domestic purposes, for watering stock, for irrigation and for manufacturing. The right to take water for domestic purposes and for watering stock is an absolute right, and each proprietor may take what is necessary for these purposes, without regard to the effect upon lower proprietors. But the right to take water for irrigation or manufacturing purposes is qualified and limited by the exist-

casion can be satisfied through eminent domain irrespective of the quantity or the property appropriated.[242]

Waters and riparian rights. Every riparian owner has the right of access to the water and to a continuance of its flow to and from his premises in the quantity, the quality and the manner in which it is accustomed to flow by nature, subject, however, to the right of other proprietors to make use of it in a lawful manner.[243] This right, the courts have held, is property, and cannot be taken or damaged without the payment of just compensation.[244] The text book writers seem to agree that this right can be taken or injuriously affected through an abstraction or diversion of the water or by any interference with the flow of the water or its current. Public corporations may, in the exercise of their legal powers, take such action as will effect the taking of this particular property right and for which injury the property owner will be entitled to compensation. Considering first then the abstraction or diversion of water by a public corporation for the purpose of securing a water supply for its own use and that of its inhabitants: To furnish a sufficient supply of pure and wholesome water is required as a public and governmental duty. It cannot attain this end without securing the water in a legal manner. A public corporation no more than the individual is permitted to appropriate the property of others even though this use is a public one. Where, therefore, in the construction or maintenance of a system of waterworks, the water of a riparian owner is abstracted or diverted, he is entitled to recover compensation and this whether the water is taken directly from the stream [245] or body of water,

ence of like rights in the lower owners, and must be exercised with a due regard to such rights."

[242] Baring v. Erdman, Fed. Cas. No. 981; City of Hartford v. Day, 64 Conn. 250, 29 Atl. 480; Martin v. City of Evansville, 32 Ind. 85 Use of property below high-water mark may be regulated by virtue of the general property conferred to promote navigation but lands above high-water mark can only be acquired or regulated upon making compensation to the property owner.

[243] Gould, Waters, § 204; Angell, Water Courses, §§ 90, 96; Farnham, Waters & Water Rights, §§ 62, 64, 65, 66, 76 et seq.

[244] Bottoms v. Brewer, 54 Ala. 288; St. Helena Water Co. v. Forbes, 62 Cal. 182; Lux v. Haggin, 69 Cal. 255; Harding v. Stamford Water Co., 41 Conn. 87; City of Emporia v. Soden, 25 Kan. 588; Clark v. Cambridge & A. Irr. & Imp. Co., 45 Neb. 799, 69 N. W. 239.

[245] United States v. Great Falls Mfg. Co., 112 U. S. 645; Long Island Water Supply Co. v. City of Brooklyn, 166 U. S. 685; Saunders v.

Bluefield Waterworks Co., 58 Fed. 133; Pine v. City of New York, 103 Fed. 337. A municipality cannot condemn land situated in another state for the purpose of a water supply. Dudden v. Guardians of Poor of Clutton Union, 1 Hur. & N. 630; Stein v. Burden, 24 Ala. 130, Id., 29 Ala. 127; St. Helena Water Co. v. Forbes, 62 Cal. 182; City of Santa Cruz v. Enright, 95 Cal. 105, 30 Pac. 197; Harding v. Stamford Water Co., 41 Conn. 87; Fisk v. City of Hartford, 70 Conn. 720; Tampa Waterworks Co. v. Cline, 37 Fla. 586, 20 So. 780, 33 L. R. A. 376; City of Elgin v. Elgin Hydraulic Co., 85 Ill. App. 182; Bass v. City of Ft. Wayne, 121 Ind. 389, 23 N. E. 259; Dodge v. City of Council Bluffs, 57 Iowa, 560, 10 N. W. 886; City of Emporia v. Soden, 25 Kan. 588; Reddell v. Bryran, 14 Md. 444; Aetna Mills v. Inhabitants of Brooklyn, 127 Mass. 69; Johnson v. City of Boston, 130 Mass. 452; Watuppa Reservoir Co. v. Mackenzie, 132 Mass. 71; Cowdrey v. Woburn, 136 Mass. 409; Pickman v. Peabody, 145 Mass. 480, 14 N. E. 751; Proprietors of Mills v. Braintree Water Supply Co., 149 Mass. 478, 4 L. R. A. 272; Nemasket Mills v. City of Taunton, 166 Mass. 540, 44 N. E. 609; Hall v. City of Ionia, 38 Mich. 493; Minneapolis Mill Co. v. St. Paul Water Com'rs, 56 Minn. 485, 58 N. W. 33; Id., 168 U. S. 349, where the court held that the appropriation of waters of a lake for a city water supply thereby preventing their flowing past a water power in a river without any compensation for the resulting injury to riparian owners is a matter of local law on which the federal courts must follow state decisions.

Thorn v. Sweeney, 12 Neb. 251; Higgins v. Flemmington Water Co., 36 N. J. Eq. (9 Stew.) 538; Olmsted v. Morris Aqueduct Co., 46 N. J. Law, 495; Ingersoll v. Town of Newton, 57 N. J. Eq. 367, 41 Atl. 385; Butler Rubber Co. v. Newark, 61 N. J. Law, 32, 40 Atl. 224; Gardner v. Village of Newburgh, 2 Johns. Ch. (N. Y.) 161; Chace v. Warsaw Waterworks Co., 79 Hun, 151, 29 N. Y. Supp. 729; Sumner v. City of Gloversville, 35 Misc. 523, 71 N. Y. Supp. 1088. See, also, as holding the same, Auburn v. Union Water Power Co., 90 Me. 576, 38 L. R. A. 188; Smith v. City of Brooklyn, 18 App. Div. 340, 46 N. Y. Supp. 141; Id., 160 N. Y. 357, 54 N. E. 787, 45 L. R. A. 664; In re Middletown, 82 N. Y. 196; Smith v. City of Rochester, 92 N. Y. 463; Neal v. City of Rochester, 156 N. Y. 213; Appeal of Haupt, 125 Pa. 211, 17 Atl. 436, 3 L. R. A. 536; Lord v. Meadville Water Co., 135 Pa. 122, 19 Atl. 1007, 8 L. R. A. 202; Howe v. Norman, 13 R. I. 488; Leonard v. City of Rutland, 66 Vt. 105; Wisconsin Water Co. v. Winans, 85 Wis. 26, 54 N. W. 1003, 20 L. R. A. 662. But see Barre Water Co. v. Carnes, 65 Vt. 626, 27 Atl. 609, 21 L. R. A. 769. See, also, Farnham, Waters, § 137.

The rights of a riparian owner may be defeated by grant, custom or estoppel. See the following cases: Race v. Ward, 30 Eng. L. R. Eq., 187; Stein v. Ashby, 24 Ala. 521; Feliz v. City of Los Angeles, 58 Cal. 73; Vernon Irrigation Co. v. City of Los Angeles, 106 Cal. 237, 39 Pac. 762; Fisk v. City of Hartford, 70 Conn. 720; Mitchell v. Parks, 26 Ind. 354; City of Logansport v. Uhl, 99 Ind. 531; Jones v. Portsmouth Aqueduct, 62 N. H. 488. The facts considered not held sufficient to create an estoppel. Hannum v. Borough of West Chester, 70

or whether it is lost by a percolation through the soil.[246] The taking in either case is complete and compensation must be made. This subject has been somewhat considered in a previous section.[247] A public corporation may interfere with a water right in respect to the second class of injuries by a discharge of its sewage into a stream or body of water in such a manner as to take or injuriously affect the right of the riparian owner to the flow of the stream or the preservation of the condition of a body of water in its natural purity.[248] Where such conditions and injuries can

Pa. 367; Lonsdale Co. v. City of Woonsocket, 21 R. I. 498, 44 Atl. 929; Fisher v. Bountiful City, 21 Utah, 29, 59 Pac. 520.

[246] Cowdrey v. Inhabitants of Woburn, 136 Mass. 409; Smith v. City of Broklyn, 18 App. Div. 340, 46 N. Y. Supp. 141; Van Wycklen v. City of Brooklyn, 118 N. Y. 427; Rigney v. Tacoma Light & Water Co., 9 Wash. 576, 38 Pac. 147, 26 L. R. A. 425.

[247] See §§ 462 et seq.

[248] Attorney General v. Corporation of Halifax, 39 Law J. Ch. 129; Id., 21 Law T. (N. S.) 52; City of Birmingham v. Land Co., 137 Ala. 538, 34 So. 613; Peterson v. City of Santa Rosa, 119 Cal. 387; Platt v. City of Waterbury, 72 Conn. 531, 45 Atl. 154, 48 L. R. A. 691. "The use of a stream for drainage is unreasonable when it results in the concentration of filth and its discharge into the stream in such quantities that it is necessarily carried to the premises of another where it produces a nuisance dangerous to health and destructive to the value of the property. And although a city has implied power to construct drains beneath its streets, if, by their use it creates a nuisance, the city is liable."

City of Jacksonville v. Lambert, 62 Ill. 519. "It may be true that a city is liable to be compelled to afford sufficient drainage for the health and comfort of the people, but that would not authorize them so to construct the work as to destroy or seriously impair the value of the property of an individual. If * * * there is no means of making proper drainage without injury to individuals, let the community for whose benefit it is constructed, through their corporate government, by condemnation or otherwise, make compensation. Every principle of justice, and the dictates of reason, would say that it is wholly wrong to impose the burden of the nuisance on one or a few citizens."

City of Jacksonville v. Doan, 145 Ill. 23, 33 N. E. 878; Village of Dwight v. Hayes, 150 Ill. 273, 37 N. E. 218; Robb v. Village of La Grange, 158 Ill. 21, 42 N. E. 77; City of Valparaiso v. Moffitt 12 Ind. App. 256, 39 N. E. 909; Woodward v. City of Worcester, 121 Mass. 245; O'Brien v. City of St. Paul, 18 Minn. 176 (Gil. 163); Foncannon v. City of Kirksville, 88 Mo. App. 279; Vale Mills v. Nashua, 63 N. H. 136; Doremus v. City of Paterson, 65 N. J. Eq. 711, 55 Atl. 304; Grey v. City of Paterson, 58 N. J. Eq. 1, 42 Atl. 749; Demby v. City of Kingston, 60 Hun, 294, 14 N. Y. Supp. 601; Noonan v. City of Albany, 79 N. Y. 470; Chapman v. City of Rochester,

be established, there is a taking clearly of private property for which compensation must be made. The claim has been made that where there is statutory permission to turn sewage into a stream or body of water, that it relieves the corporation from any claim for damages. This claim involves a determination of the power of the legislature to grant authority for the creation of a nuisance and this question is necessarily determined not by an inspection and consideration of the statute itself but by constitutional provisions. The weight of authority sustains the right of a riparian owner to recover damages and this is especially the case where the liberal theory as to the meaning of the words "property" and "taking" have been adopted, or where constitutional provisions exist using words other than "taking" or "taken" and which enlarge the owner's right of compensation. See as holding to the contrary, however, the Indiana and New England cases cited in the notes.[249] The general principle applying

110 N. Y. 273, 18 N. E. 88, 1 L. R. A. 296; Good v. City of Altoona, 162 Pa. 493, 29 Atl. 741; Clark v. Peckham, 9 R. I. 455; City of San Antonio v. Pizzini (Tex. Civ. App.) 58 S. W. 635; New Odorless Sewerage Co. v. Wisdom, 30 Tex. Civ. App. 224, 70 S. W. 354; City of San Antonio Board v. Smith, 94 Tex. 266. But see Vickers v. Durham, 132 N. C. 880, 44 S. E. 685. An injunction will not be granted at the instance of a riparian owner where there is no evidence that the proposed acts of the defendant will cause injury.

[249] Lind v. City of San Luis Obispo, 109 Cal. 340; Nolan v. City of New Britain, 69 Conn. 668, 38 Atl. 703; Watson v. Town of Milford, 72 Conn. 561, 45 Atl. 167; City of Champaign v. Forrester, 29 Ill. App. 117; City of Bloomington v. Costello, 65 Ill. App. 407; Loughran v. City of Des Moines, 72 Iowa, 382; Randolf v. Town of Bloomfield, 77 Iowa, 50, 41 N. W. 562; Hollenbeck v. City of Marion, 116 Iowa, 69; Long v. City of Emporia, 59 Kan. 46; Herr v. Central Kentucky Lunatic Asylum, 97 Ky. 458. 30 S. W. 971, 28 L. R. A. 394; Franklin Wharf Co. v. City of Portland, 67 Me. 46; Attwood v. City of Bangor, 83 Me. 583, 22 Atl. 466; West Arlington Imp. Co. v. Mt. Hope Retreat, 97 Md. 191, 54 Atl. 982; Morse v. City of Worcester, 139 Mass. 389, 2 N. E. 694; Middlesex Co. v. City of Lowell, 149 Mass. 509, 21 N. E. 872; Bacon v. City of Boston, 154 Mass. 100; Titus v. City of Boston, 161 Mass. 209, 36 N. E. 793; Lincoln v. Commonwealth, 164 Mass. 368, 41 N. E. 489; Edmondson v. City of Moberly, 98 Mo. 523, 11 S. W. 990; Smith v. City of Sedalia, 152 Mo. 283, 53 S. W. 907, 48 L. R. A. 711; Simmons v. City of Paterson, 60 N. J. Eq. 385; Seifert v. City of Brooklyn, 101 N. Y. 136; Sammons v. Gloversville, 175 N. Y. 346, 67 N. E. 622; City of Mansfield v. Balliett, 65 Ohio St. 451, 63 N. E. 86, 58 L. R. A. 628; Owens v. City of Lancaster, 182 Pa. 257; City of Paris v. Allred, 17 Tex. Civ. App. 125, 43 S. W. 62; Trevett v. Prison Ass'n, 98 Va. 332, 36 S. E. 373, 50

to the discharge of sewage into a stream or body of water establishes the rule that before a riparian owner can acquire a right of action the discharge must have been so great or of such a character as to create a nuisance and deprive him of some of his property rights. Injuries of the third class can be effected causing an increase or decrease in the flow of water by the construction of public works in such a manner as to divert or deflect the current of a stream from its natural course, and the fact that this may have been occasioned by a public corporation in the proper exercise of a granted power and for a public purpose is no excuse and the owner can recover for the injuries he may have suffered.

§ 751. Franchises as property may be taken or injuriously affected.

A franchise was defined by Chief Justice Taney in a leading case [250] as "a special privilege conferred by government upon individuals which does not belong to the citizens of the country,

L. R. A. 564. But see City of Richmond v. Test, 18 Ind. App. 482, 48 N. E. 610; Peck v. Michigan City, 149 Ind. 670, 49 N. E. 800.

City of Valparaiso v. Hagen, 153 Ind. 337, 54 N. E. 1062, 48 L. R. A. 707. "The facts present a case wherein a principle of the greatest good to the greatest number must be permitted to operate, and private interest yield to the public good, and if the erection has been skilfully performed, and without negligence, it must be held to be a lawful exercise of power that equity will not restrain," and further, that a municipal corporation "may open and improve streets, construct gutters, sluices, and water ways; and if storm water carries into these latter the multifarious filth and garbage incident to populous places, and bears the same away by natural channels to the general water course of the basin, the right of the municipality to permit it will not be doubted, even though the waters of the stream are thereby so polluted as to render them unfit for ordinary uses. * * * And, if cities are permitted to adulterate streams by allowing all accumulating surface impurities to flow into them by natural channels, we do not perceive why the underlying principle will not allow them to deepen these natural storm channels and transform them into covered sewers, nor why the right to protect the health and welfare of the public against one class of noxious matter should not be extended to all classes of equal virulence." Child v. City of Boston, 86 Mass. (4 Allen) 41; Haskell v. City of New Bedford, 108 Mass. 208; Merrifield v. City of Worcester, 110 Mass. 216; Brayton v. City of Fall River, 113 Mass. 218; Boston Belting Co. v. City of Boston, 149 Mass.

[250] Bank of Augusta v. Earle, 13 Pet. (U. S.) 519, 595.

generally, of common right." The doctrine is thoroughly established and beyond any question that a franchise is a species of property which may be taken or injuriously affected by a public corporation and for which the owner is entitled under these circumstances to compensation.[251] The grant by a public corporation to persons or corporations of the right to transact certain business where a similar grant already exists in favor of others raises the question of whether the latter grant is not a taking of property. Since franchises are a special gift from the sovereign and in derogation of common right, they are strictly construed, and an interference with the right or business of an existing corporation of the character indicated does not logically or legally lead to a corresponding right of compensation. The mere fact that through the granting of a similar franchise the profits of an existing corporation will be diminished or destroyed does not necessarily involve the question of a taking of property.[252] Such a grant may be exclusive in its character or otherwise and where not of the former character, the grant of a similar franchise will

44, 20 N. E. 320; Sayre Co. v. City of Newark, 60 N. J. Eq. 361, 45 Atl. 985; Lefrois v. Monroe County, 162 N. Y. 563, 57 N. E. 185, 50 L. R. A. 206.

[251] Powell v. Sammons, 31 Ala. 562; Enfield Toll Bridge Co. v. Hartford & N. H. R. Co., 17 Conn. 48; Ft. Wayne Land & Imp. Co. v. Maumee Ave. Gravel Road Co., 132 Ind. 80, 15 L. R. A. 651; State v. Noyes, 47 Me. 189; City of New York v. Starin, 106 N. Y. 1; In re City of Brooklyn, 143 N. Y. 596, 38 N. E. 983, 26 L. R. A. 270. See, also, cases cited 10 Am. & Eng. Enc. of Law (2d Ed.) pp. 1091, 1092 on the subject of "Franchises Subject to the right of Eminent Domain."

The following states have constitutional provisions relative to the appropriation of property of one corporation including its franchises by another. Ala. 1875, art. 1, § 24; Ark. 1874, art. 17, § 9; Cal. 1879, art. 12, § 8; Colo. 1876, art. 15, § 8; Ga. 1877, art. 4, § 2, par. 2; Idaho 1889, art. 11, § 8; Ill. 1870, art. 11, § 14; Ky. 1891, § 195; Miss. 1890, art. 7, § 190; Mo. 1875, art. 12, § 4; Mont. 1889, art. 15, § 9; Neb. 1875, art. 11, § 6; N. D. 1889, art. 7, § 134; Pa. 1873, art. 16, § 3; S. D. 1889, art. 17, § 4; Utah 1895, art. 12, § 11; Wash. art. 12, § 10; W. Va. 1872, art. 11, § 12; Wyo. art. 10, § 9.

[252] Minturn v. La Rue, 23 How. (U. S.) 435; Northwestern Fertilizing Co. v. Hyde Park, 97 U. S. 659; Newton v. Mahoning County Com'rs, 100 U. S. 548; Hamilton Gas Light & Coke Co. v. City of Hamilton, 146 U. S. 258; Thompson Houston Elec. Co. v. City of Newton, 42 Fed. 723; Richmond & L. Turnpike Road Co. v. Rogers, 62 Ky. (1 Duo.) 135; In re Hamilton Ave., 14 Barb (N. Y.) 405; State v. City of Hamilton, 47 Ohio St. 52; City of Houston v. Houston City St. R. Co., 83 Tex. 548, 19 S. W. 127.

not give rise to a claim for damages since there is no promise in favor of the first grantee that other privileges of the same character will be withheld from other persons.[253] Where, however, the exclusive right or privilege is given to carry on certain business, the grant of a similar franchise or the carrying on of the same business or occupation by the public corporation itself will create a claim for compensation.[254] The power of the govern-

[253] Washington & B. Turnpike Co. v. Maryland, 70 U. S. (3 Wall.) 210; Charles River Bridge v. Warren Bridge, 11 Pet. (U. S.) 420, affirming 24 Mass. (7 Pick.) 344. Thompson Houston Elec. Co. v. City of Newton, 42 Fed. 723. "The theory of the complainant is that under this statute the city had the option given it in regard to electric plants, and that it could originally have erected the same by vote of the people, but, having elected to authorize private parties so to do, it is estopped from afterwards entering the field as a competitor; that while the complainant has not an exclusive right under its agreement with the city, and cannot object to the city authorizing other private companies or persons to erect and maintain electric plants in the city, yet complainant has the right to enjoin the city from undertaking the work, because the city can, through the exercise of its taxing power over the property in the city, including that owned by complainant, raise money for the running of the plant, instead of being compelled to provide the same by charging for the use of the light, and thus the city can practically drive complainant out of the field, and destroy the value of its plant, which was erected in the city by an agreement with the municipal authorities. There is great force in the suggestion thus made. It is doubtless true that, if the city enters the field by the erection of its own plant, it will have an advantage over the complainant yet it does not follow that the court can interpose and restrain the city from erecting the contemplated plant. As already stated, the city did not grant any exclusive rights to complainant; and the latter, when it erected its plant, took the chance as to future competition."

Salem & H. Turnpike Co. v. Town of Lyme, 18 Conn. 451; Curtis v. Parish of Morehouse, 12 La. Ann. 649; Long v. City of Duluth, 49 Minn. 280, 51 N. W. 938; Syracuse Water Co. v. City of Syracuse, 116 N. Y. 167, 22 N. E. 381, 5 L. R. A. 546; Franklin & C. Turnpike Co. v. County Court, 27 Tenn. (8 Humph.) 342.

[254] New Orleans Gas Co. v. Louisiana Light Co., 115 U. S. 650; New Orleans Waterworks Co. v. Rivers, 115 U. S. 674; St. Tammany Waterworks Co. v. New Orleans Waterworks Co., 120 U. S. 54; Powell v. Sammons, 31 Ala. 552; Montgomery Gas Light Co. v. City Council of Montgomery, 87 Ala. 245, 4 L. R. A. 616; Citizens' Water Co. v. Bridgeport Hydraulic Co., 55 Conn. 1; Metropolitan Gas Co. v. Village of Hyde Park, 27 Ill. App. 361; Chicago Municipal Gas Light & Fuel Co. v. Town of Lake, 130 Ill. 42, 22 N. E. 616; Citizens' Gas & Min. Co. v. Town of Elwood, 114 Ind. 332; Crowder v. Town of Sullivan, 128

ment or its subordinate agencies to grant an exclusive contract being conceded, there is established, therefore, the principle that such a grant becomes property which can be taken and against the taking of which without compensation the constitutional prohibitions will apply relating to the exercise of the power of eminent domain, as well as those which prevent the impairment of contract obligations.[255] The right of compensation, where there is an interference with the full enjoyment of the franchise right or privilege, cannot be seriously questioned where the action is caused through the grant of a similar franchise to other individuals. The government itself or one of its subordinate agencies may, however, engage in the same business as that granted to be exclusively carried on by some private person or corporation. There are cases which hold that the sovereign may do this without being responsible,[256] but the better reasons incline to the doc-

Ind. 486, 13 L. R. A. 647; City of Newport v. Newport Light Co., 84 Ky. 166; Long v. City of Duluth, 49 Minn. 280; Power v. Village of Athens, 99 N. Y. 592; Hydes Ferry Turnpike Co. v. Davidson County, 91 Tenn. 291. But see Emerson v. Com., 108 Pa. 111. An exclusive franchise to supply gas for heating purposes is not impaired by a grant of the right to use natural gas for the same purposes to another company. Gas Co. v. Parkersburg, 30 W. Va. 435. A grant of an exclusice right to light a city with gas is not infringed by the grant of a privilege to light with electricity.

[255] See the authorities cited generally in this section and also authorities cited under the sections relating to the power of the municipality to grant exclusive franchises.

[256] Stein v. Bienville Water Supply Co., 141 U. S. 67. Hamilton Gaslight & C. Co. v. City of Hamilton, 146 U. S. 258. A grant under legislative authority by a city of an exclusive privilege for a term of years, for the supplying of a city and its people with gas does not prevent the city from erecting its own gas works under a state law then existing and giving it power so to do. The court in its opinion on page 267 say: "Accepting as we do, this decision of the highest court of the state as correctly interpreting the legislative will, and, therefore, assuming that the legislature intended by section 2486 to confer authority upon the city of Hamilton to erect gas-works at its expense, whenever deemed by it expedient or for the public good to do so, the next contention of the plaintiff is that such legislation is within the constitutional inhibition of state laws impairing the obligations of contracts. This view is inadmissible. The statutes in force when the plaintiff became a corporation did not compel the city to use the gaslight furnished by the plaintiff. The city was empowered to contract with the company, for lighting streets, lands, squares, and public places within tis limits, but it was under no legal obligation to make a contract of that character, although it could regulate, by ordin-

trine that where property has been created through the grant of an exclusive privilege or franchise, a taking or a damage to it may be as effectually made by the grantor as by private individuals. The government can possess no greater right to take the private property which has been created through its own proper act than other private property.[257]

§ 752. Other concrete illustrations of a taking.

Where the right to appropriate property under the power of eminent domain exists, if the necessities of the occasion require, the whole of the property desired can be taken and it necessarily

ance, the price to be charged for gaslight supplied by the plaintiff and used by the city or its inhabitants. It may be that the stockholders of the plaintiff supposed, at the time it became incorporated, and when they made their original investment, that the city would never do what evidently is contemplated by the ordinance of 1889. And it may be that the erection and maintenance of gas-works by the city at the public expense, and in competition with the plaintiff, will ultimately impair, if not destroy, the value of the plaintiff's works for the purposes for which they were established. But such considerations cannot control the determination of the legal rights of the parties. As said by this court in Curtis v. Whitney, 80 U. S. (13 Wall.) 68, 70, 20 Law. Ed. 513, 514: 'Nor does every statute which affects the value of a contract impair its obligation. It is one of the contingencies to which parties look now in making a large class of contracts, that they may be affected in many ways by state and national legislation.' If parties wish to guard against contingencies of that kind they must do so by such clear and explicit language as will take their contracts out of the established rule that public grants, susceptible of two constructions, must receive the one most favorable to the public. Upon this ground it was held in Stein v. Bienville Water Supply Co., 141 U. S. 67, 81, 35 Law. Ed. 622, 628, that 'we are forbidden to hold that a grant, under legislative authority, of an exclusive privilege, for a term of years, of supplying a municipal corporation and its people with water drawn by means of a system of waterworks from a particular stream or river, prevents the state from granting to other persons the privilege of supplying, during the same period, the same corporation and people with water drawn in like manner from a different stream or river." Lehigh Water Co's. Appeal, 102 Pa. 515.

[257] Hall v. Ragsdale, 4 Stew. & P. (Ala.) 252; Norwich Gaslight Co. v. Norwich City Gas Co., 25 Conn. 19; Village of Highland Park v. Detroit & B. Plank-Road Co., 95 Mich. 489; Buckingham v. Smith, 10 Ohio, 288; State v. Cincinnati Gaslight & Coke Co., 18 Ohio St. 293; Hydes Ferry Turnpike Co. v. Davidson County, 91 Tenn. 291.

follows that any interest or quantity less than the whole can be likewise appropriated. This principle warrants the conclusion that the use or an enjoyment of an easement or interest may be taken or interfered with to such an extent as to authorize a claim for compensation.[258] The appropriation of an easement or a part of private property may constitute a taking, such as the construction of a ditch, sewer [259] or the laying of water or gas pipes [260] or the stringing of electric wires for lighting purposes.[261] These acts impair and injuriously affect the right of exclusion which is one of the essential rights of property. Lateral support is also one of the rights of property and if a public corporation in the construction of any work of public improvement interferes with this, it will amount to a taking of property for which compensation must be made.[262] This question is also considered in a later section.

[258] Boston Gaslight Co. v. Old Colony & N. R. Co., 96 Mass. (14 Allen) 444; Ladd v. City of Boston, 151 Mass. 585, 24 N. E. 858; Arnold v. Hudson River R. Co., 55 N. Y. 661; Storey v. New York El. R. Co., 90 N. Y. 122.

[259] Plummer v. Sturtevant, 32 Me. 325; Ward v. Peck, 49 N. J. Law, 42; People v. Haines, 49 N. Y. 587; Watson's Ex'r v. Pleasant Tp. 21 Ohio St. 667.

[260] Smith v. City of Atlanta, 92 Ga. 119, 17 S. E. 981.

[261] Braceville Coal Co. v. People, 147 Ill. 66, 35 N. E. 62, 22 L. R. A. 340; Ritchie v. People, 155 Ill. 98, 40 N. E. 454, 29 L. R. A. 79; Western Union Tel. Co. v. Moyle, 51 Kan. 203, 32 Pac. 895; State v. Goodwill, 33 W. Va. 179, 10 S. E. 285, 6 L. R. A. 621.

[262] Armstrong v. City of St. Paul, 30 Minn. 299; Nichols v. City of Duluth, 40 Minn. 389. "Every person has a right ex jure naturae to the lateral support of the adjoining soil, and is entitled to damages for its removal. A municipal corporation has no greater rights or powers in that regard over the soil of the streets than a private owner has over his own land, and will be liable in damages for removing this lateral support the same as would a private owner if improving his property for his own use. It is no defense that the excavation was necessary for the purpose of grading the street. If the city desires greater rights than those possessed by private owners, it must acquire them by the exercise of eminent domain. It must either do this, or else itself substitute other lateral support in place of the soil which it removes. The liability of the city in these cases does not depend as appellant assumes, upon its negligence in making the excavation. This right of the lateral support of the adjoining soil, being a natural one, is absolute, and independent of any question of negligence." Keating v. City of Cincinnati, 38 Ohio St. 142; Stearns v. City of Richmond, 88 Va. 992, 14 S. E. 847; Darke v. City of Seattle, 5 Wash. 1, 31 Pac. 310, 32 Pac. 82, 20 L. R. A. 68. But see Fellowes v. City of New Haven, 44

§ 753. Annexation of land to a municipality not regarded as a taking.

It is a well known fact that through the larger increased expenditures of a municipal corporation for police, fire and educational purposes and for local improvements, the right of taxation upon property within the limits of such organizations is largely in excess of that levied in adjacent districts. Frequently municipal corporations for the purpose of increasing their revenues by an increase of taxable property attempt to annex tracts of land immediately adjoining their limits. The constitutionality of this action has been raised, the claim being made that since the land annexed is of an agricultural and suburban character, it cannot receive the benefits which are supposed to be derived from municipal organization and, therefore, its annexation amounts to a taking of private property without the payment of compensation.[263] The weight of authority is to the effect that the annexation of territory is not a taking of property and the owners, therefore, are not entitled to compensation.[264] This doctrine is largely based upon the large, if not absolute possession by the sovereign over all territory within its jurisdiction; the limits of all municipal corporations being held, so it has been repeatedly declared, at the pleasure of the sovereign who possesses the right to enlarge, diminish or alter the technical boundaries of all its subordinate agencies at will.[265]

§ 754. Right to labor or contract.

The right to labor [266] and the right to contract [267] constitutes property, and any undue or illegal interference with it will come

Conn. 240; Mitchell v. City of Rome, 49 Ga. 19; City of Quincy v. Jones, 76 Ill. 231; Radcliffe's Ex'rs v. City of Brooklyn, 4 N. Y. (4 Comst.) 195.

[263] Morford v. Unger, 8 Iowa, 82; Fulton v. City of Davenport, 17 Iowa, 404; Buell v. Ball, 20 Iowa, 282; City of Covington v. Southgate, 54 Ky. (15 B. Mon.) 491; Sharp's Ex'r v. Dunavan, 56 Ky. (17 B. Mon.) 223; Trustees of Elkton v. Gill, 94 Ky. 138; People v. Daniels, 6 Utah, 288, 22 Pac. 159, 5 L. R. A. 444; Smith v. Sherry, 50 Wis. 210.

[264] Forsythe v. City of Hammond, 68 Fed. 774; Stilz v. City of Indianapolis, 55 Ind. 515; Groff v. Frederick City, 44 Md. 67; Giboney v. City of Cape Girardeau, 58 Mo. 141; Martin v. Dix, 52 Miss. 53; Kelly v. City of Pittsburgh, 85 Pa. 170; Appeal of Hewitt, 88 Pa. 55; Norris v. City of Waco, 57 Tex. 635.

[265] Turner v. Althaus, 6 Neb. 54, overruling Bradshaw v. City of Omaha, 1 Neb. 16. See, also, §§ 84 and 85 ante.

[266] Adams v. Brenan, 177 Ill. 194, 52 N. E. 314, 42 L. R. A. 718; Fiske

v. People, 188 Ill. 206, 52 L. R. A. 291; State v. Julow, 129 Mo. 163, 29 L. R. A. 257; Marshall & Bruce Co. v. City of Nashville, 109 Tenn. 495, 71 S. W. 815. McQuillin on Municipal Ordinances, § 553, on the validity of ordinances restricting competition involving union labor. But see St. Louis Quarry & Const. Co. v. Frost, 90 Mo. App. 677; In re Ten Hour Law for St. Ry. Corporations, 24 R. I. 603, 54 Atl. 602. See, also, § 535, ante, and authorities cited. See, also, note citing many cases taken from vol. 3, Current Law, in the note following.

[267] United States v. Martin, 94 U. S. 400. In the head notes by Mr. Justice Hunt it is stated: "1. The Act of Congress, declaring 'that eight hours shall constitute a day's work for all laborers, or workmen * * * employed by, or on behalf of the Government of the United States,' is in the nature of a direction by the United States to its agents.

"2. It is not a contract with laborers to that effect, and does not prevent the officers of the Government from making agreements with laborers by which the day's labor may be more or less than eight hours.

"3. The Act does not prescribe the amount of compensation to be paid for labor of eight hours or of any other time."

Ex parte Kuback, 85 Cal. 274, 24 Pac. 737, 9 L. R. A. 482; In re House Bill No. 203, 21 Colo. 27; City of Atlanta v. Stein, 111 Ga. 789, 36 S. E. 932, 51 L. R. A. 335; Ritchie v. People, 155 Ill. 98, 40 N. E. 454, 29 L. R. A. 79; McChesney v. People, 200 Ill. 146, 65 N. E. 626. "The contract is to be awarded to the responsible bidder offering to do the work for the lowest sum, and any provision tending to increase the cost, and make the bids less favorable to the public and the property owners, is against public policy, illegal, and void. The provisions in the specifications limiting the right of the contractor and laborer to agree with each other upon the length of time which shall constitute a day's work, and authorizing a forfeiture of the contract if the contractor should allow laborers to work more than eight hours in any one day, was pronounced illegal, unconstitutional and void in Fiske v. People, 188 Ill. 206, 52 L. R. A. 291, 58 N. E. 985, as infringing upon the freedom of contract to which every citizen is entitled under the law. Such a provision or restriction in a competitive bidding is unlawful and against public policy,—and this is conceded by counsel for appellee. They insist, however, that to enable one whose lands have been assessed to pay for an improvement to avail himself of such an objection he must show that the existence of the provision has increased the cost of the work,—and this must be a definite showing of a final injury to him, in dollars and cents. That is not the rule. The law entitled a property owner to the security afforded by its provisions, and it is sufficient for him to show that he has been deprived of the protection which the law gives him, of having bids made upon a lawful basis, and free from restrictions likely to produce a result detrimental to his interests. It would certainly be difficult, if not impossible, to prove in every instance that an illegal limitation worked unfavorably, or the amount of injury, in dollars and cents resulting from it. The property owner is not obliged to show in each instance that he was preju-

under the prohibition of the eminent domain clause of the constitution. The vacation or alteration of a highway, a change of its grade, the granting of the use of highways by a subordinate public corporation or by the state to railroad, telegraph or telephone companies, and the imposition of an additional use or change of use itself of property acquired by a public corporation, all involve the question of a taking of property but they are more appropriately considered under succeeding sections discussing the control and use of highways and streets by public corporations.

diced by unlawful restrictions and disregard of the law, but it is for the authorities seeking to impose the burden upon his lands to prove a substantial compliance with all of these provisions designed for his benefit. It would be just as reasonable to insist that if the requirements of competitive bidding were disregarded, and the work done by hiring laborers by the day, the property owner may be able to show that the price was not reasonable, or that the work was done at a greater expense than it would have been if the law had been complied with. It is a material and important right of the property owner that there shall be free and open competition, unrestricted by illegal and unconstitutional provisions, the natural tendency of which would be to increase the cost of the work, and it is undeniable that the clauses in question in this case lay down rules which would naturally increase such cost, and be detrimental to the public. The question in this case is whether it was shown that the bidding was upon the basis of this specification.

In Hamilton v. People, 194 Ill. 133, 62 N. E. 533, there was a clause contained in the specifications of the contract by which it was agreed that the contractor should not employ or permit to be employed on the work other than native-born or naturalized citizens of the United States. The clause was not found in the ordinance providing for the improvement, nor in any general or special ordinance of the city, and it was not shown that there was any such requirement in the advertisements for bids, or that the bidders knew of it. It was held that the mere fact that such a clause was found among the specifications was not sufficient evidence that it entered into the bidding in any way.

In Givins v. People, 194 Ill. 150, 62 N. E. 534, a like provision in the contract was made the basis of an objection; but it was not shown that it was a requirement in bidding for the work, and the fact that it was ingrafted on the contract was not considered sufficient to prove that it could have affected the cost of the improvement.

In Grey v. People, 194 Ill. 486, 62 N. E. 894, it was shown that the general ordinance of the city required that all bids for public work in Chicago should contain a clause binding the bidder to hire only such persons in the performance of the work as were members of labor unions. It was not shown, however, that the ordinance was enforced, or that the provision entered into the competition, so as

§ 755. The quantity and estate taken.

The state through its legislative branch selects its agents for the exercise of eminent domain although it may directly exercise the power itself. By the same means, the state may determine the quantity of property and the particular estate to be taken. The

to exclude bidders who employed or desired to employ persons not members of labor unions. While the ordinance was regarded as unconstitutional and void, it was held that the proof was not sufficient to connect it with the bidding for the work.

In Treat v. People, 195 Ill. 196, 62 N. E. 891, the two conditions of a general ordinance, and a provision in the contract were made the basis of an objection. It was the same general ordinance offered in evidence in this case, and the same provision in the contract, but it was not shown that the requirements of the ordinance were enforced in the bidding, or that the bidders were required or invited to bid upon such specification, or with notice that it would be inserted in the contract. It was held that the objection was not good. Precisely the same condition exists here. The law requires that the notice to bidders shall state where the specifications for improvement are to be found, but there was no showing in this case what specifications were referred to in the notice, or that they contained this clause, or that the bids were based upon the specifications contained in it.

What was said in some of the cases above mentioned with reference to showing that the cost of the work was increased by the obnoxious provisions of the contracts, or that they operated to increase the burden of taxation imposed upon the property of the objector, must be understood, not as requiring proof in a particular instance of increased cost or the amount of injury inflicted upon the public, but as meaning that property owners must show that the provision restricting competition and having a tendency injurious to the public actually entered into the competition in some way. There being no evidence that the bidding was upon the specifications offered in evidence, the court was right in overruling the objection." Mathews v. People, 202 Ill. 389; Street v. Varney Electrical Supply Co., 160 Ind. 338, 66 N. E. 895; Low v. Rees Printing Co., 41 Neb. 127, 59 N. W. 362, 24 L. R. A. 702; McCarthy v. City of New York, 96 N. Y. 1; People v. Coler, 166 N. Y. 1, 59 N. E. 716, 52 L. R. A. 814; City of Cleveland v. Clements Bros. Const. Co., 67 Ohio St. 197, 65 N. E. 885, 59 L. R. A. 775; State v. Buchanan, 29 Wash. 602, 70 Pac. 52, 59 L. R. A. 342.

Vol. 3, Current Law, pp. 751 et seq. note 88. "The liberty to contract, subject only to such limitations as may be imposed by the legislature in the legitimate exercise of the police power for the public welfare is not only secured by the constitution of nearly every state, but is undoubtedly within the protection of the federal constitution and covered by the fourteenth amendment thereof (U. S. Const. art. 14, § 1). People v. Marx, 99

selection of an agency for the exercise of the power as well as the quantity and the estate taken are questions of legislative discretion and where these are fixed in this manner it is not for the courts to interfere, unless the quantity taken is so clearly in excess of the necessities of an occasion for the exercise of the power that they will hold it unreasonable. The estate taken whether

N. Y. 377, 2 N. E. 29, 52 Am. Rep. 34; Hooper v. California, 155 U. S. 648, 662, 15 Sup. Ct. 207, 39 Law. Ed. 297, 303; Bailey v. People, 190 Ill. 28, 60 N. E. 98, 83 Am. St. Rep. 116, 54 L. R. A. 838; Kuhn v. Common Council of Detroit, 70 Mich. 534, 38 N. W. 470; People v. Rosenberg, 138 N. Y. 410, 416, 34 N. E. 285; People v. Coler, 166 N. Y. 1, 21, 59 N. E. 716, 52 L. R. A. 814; Palmer v. Tingle, 55 Ohio St. 423, 45 N. E. 313. Corporations both private and public are entitled to the benefit of this provision for the preservation and protection of their right to make contracts affecting their local affairs. In re Parrott, 6 Sawy. 349, 1 Fed. 481; Butchers' Union Slaughter House Co. v. Crescent City, L. S. L. Co., 111 U. S. 746, 764, 4 Sup. Ct. 652, 28 Law. Ed. 585, 589; Blythe v. State, 4 Ind. 525; Howard County Com'rs v. Pollard, 153 Ind. 371, 55 N. E. 87; Smyth v. Ames, 169 U. S. 466, 18 Sup. Ct. 418, 42 Law. Ed. 819. If the legislature has the right to fix the minimum rate of wages to be paid for common labor, then it has the power to fix the maximum rate. And if it can regulate the price of labor, it may also regulate the prices of flour, fuel, merchandise and land. But these are powers which have never been conceded to the legislature, and their exercise by the state would be utterly inconsistent with our ideas of civil liberty. Among the most odious and oppressive laws ever enacted by the English parliament, in the worst of times, were the statutes of labor of Hen. IV and Edw. III. These enactments fixed a maximum rate of wages for the laboring man, prohibited him from seeking employment outside of his own country, required him to work for the first employer who demanded his services, and punished every violation of the statute with severe penalties. In the very nature and constitution of things, legislation which interferes with the operation of natural and economic law defeats its own object, and furnishes to those whom it professes to favor few of the advantages expected from its provisions. Statutes attempting to regulate such wages have been before the courts of many states and in nearly every instance have been held unconstitutional. People v. Coler, 166 N. Y. 1, 59 N. E. 716, 82 Am. St. Rep. 605, 52 L. R. A. 814; State v. Norton, 5 Ohio N. P. 183; Com. v. Perry, 155 Mass. 117, 28 N. E. 1126, 31 Am. St. Rep. 533, 14 L. R. A. 325; Ramsey v. People, 142 Ill. 380, 32 N. E. 364, 17 L. R. A. 853; Jones v. Great Southern Fireproof Hotel Co., 79 Fed. 477; State v. Julow, 129 Mo. 163, 31 S. W. 781, 50 Am. St. Rep. 443, 29 L. R. A. 257; Shaver v. Pennsylvania Co., 71 Fed. 931; Atkins v. Town of Randolph, 31 Vt. 237; Palmer v. Tingle, 55 Ohio St. 423, 45 N. E. 313; City of Cleveland v. Clements Bros.

an easement or one in fee simple is also a question of legislative discretion and usually conclusive.[268] Ordinarily, the question of quantity and the estate is left to the grantee of the power to be determined by the needs of a particular exercise of the power and the rule holds that no more can be taken than is necessary to accomplish the result sought by the proceeding. The application of this principle, however, does not operate as a prohibition against the acquirement of property by this method, having in view the future development and growth of an enterprise or undertaking in aid of which the power is invoked. Unless warranted by this reasoning, the taking of the whole of the property of a person will be considered an illegal exercise of eminent domain although payment of compensation may be made. The needs of the particular exercise of the power measured either by present necessities or reasonable future development determines the quantity which can be legally taken. The right of eminent domain is based upon the necessity of taking private property for a public use and in no case can the right be broader than the necessities of the particular occasion.[269]

Const. Co., 67 Ohio St. 197, 65 N. E. 885, 93 Am. St. Rep. 670, 59 L. R. A. 775. See Street v. Varney Electrical Supply Co., 160 Ind. 338, 66 N. E. 895, 61 L. R. A. 154, 160. But see Holden v. Hardy, 169 U. S. 366, affirming State v. Holden, 14 Utah, 71. See, also, § 535, ante, and authorities cited.

[268] People v. Blake, 19 Cal. 579; Kuschke v. City of St. Paul, 45 Minn. 225, 47 N. W. 786; Fairchild v. City of St. Paul, 46 Minn. 540, 49 N. W. 325. The legislature is exclusive judge of the amount of land and of the estate therein which can be taken under the power of eminent domain where the use is a public one.

In re Water Com'rs, 3 Edw. Ch. (N. Y.) 552; Heyward v. City of New York, 7 N. Y. (3 Seld.) 314; Bennett v. Boyle, 40 Barb. (N. Y.) 551; Brooklyn Park Com'rs v. Armstrong, 45 N. Y. 234. Where an act provides that upon the fulfillment of its requirements, the land appropriated should vest forever in the corporation, it acquires an absolute estate and not an easement and no reversionary interest is left in the former owners. The title acquired by the corporation under such an act is, however, subject to a trust to hold the lands for public use as a park and the city cannot convey or dispose of them in contravention of the trust although the legislature has the power to relieve it and authorize a sale of the lands free from the trust.

[269] Matter of Curran, 38 App. Div. 82, 55 N. Y. Supp. 1018. A municipality may take ample space for the access of light and air in the acquirement of land for street purposes; it is not limited to the amount actually needed for travel.

§ 756. Limitations upon a taking.

The operation of constitutional provisions, the restriction of agencies selected for the exercise of the power and the question of public use, all operate as a limitation upon the exercise of the power of eminent domain. There will be found, upon an examination of the authorities, the further principle that property which is already devoted to a public use cannot, except in extreme cases, be appropriated by other agencies for the same use.[270] The authorities cited in the notes consider the appropriation of land devoted to public use, as streets and parks, by those authorized to exercise the power of eminent domain. The right to condemn in these cases is limited to the taking of a portion or of a crossing only and does not extend to an appropriation of the entire tract or an exclusive use of a longitudinal portion.[271] The right to con-

[270] McCullough v. City & County of San Francisco, 51 Cal. 418. A public square cannot be condemned as a site for a school house. Rominger v. Simmons, 88 Ind. 453. School lands may be appropriated for use as highways.

Inhabitants of Charlestown v. Middlesex County Com'rs, 44 Mass. (3 Metc.) 202; Inhabitants of Marblehead v. Essex County Com'rs, 71 Mass. (5 Gray) 451; In re Wellington, 33 Mass. (16 Pick.) 87; Inhabitants of Easthampton v. Hampshire County Com'rs, 154 Mass. 424, 13 L. R. A. 157; Milwaukee & St. P. R. Co. v. Faribault, 23 Minn. 167. Land occupied as the depot grounds of a railroad cannot be appropriated for a highway under a charter power conferring in general terms the right to open streets.

St. Paul Union Depot Co. v. City of St. Paul, 30 Minn. 359. Land already appropriated for a depot building and appurtenances cannot be taken for a public street. New Jersey Southern R. Co. v. Long Branch Com'rs, 39 N. J. Law, 28. A municipal corporation under authority to condemn lands for public streets has no power to lay a street longitudinally over grounds legally acquired by a railway company under its charter and upon which is constructed a portion of its track; the court further holding in this case that lands acquired under legislative authority and in actual use for corporate purposes cannot be taken for another public use, the nature of which requires the exclusive possession and occupation of the lands condemned. Appeal of Tyrone Tp. School Dist. (Pa.) 15 Atl. 667. See, also, authorities collected 18 Am. Dig. (Cent. Ed.) cols. 847 et seq.

[271] State v. Railroad Com'rs, 56 Conn. 308, 15 Atl. 756; Cornwall v. Louisville & N. R. Co., 87 Ky. 72, 7 S. W. 553; Louisville & N. R. Co. v. Whitley County Ct., 95 Ky. 215, 24 S. W. 604; Irwin v. Great Southern Tel. Co., 37 La. Ann. 63; Union Depot Co. v. City of St. Louis, 8 Mo. App. 412; State v. Morris & E. R. Co., 25 N. J. Law (1 Dutch.) 437; In re New York & B. B. R. Co., 20 Hun (N. Y.) 201; Osborne v. Jersey

demn such property is dependent further upon the character of the title acquired by the public corporation in the highway or park. If a fee simple is acquired, the right of condemnation is enlarged; if an easement only, the adjoining property owner controls to a larger extent the right of appropriation.[272] The converse of the rule also holds that a public corporation has no general or implied power to appropriate for its public uses, including those of highways and parks, property already devoted to a public use, especially the tracks, yards, depots, depot grounds or facilities of common carriers.[273] The general principle controlling the condemnation of property by either public corporations

City & A. R. Co., 27 Hun (N. Y.) 589; In re Prospect Park & C. I. R. Co., 67 N. Y. 371; In re New York Cent. & H. R. R. Co., 77 N. Y. 248; Burough of Millvale v. Evergreen R. Co., 131 Pa. 1, 7 L. R. A. 369; White River Turnpike Co. v. Vermont Cent. R. Co., 21 Vt. 590; James River & K. Co. v. Anderson, 12 Leigh (Va.) 278. See, also authorities cited under the four following notes.

[272] Montgomery v. Santa Ana Westminster R. C., 104 Cal. 186, 37 Pac. 786, 25 L. R. A. 654; City of Jacksonville v. Jacksonville R. Co., 67 Ill. 540; Chicago, N. & S. W. R. Co. v. Town of Newton, 36 Iowa, 299; Chagrin Falls & C. Plank Road Co. v. Cane, 2 Ohio St. 419. See, also, City of Clinton v. Cedar Rapids & M. R. R. Co., 24 Iowa, 455.

[273] Evergreen Cemetery Ass'n v. City of New Haven, 43 Conn. 234. The same rule applies to the property of a cemetery association. Illinois Cent. R. Co. v. City of Chicago, 138 Ill. 453, 28 N. E. 740; City of Valparaiso v. Chicago & G. T. R. Co., 123 Ind. 467, 24 N. E. 249; City of Seymour v. Jeffersonville, M. & I. R. Co., 126 Ind. 466, 26 N. E. 188; Boston & A. R. Co. v. City Council of Cambridge, 166 Mass. 224, 44 N. E. 140; Milwaukee & St. P. R. Co. v. City of Faribault, 23 Minn. 167.

St. Paul Union Depot Co. v. City of St. Paul, 30 Minn. 359, 15 N. W. 684. "The court, therefore, decided that the city might, under its general power to lay out public streets and to condemn lands for such purposes, include this land in question in the proposed street. This presents the first and most important question in the case. The fact conclusively appears that the land in question is needed and is actually used for a public purpose, authorized by plaintiff's charter. This places plaintiff's rights upon the same footing as if the necessity and propriety of its appropriation had been preliminarily determined by the court or legislature. Plaintiff's beneficial use is practically exclusive, and cannot be appropriated or taken away except by express authority of the legislature, or by necessary implication. Milwaukee & St. P. R. Co. v. City of Faribault, 23 Minn. 167. This amount of land seems to be indispensable now, to say nothing of the future demands of plaintiff's business, and the plaintiff is not necessarily limited to a use of this portion of its depot

or common carriers limits the right, if it exists at all, to the taking of a limited portion only for use as a crossing or denying the right altogether if its exercise would result in the destruction of or a serious impairment of the public use to which the property is

grounds without any modification of the present arrangement It is entitled to make any changes in the side-walk baggage-rooms, or otherwise, which may better facilitate the use of the premises for depot purposes.

"The power to extend streets and highways across railway tracks at convenient and suitable places, is necessarily implied in the general authority conferred on cities and towns for such purposes, without express provisions on the subject. In like manner, railroads necessarily cross streets and highways on their routes. An adjustment of the two public uses is thus demanded by public convenience and necessity wherever practicable, and may well be presumed to be contemplated in the legislation authorizing such improvements, and by corporations in accepting or acting under such legislation. Little Miami, & C. & X. R. Co. v. City of Dayton, 23 Ohio St. 510; New Jersey So. R. Co. v. Long Branch Com'rs, 39 N. J. Law, 28. The same principle would doubtless be applicable to other easements sought to be acquired in the land of a corporation, such as the right to extend water-pipes, which may be enjoyed without any serious detriment to a prior public use. In re Rochester Water Com'rs, 66 N. Y. 413. This general presumption, however, yields where the second improvement proceeds under a general power, the exercise of which in a particular instance would be subsersive of a prior public use. Milwaukee & St. P. R. Co. v. City of Faribault, 23 Minn. 167; In re City of Buffalo, 68 N. Y. 167, 174.

"It is also the general rule that a general statutory authority in a charter cannot be presumed to authorize the taking of land already lawfully appropriated and needed as a site for a depot and its necessary appendages, or car-shops, etc., or land within the lines of the location of a railroad and parallel with the track, for the purposes of a street or highway, for the reason that it has already been set apart for a specific public use under the sanction of law, and it cannot, therefore, be diverted to another public purpose, except the power be expressly given or necessarily implied. And there can ordinarily be no necessary implications of the existence of such authority from the grant of a general statutory power to lay out streets, because there is ample authority to appropriate other lands, and especially where, as in this case, the public necessity for the particular street is not demonstrated. Albany N. R. Co. v. Brownell, 24 N. Y. 345, 350; Boston & Maine R. Co. v. Lowell & L. R. Co., 124 Mass. 368, 373; City of Bridgeport v. New York & N. H. R. Co., 36 Conn. 255.

"In this case, while the opinion of the witnesses differ as to the effect of the proposed improvement upon plaintiff's rights, there is not substantial dispute as to the facts. The conclusion of the trial court seems to be based upon the theory that the use in common of the entire

already devoted.[274] Where express statutory authority exists, however, authorizing the action, this will control, but the right must be strictly exercised.[275] Strictly speaking, the power of eminent domain is continuing and inextinguishable, and, if the public good requires it, all property is subject to its exercise, but a second appropriation cannot be made where it is inconsistent with the first and tends to deprive the first person acquiring a public use from the full enjoyment of it.[276] But, as said in the Minnesota case cited above: "The power to extend streets and highways across railway tracks, at convenient and suitable places,

street will so far add to the convenience of access to the depot that the use of plaintiff's land for a public street can be so harmonized with plaintiff's use thereof for depot purposes as practically to work no serious injury.

"This position is not tenable, if it involves a surrender of any substantial rights in the land in question. The plaintiff cannot be required to accept a beneficial use upon land to be taken from others in exchange for the exclusive enjoyment of its own."

City of Hannibal v. Hannibal & St. J. R. Co., 49 Mo. 480; Hyde v. City of Newark, 28 N. J. Law (4 Dutch.) 529; New Jersey So. R. Co. v. Long Branch Com'rs, 39 N. J. Law, 28; Van Reipen v. Jersey City, 58 N. J. Law, 262, 33 Atl. 740; In re Village of Walden, 14 N. Y. State Rep. 590; Albany Northern R. Co. v. Brownell, 24 N. Y. 345; In re Boston & A. R. Co., 53 N. Y. 574; In re City of Buffalo, 68 N. Y. 167; Prospect Park & C. I. R. Co. v. Williamson, 91 N. Y. 552; Suburban Rapid-Transit Co. v. City of New York, 128 N. Y. 510, 28 N. E. 525; Bellaire & O. R. Co. v. City of Buffalo, 7 Ohio Dec. 607; Little Miami C. & X. R. Co. v. City of Dayton, 23 Ohio St. 510; Oregon R. Co. v. City of Portland, 9 Or. 231; Winona & St. P. R. Co. v. City of Watertown, 4 S. D. 323, 56 N. W. 1077.

[274] Cincinnati, W. & M. R. Co. v. City of Anderson, 139 Ind. 490, 38 N. E. 167; Chicago, M. & St. P. R. Co. v. Starkweather, 97 Iowa, 159, 66 N. W. 87, 31 L. R. A. 183; Battle Creek & S. R. Co. v. Tiffany, 99 Mich. 471, 58 N. W. 617. The burden is upon the railroad corporation in such a case to show the impossibility and incompatibility of a concurrent use.

[275] Ill Cent. R. Co. v. City of Chicago, 141 Ill. 586, 30 N. E. 1044, 17 L. R. A. 530; Chicago & N. W. R. Co. v. City of Chicago, 151 Ill. 348, 37 N. E. 842; Lake Erie & W. R. Co. v. City of Kokomo, 130 Ind. 224, 29 N. E. 780; Parks and Boulevard Com'rs of Detroit v. Michigan Cent. R. Co., 90 Mich. 385, 51 N. W. 447; Parks & Boulevard Com'rs of Detroit v. Detroit, G. H. & M. R. Co., 93 Mich. 58, 52 N. W. 1083; In re City of New York, 125 N. Y. 253, 31 N. E. 1043; In re District of Kensington, 2 Rawle (Pa.) 445.

[276] Lake Erie & W. R. Co. v. Seneca County Com'rs, 57 Fed. 945; Enfield Toll Bridge Co. v. Hartford & N. H. R. Co., 17 Conn. 454; St. Louis, H. & K. C. R. Co. v. Hannibal Union Depot Co., 125 Mo. 82.

is necessarily implied in the general authority conferred on cities and towns for such purposes, without express provisions on the subject. In like manner, railroads necessarily cross streets and highways on their routes. An adjustment of the two public uses is thus demanded by public convenience and necessity wherever practicable." Neither can an agent, to whom has been granted the power by the state, select someone to exercise the power either for his benefit or that of the individual in favor of whom the attempted delegation has been made. In many states also will be found limitations upon the power in respect to the property taken, excluding land occupied by farm buildings, orchards, gardens, yards, burying grounds, houses and structures of a similar character.[277]

§ 757. Definition of the phrase "public use."

The power of eminent domain is authorized only when property is to be taken for a public use; it cannot be exercised for a mere private purpose. The state has no power even when compensation in full is paid, in any case, to divest an individual of his

[277] Nischen v. Hawes (Ky.) 21 S. W. 1049. Under Kentucky Gen. St. c. 94, art. 1, § 19, prohibiting the opening of a road through an orchard without the owner's consent, a collection of fifteen or twenty trees is to be considered as such. Howard v. Brown, 37 Neb. 902, 56 N. W. 713; Pancoast v. Troth, 34 N. J. Law, 377. An engine house belonging to a private individual to be occupied by a fire company is not a public building within the meaning of the statute which prohibits the appropriation of public buildings and dwelling houses in order to establish or alter a public highway. Lansing v. Caswell, 4 Paige (N. Y.) 519; People v. Dutchess County, 23 Wend. (N. Y.) 360. Two apple trees in a lane do not constitute an orchard. People v. Kingman, 24 N. Y. 559. Under 1 N. Y. Rev. St. p. 514, § 57, which prohibits the laying out of a public road through a mill yard, ground not definitely occupied and without fixed boundaries although used for piling logs, not adjoining the saw mill does not come within the prohibition.

Snyder v. Plass, 28 N. Y. 465; People v. Highway Com'rs of Town of Greenburgh, 57 N. Y. 549. The prohibition against the laying out of a highway through a garden extends only to land which is part of a cultivated garden and actually used as such. Swift & Given's Appeal, 111 Pa. 516; Seymour v. State, 19 Wis. 240; Smart v. Hart, 75 Wis. 471, 44 N. W. 514. Under Rev. St. Wis. 1878, § 1263, which prohibits the laying out of a public highway through any building or fixture or upon the yard or enclosure necessary to the use or enjoyment thereof without the consent of the owner a highway cannot be laid through a cow stable,

property and grant it to another without some reference to a use to which it is to be appropriated for the public benefit.[278] What is a public use is a judicial question [279] and one upon which there

wagon shed, or chicken-house. But see Crowell v. Town of Londonder, 63 N. H. 42; Barr v. City of New Brunswick, 58 N. J. Law, 255, 33 Atl. 477. The exception does not apply to a municipal corporation which may condemn a dwelling house in order to use the land occupied by it for street purposes. In re Opening of 22d St. 102 Pa. 108.

[278] Kaukauna Water Power Co. v. Green Bay & Miss. Canal Co., 142 U. S. 254; Sadler v. Langham, 34 Ala. 311; Lorenz v. Jacob, 63 Cal. 73; Prior v. Swartz, 62 Conn. 132, 25 Atl. 398, 18 L. R. A. 668; Robinson v. Swope, 75 Ky. (12 Bush) 21; Van Witsen v. Gutman, 79 Md. 405, 24 L. R. A. 403; Turner v. Nye, 154 Mass. 579, 28 N. E. 1048, 14 L. R. A. 487; In re Albany St., 11 Wend. (N. Y.) 151; Pocantico Water Works Co. v. Bird, 130 N. Y. 249, 29 N. E. 246; State v. Lyle, 100 N. C. 497; Waddell's Appeal, 84 Pa. 90; City of Wilkes-Barre v. Wyoming Historical Soc., 134 Pa. 616; Fort v. Goodwin, 36 S. C. 445; Tyler v. Beacher, 44 Vt. 648; Osborn v. Hart, 24 Wis. 89; Wisconsin Water Co. v. Winans, 85 Wis. 26, 54 N. W. 1003, 20 L. R. A. 662. See, also, many authorities cited in Lewis, Em. Dom. (2d Ed.) § 157.

[279] Shoemaker v. United States, 147 U. S. 282; Sadler v. Langham, 34 Ala. 311; Loughbridge v. Harris, 42 Ga. 501; Bankhead v. Brown, 25 Iowa, 540; In re St. Paul & No. P. R. Co., 34 Minn. 227. Lots held by a state university but not set apart or occupied for public purposes the court held in this case could be acquired by condemnation proceedings as in the case of the lands of private persons or corporations. "These lots are not used or held for public purposes by the state, and are not contiguous to the university grounds, and are liable to be appropriated in the same manner as lands of private persons. No good reason, therefore, appears why they might not be taken for public use by the railway company if reasonably necessary therefor. And the necessity or propriety of appropriating these particular lots does not seem to be questioned, if the enterprise is to proceed. The court, it appears, upon the hearing of the petition, was satisfied that the public interests required the prosecution of the enterprise, and we think there was a sufficient prima facie case made to sustain such determination. The court was entitled to consider the nature of the enterprise as disclosed by the record, the location, termini, and extent of the line, as well as the evidence before it of the expenditures and improvements already made, and the facilities for business possessed by the company. It would also take judicial notice of things generally known to the public, such as the general development of commercial interests and the increase of trade and travel, in determining the question of the propriety or importance of extending the proposed line of road. * * * Whether, however, the use for which lands are sought to be taken in such cases is a public use, and

is a great variety and conflict of reasoning and results. As said by a Nevada case,[280] "No question has ever been submitted to the courts upon which there is a greater variety and conflict of reasoning and results than that presented as to the meaning of the words 'public use' as found in the different state constitutions regulating the right of eminent domain." The question of public use is not affected by the character of the agency employed. The query is what are the objects or results to be accomplished—not who are the instruments or agencies selected by the sovereign for attaining this.[281] Neither is the question of public use affected or

whether they are reasonably necessary or required therefor by the corporation, or whether a proposed public use would be inconsistent with or subsersive of a prior public use to which particular public lands sought to be appropriated had already been dedicated,—these are undoubtedly questions for the court, and, so far as the determination thereof may affect the prosecution of a proposed enterprise, it will, to that extent, be under the control of the court." Welton v. Dickson, 38 Neb. 767, 57 N. W. 559, 22 L. R. A. 496; Coster v. Tide Water Co., 18 N. J. Eq. (3 C. E. Green) 54; Apex Transp. So. v. Garbade, 32 Or. 582; Tyler v. Beacher, 44 Vt. 648.

[280] Dayton Gold & Silver Min. Co. v. Seawell, 11 Nev. 394.

[281] Cottrill v. Myrick, 12 Me. 222; Bloodgood v. Mohawk, & H. R. R. Co., 18 Wend. (N. Y.) 9. "Let us inquire, then, whether the act incorporating this company authorized it to take the property of the plaintiff for public use. The use for which it was taken is declared in the act. * * * Does the fact that the power to construct the road is given to a company alter the nature of the grant? Surely not. It is entirely immaterial who constructs the road, or who defrays the expense of the construction. The object for which it is constructed must determine the nature of the grant, whether for public or private use. What object had the legislature in view in authorizing this company to construct the road in question over the plaintiff's land? It was not the private emolument the company was to receive for the use of the road. For such a purpose the right would never have been conferred. The legislature, who are constituted the judges of the expediency of taking private property for public use, came to the conclusion that the public required the use of a railroad between the cities of Albany and Schenectady. It deemed it inexpedient to construct it at the public expense, and adopted the policy of having a company construct it at its own expense and risk, having the money expended refunded by way of tolls or fare from the individuals who should travel upon it; reserving the right, however, to take it as the property of the state within a certain period. Because the legislature permitted the company to remunerate itself for the expense of constructing the road, from those who should travel upon it, its pri-

determined by the fact that the use or the benefit is local or limited [282] nor is it determined by the necessity or the lack of necessity for the condemnation; [283] neither is it established by the frequency or the infrequency of the use.[284]

There are two theories in respect to the proper and legal meaning of the words "public use" as used in constitutions or legislative enactments. The first might be termed the theory of strict construction and it maintains the principle that for a public use to exist there must be a literal use or right of use on the part of the public generally, or limited portion of it, without the payment of compensation for the exercise of this use or right of use.[285]

vate character is not established; it does not destroy the public nature of the road, or convert it from a public to a private use." Willyard v. Hamilton, 7 Ohio (p. 2) 111; Lancey v. King County, 15 Wash. 9, 34 L. R. A. 817.

[282] Gilmer v. Lime Point, 18 Cal. 229; Ross v. Davis, 97 Ind. 79; Phillips v. Watson, 63 Iowa, 28; Riche v. Bar Harbor Water Co., 75 Me. 91; Talbot v. Hudson, 82 Mass. (16 Gray) 417. "It has never been deemed essential that the entire community or any considerable portion of it should directly enjoy or participate in an improvement or enterprise, in order to constitute a public use, within the true meaning of these words as used in the constitution. Such an interpretation would greatly narrow and cripple the authority of the legislature, so as to deprive it of the power of exerting a material and beneficial influence on the welfare and prosperity of the state. In a broad and comprehensive view, such as has been heretofore taken of the construction of this clause of the Declaration of Rights, everything which tends to enlarge the resources, increase the industrial energies, and promote the productive power of any considerable number of the inhabitants of a section of the state, or which leads to the growth of towns and the creation of new sources for the employment of private capital and labor, indirectly contributes to the general welfare and to the prosperity of the whole community." Township Board of Education v. Hackmann, 48 Mo. 243; Coster v. Tide Water Co., 18 N. J. Eq. (3 C. E. Green) 54; Hartwell v. Armstrong, 19 Barb. (N. Y.) 166; Pocantico Water Works Co. v. Bird, 130 N. Y. 249; In re Burns, 155 N. Y. 23; McQuillen v. Hatton, 42 Ohio St. 202; Keller v. City of Corpus Christi, 50 Tex. 614; Williams v. School Dist. No. 6, 33 Vt. 271; Lewis County v. Gordon, 20 Wash. 80; Skagit county v. McLean, 20 Wash. 92, 54 Pac. 781.

[283] Jordan v. Woodward, 40 Me. 317; Dayton Gold & Silver Min. Co. v. Seawell, 11 Nev. 394; Varner v. Martin, 21 W. Va. 534.

[284] Green v. Elliot, 86 Ind. 53. The question of whether a proposed highway will be of public utility depends upon whether the public convenience requires it; not upon the existence of an absolute necessity for it.

[285] Lewis, Em. Dom. §§ 164 et seq.

The second theory is based upon a liberal interpretation of the words "public use" and holds that the words are equivalent to public benefit, utility or advantage, and are not limited by the actual use by the public in the property taken or some limited portion of it.[286] The modern construction of the words seems to be in favor of the second or liberal interpretation and of an equivalent meaning of use by the public.[287]

§ 758. Concrete illustrations of public use.

The theoretical discussion of the proposition is always interesting but unsatisfactory. The most substantial aid which perhaps

[286] Olmstead v. Camp, 33 Conn. 532. "The defendant insists that, in favor of private rights, the construction should be strict, and that the term 'public use' means possession, occupation, direct enjoyment, by the public. Or in other words that the property must be literally taken by the public as a body into its direct possession and for its actual use, as in the instances of a state-house, a court house, a fort, an arsenal, a park, etc. It seems to us that such a limitation of the intent of this important clause would be entirely different from its accepted interpretation, and would prove as unfortunate as novel. One of the most common meanings of the word 'use' as defined by Webster, is 'usefulness, utility, advantage, productive of benefit.' 'Public use' may, therefore, well mean public usefulness, utility or advantage, or what is productive of general benefit; so that any appropriating of private property by the state under its right of eminent domain for purposes of great advantage to the community, is a taking for public use. Such, it is believed, is the construction which has uniformly been put upon the language by courts, legislatures and legal authorities. * * * The term 'public use' is synonymous with public benefit or advantage. It is equivalent to the language, so familiar in our statute in relation to highways, 'of common convenience and necessity.'"

Todd v. Austin, 34 Conn. 78; Concord R. Co. v. Greely, 17 N. H. 47. "It has been said that property could not be properly alleged to be taken for the public use, unless, when taken, it should belong to the public as owning it; that the words substantially mean, that the property should be changed, by the act of application, and should belong to the community at large. This position can be maintained only upon the assumption that the words 'public use' are equivalent to the words 'public ownership,' or with other words which express the idea that the private property, by the act of application, becomes the property of the public. There is nothing in the constitution that authorizes us to extend the words 'public uses' into such a meaning." Trenton & N. B. Turnpike Co. v. American & E. Commercial News Co., 43 N. J. Law, 384; Seely v. Sebastian, 4 Or. 27.

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a text book can afford to one seeking information upon a particular subject in respect to which there is great diversity and conflict of reason and opinion is to give concrete illustrations of the interpretation of words and phrases placed upon them by the different courts.

§ 759. Highways.

One of the most common as well as familiar illustrations of an exercise of the power of eminent domain on the part of a public corporation is that for the acquisition of real property for use as a public highway.[288] The term, as will be remembered, is a general one and applies to all ways used by the public as a means of passing or repassing [289] and its public character does not depend upon the extent of the use,[290] the location of the way [291] or

Tp. v. Van Hoesen, 87 Mich. 533, 49 N. W. 894, 14 L. R. A. 114; In re Niagara Falls & W. R. Co., 108 N. Y. 375, 15 N. E. 429; Fork Ridge Baptist Cemetery Ass'n v. Redd, 33 W. Va. 262.

[288] Edgerton v. Town of Green Cove Springs, 19 Fla. 140; Dunham v. Village of Hyde Park, 75 Ill. 371; Phillips v. Watson, 63 Iowa, 28, 18 N. W. 659; Brimmer v. City of Boston, 102 Mass. 19; Inhabitants of Wells v. York County Com'rs (Me.) 11 Atl. 417; Smith v. City of St. Paul, 72 Minn. 472, 75 N. W. 708; Smith v. Helmer, 7 Barb. (N. Y.) 416; Shaver v. Starrett, 4 Ohio St. 494; Lindsay v. Charleston City Com'rs, 2 Bay (S. C.) 38. See, also, cases cited generally under this paragraph.

[289] Underwood v. Bailey, 59 N. H. 480. Land cannot be appropriated under the power of eminent domain for a highway which will not accommodate the public. See § 423, ante.

[290] Roberts v. Williams, 15 Ark. 43; Sherman v. Buick, 32 Cal. 241; Monterey County v. Cushing, 83 Cal. 507; Reynolds v. Reynolds, 15 Conn. 83; Ross v. Davis, 97 Ind. 79; Logan v. Stogsdale, 123 Ind. 372, 8 L. R. A. 58; Johnson v. Clayton County Sup'rs, 61 Iowa, 89; Phillips v. Watson, 63 Iowa, 32; Pagels v. Oaks, 64 Iowa, 198; Cemetery Ass'n v. Meninger, 14 Kan. 312; City of Savannah v. Hancock, 91 Mo. 54; Coster v. Tide Water Co., 18 N. J. Eq. 54; State v. City of Orange, 54 N. J. Law, 111, 22 Atl. 1004, 14 L. R. A. 62; State v. Stackhouse, 14 S. C. 417; Lewis v. Washington, 5 Grat. (Va.) 265; Paine v. Town of Leicester, 22 Vt. 44.

Elliott, Roads & Streets (2d Ed.) § 192. "Roads and streets used by the public, with a right in all the public to use them, are undoubtedly public, and private property may be appropriated for the purpose of constructing such ways. The test is, not simply how many persons do actually use them, but,

[291] Crosby v. Hanover, 36 N. H. 404; West Pikeland Road, 63 Pa. 471; Gilman v. Town of Westfield, 47 Vt. 20.

the fact of its continuity and connection with other ways.[292] The fact that a highway may not be entirely of a useful character but is designed for purposes of amusement, health or recreation, will not destroy its character as a public way, and its use as a public one of such a character will be sufficient to justify the exercise of eminent domain.[293] In some states the provision is made for the establishment of so-called private roads or highways and the character of these roads is not dependent so much upon the name applied to it by the state but by its use. If a road is authorized to be laid out on the application of an individual, is paid for and kept in repair wholly or in part by him, although he may be especially accommodated by its laying out, yet, if it is one designed for the use without permission from such individual by all who may desire, it is still to be regarded as a public way.[294] Where, however, the road, after it is laid out, becomes or remains the pri-

how many have a free and unrestricted right in common to use them; for, if the public generally are excluded, the way must be regarded as a private one; if the public have the right to use the way at pleasure and on equal terms, it is a public one, although in reality it is little used. Where the way is a private one the right of eminent domain cannot be successfully invoked." But see Los Angeles County v. Reyes (Cal.) 32 Pac. 233; Richards v. Wolf 82 Iowa, 358, 47 N. W. 1044. A public highway cannot be laid out for the convenience of a single person.

[292] Peckham v. Town of Lebanon, 39 Conn. 231; Goodwin v. Town of Wethersfield, 43 Conn. 437; Sheaff v. People, 87 Ill. 189; Moore v. Auge, 125 Ind. 562; Masters v. McHolland, 12 Kan. 17; Bartlett v. City of Bangor, 67 Me. 460; Fields v. Colby, 102 Mich. 450, 60 N. W. 1048; Watson v. Town of South Kingstown, 5 R. I. 562; Decker v. Menard County (Tex. Civ. App.) 25 S. W. 727; Snow v. Town of Sandgate, 66 Vt. 451, 29 Atl. 673; Schatz v. Pfeil, 56 Wis. 4[illegible]. But see State v. Price, 21 Md. 448.

[293] Bryan v. Town of Branford, 50 Conn. 246; Higginson v. Inhabitants of Nahant, 93 Mass. (11 Allen) 530; Petition of Mt. Washington Road Co., 35 N. H. 134; Town of Woodstock v. Gallup, 28 Vt. 587. But see Farist Steel Co. v. City of Bridgeport, 60 Conn. 278, 22 Atl. 561, 13 L. R. A. 590. The taking of lands for the sole purpose of preserving a satisfactory view of a public bridge is not a proper exercise of the power of eminent domain.

[294] Sherman v. Buick, 32 Cal. 241. "Thus if the legislature provides for the laying out and establishing of a certain class of roads or highways which from any cause, whether for the purposes of classification or otherwise, is denominated 'private,' or as being for the especial benefit of certain individuals upon whom the burden of cost and repair is cast, instead of the public at large, it by no means follows that such roads become the private property or estate of the

vate property of a person from which he may exclude the public, then its use is a private one and in the laying out of which the condemnation of property under the power of eminent domain is unauthorized.[295] If the road is intended for public use even though the applicant may be required to pay all costs connected with its laying out and repair, it is to be considered a public way. If it is for the exclusive use of the applicant, it is a private road.[296] The appropriation and use of public funds for its laying out and repair, either wholly or in part, will be considered a good test of its character as a public way, although it may be denominated as a private road in the statute.[297]

individuals designated, even if the legislature has so provided in express terms; for where roads are laid out, whether mainly for the accommodation of particular neighborhoods or individuals or not, it must be understood as having been provided for the use of every one who may have occasion to travel it, and hence as being public. In other words, the legislature has no power to lay out and establish 'private roads,' in the sense that they are to be the private property of particular individuals, or that they are what are denominated 'private ways,' at common law; and hence, so far as they undertake to do so, their action is simply null and void; but the road so laid out and established becomes a way over which all may lawfully pass who have occasion, and therefore public; and the language employed by the legislature, so far as it relates to the legal character of the road—as public or private—must be understood as being used for the purpose of distinguishing it from all other roads, or in general terms, for the purposes of classification." Township of Madison v. Gallager, 159 Ill. 105, 42 N. E. 316; Bankhead v. Brown, 25 Iowa, 540; Denham v. Bristol County Com'rs, 108 Mass. 202.

[295] Sadler v. Langham, 34 Ala. 311; Nesbitt v. Trumbo, 39 Ill. 110; Crear v. Crossly, 40 Ill. 175; Robinson v. Swope, 75 Ky. (12 Bush) 21; Shake v. Frazier, 94 Ky. 143; State v. Price, 21 Md. 449; Dickey v. Tenninson, 27 Mo. 373; Welton v. Dickson, 38 Neb. 767, 57 N. W. 559, 22 L. R. A. 496; Taylor v. Porter, 4 Hill (N. Y.) 140; Witham v. Osburn, 4 Or. 318; Snow v. Town of Sandgate, 66 Vt. 451, 29 Atl. 673; Salt Co. v. Brown, 7 W. Va. 191; Osborn v. Hart, 24 Wis. 89. But see Steele v. Madison County Com'rs, 83 Ala. 304; Latah County v. Peterson, 2 Idaho, 1118, 16 L. R. A. 81; State v. Stackhouse, 14 S. C. 417.

[296] Gilmer v. Lime Point, 18 Cal. 229; Olmstead v. Camp, 33 Conn. 532; Wild v. Deig, 43 Ind. 455; Davis v. Smith, 130 Mass. 113; Proctor v. Andover, 42 N. H. 348; In re Niagara Falls & W. R. Co., 108 N. Y. 375; Shaver v. Starrett, 4 Ohio St. 494; Wolcott v. Whitcomb, 40 Vt. 40.

[297] Bankhead v. Brown, 25 Iowa, 540. "The public are not bound to work or keep such roads in repair, and this is a very satisfactory test

§ 760. Parks and pleasure grounds.

Closely connected with the laying out of a public way is the establishment of public parks, boulevards, commons or pleasure grounds [298] and the opening of places of historic interest to the public.[299] The health and pleasure of the people are dependent, to some degree, upon their means of recreation and no better opportunity is afforded for its improvement than the use of the facilities suggested above. In a recent case of the supreme court of the United States,[300] the conversion of a historic spot into a public park as a means, primarily, of inculcating patriotism, was sustained. In laying out highways, pleasure grounds or drives, the fact of the public use being established, the questions of necessity, expediency and feasibility of a particular location, are left to the public authorities, the grantee of the power.[301]

§ 761. Bridges, ferries and canals.

As a means of communication connected with or forming a part of a system of public highways, it may be necessary to construct

as to whether a road is public or private." Denham v. Bristol County Com'rs, 108 Mass. 202.

[298] Kerr v. South Park Com'rs, 117 U. S. 379; Shoemaker v. United States, 147 U. S. 282; United States v. Cooper, 20 D. C. (9 Mackey) 104; People v. Salomon, 51 Ill. 37; Cook v. South Park Com'rs, 61 Ill. 115; Jones v. Town of Lake View, 151 Ill. 663, 38 N. E. 688; West Chicago Park Com'rs v. City of Chicago, 152 Ill. 392, 38 N. E. 697; In re City of Cedar Rapids, 85 Iowa, 39, 51 N. W. 1142; Winn v. Board of Park Com'rs, 12 Ky. L. R. 339, 14 S. W. 421; Rowan's Ex'rs v. Town of Portland, 47 Ky. (8 B. Mon.) 232; Boston & R. Mill Cor. v. Newman, 29 Mass. (12 Pick.) 467; Holt v. City of Somerville, 127 Mass. 408; Foster v. Boston Park Com'rs, 133 Mass. 321; Id., 131 Mass. 225; State Park Com'rs v. Henry, 38 Minn. 266; St. Louis County Court v. Griswold, 58 Mo. 175; Owners of Ground v. City of Albany, 15 Wend. (N. Y.) 374; Brooklyn Park Com'rs v. Armstrong, 45 N. Y. 234; Matter of Bushwick Ave., 48 Barb. (N. Y.) 9; Matter of Central Park Com'rs, 50 N. Y. 493; Matter of Washington Park Com'rs, 52 N. Y. 137; Matter of Central Park Com'rs, 63 Barb. (N. Y.) 282; In re City of Rochester, 137 N. Y. 243; Hammett v. Philadelphia, 65 Pa. 146; Root's Case, 77 Pa. 276; In re Vernon Park, 163 Pa. 70, 29 Atl. 972 See, also, § 432.

[299] United States v. Gettysburg Elec. R. Co., 160 U. S. 668; United States v. Certain Tract of Land in Cumberland Tp., 67 Fed. 869.

[300] United States v. Gettysburg Elec. R. Co., 160 U. S. 668.

[301] Butte County v. Boydstun (Cal.) 11 Pac. 781; State v. Price, 21 Md. 449; Commonwealth v. Inhabitants of Egremont, 6 Mass. 491; Inhabitants of Lanesborough v.

and maintain canals,[302] bridges [303] and ferries; [304] and although the use of these may depend upon the payment of tolls, yet, their character is regarded as public, their use a public one, and the exercise of eminent domain will be justified if found necessary

Berkshire County Com'rs, 39 Mass. (22 Pick.) 278.

[302] Chesapeake & O. Canal Co. v. Key, 3 Cranch C. C. 599, Fed. Cas. No. 2,649; Kaukauna Water Power Co. v. Green Bay & M. Canal Co., 142 U. S. 254. "No question is made of the power of the State to construct or authorize the construction of this improvement, and to devote to it the proceeds of the land grant of the United States. The improvement of the navigation of a river is a public purpose, and the sequestration or appropriation of land or other property, therefore, for such purpose, is doubtless a proper exercise of the authority of the State under its power of eminent domain. Upon the other hand, it is probably true that it is beyond the competency of the State to appropriate to itself the property of individuals for the sole purpose of creating a water power to be leased for manufacturing purposes. This would be a case of taking the property of one man for the benefit of another, which is not a constitutional exercise of the right of eminent domain. But if, in the erection of a public dam for a recognized public purpose, there is necessarily produced a surplus of water, which may properly be used for manufacturing purposes, there is no sound reason why the state may not retain to itself the power of controlling or disposing of such water as an incident of its right to make such improvement. Indeed, it might become very necessary to retain the disposition of it in its own hands, in order to preserve at all times a sufficient supply for the purposes of navigation. If the riparian owners were allowed to tap the pond at different places, and draw off the water for their own use, serious consequences might arise, not only in connection with the public demand for the purposes of navigation, but between the riparian owners themselves as to the proper proportion each was entitled to draw—controversies which could only be avoided by the State reserving to itself the immediate supervision of the entire supply. As there is no need of the surplus running to waste, there was nothing objectionable in permitting the State to let out the use of it to private parties, and thus reimburse itself for the expenses of the improvement." Denslow v. New Haven & Northampton Co., 16 Conn. 98; Nelson v. Fleming, 56 Ind. 310; Kough v. Darcey, 11 N. J. Law, 237; Van Schoick v. Deleware & R. Canal Co., 20 N. J. Law, 249; Thomas v. Leland, 24 Wend. (N. Y.) 65; Selden v. Delaware & Hudson Canal Co., 29 N. Y. 634; Matter of Townsend, 39 N. Y. 171; Buckingham v. Smith, 10 Ohio, 288; Carpenter v. State, 12 Ohio St. 457; Little Miami Elec. Co. v. City of Cincinnati, 30 Ohio St. 629; Dalles Lumbering Co. v. Urquhart, 16 Or 67, 19 Pac. 78; Chesapeake & O. Canal Co. v. Hoye, 2 Grat. (Va.) 511. See, also, § 430.

[303] See §§ 431 et seq.

[304] Bowman v. Wathen, 2 McLean, 376, Fed. Cas. No. 1,740; Luxton v. North River Bridge Co., 153

for their construction or completion.[305] Property necessary for the improvement of navigation either in the construction of dams or locks or otherwise can be appropriated by the same means.[306]

§ 762. Public buildings.

Real property appropriated by municipal or other public corporations for use as sites in the construction or establishment of public buildings is taken for a public use. Court houses,[307] jails,[308] school houses,[309] city halls,[310] public markets,[311] alms houses,[312] and others of a similar character,[313] are familiar examples. In this class may also be included the taking of property by the Federal or a state government for the construction of forts or fortifications,[314] postoffices, [315] navy or dock yards,[316] court houses,[317]

U. S. 525; Piatt v. Covington & C. Bridge Co., 71 Ky. (8 Bush) 31; Day v. Stetson, 8 Me. 365; Crosby v. Hanover, 36 N. H. 404; Barrington v. Neuse River Ferry Co., 69 N. C. 165; In re Towanda Bridge Co., 91 Pa. 216; Drake v. Clay, 2 Ky. (Sneed) 139. But see Sandford v. Martin, 31 Iowa, 67.

[305] Arnold v. Covington & C. Bridge Co., 62 Ky. (1 Duv.) 372; Young v. Buckingham, 5 Ohio, 485. But see International Bridge & Tramway Co. v. McLane, 8 Tex. Civ. App. 665, 28 S. W. 454.

[306] Kaukauna Water Power Co. v. Green Bay & Mississippi Canal Co., 142 U. S. 254; Avery v. Fox, Fed. Cas. No. 674; Hazen v. Essex County, 66 Mass. (12 Cush.) 475; Pearson v. Johnson, 54 Miss. 259; Calking v. Baldwin, 4 Wend. (N. Y.) 667; Matter of Petition of United States, 96 N. Y. 227; Attorney General v. City of Eau Claire, 37 Wis. 400; State v. City of Eau Claire, 40 Wis. 533.

[307] Kohl v. United States, 91 U. S. 367; Jockheck v. Shawnee County Com'rs, 53 Kan. 780; Shanfelter v. City of Baltimore, 80 Md. 483, 31 Atl. 439, 27 L. R. A. 72.

[308] See § 420.

[309] Reed v. Inhabitants of Acton, 117 Mass. 384; Township Board of Education v. Hackmann, 48 Mo. 243; Appeal of Rees (Pa.) 12 Atl. 427; Long v. Fuller, 68 Pa. 170; Peckham v. School Dist. No. 7, 7 R. I. 545; Williams v. School Dist. No. 6, 33 Vt. 271. See, also, Searl v. School Dist. No. 2, 124 U. S. 197.

[310] Cincinnati, S. & C. R. Co. v. Village of Belle Centre, 48 Ohio St. 273, 27 N. E. 464.

[311] Henkel v. City of Detroit, 49 Mich. 249; Matter of Application of Cooper, 28 Hun (N. Y.) 515.

[312] Heyward v. City of New York, 8 Barb. (N. Y.) 486.

[313] West River Bridge Co. v. Dix, 6 How. (U. S.) 546.

[314] Kohl v. United States, 91 U. S. 367; United States v. Fox, 94 U. S. 315; Ft. Leavenworth R. Co. v. Lowe, 114 U. S. 525; Gilmer v. Lime Point, 18 Cal. 229; In re League Island, 1 Brewst. (Pa.) 524.

[315] United States v. Fox, 94 U. S. 315; Ft. Leavenworth R. Co. v.

[316] Kohl v. United States, 91 U. S. 367.

[317] Kohl v. United States, 91 U. S. 367.

military camps or barracks,[318] light houses,[319] hospitals,[320] custom houses,[321] armories, arsenals,[322] or the use of property by such a government for miscellaneous purposes.[323]

Municipal improvements. It has been already stated that the preservation and improvement of the health of the people is a duty resting upon every public corporation and especially a municipal organization. The convenience of the people in matters closely allied with the public health or the protection of their property is also considered a public duty and the use of property by a public corporation of any grade for such purposes will be considered a public one for which the power may be exercised if granted. The condemnation of property will be warranted in the construction or maintenance of a system of public sewers[324] or one for furnishing a supply of water[325] or light.[326]

§ 763. Works for irrigation and drainage purposes.

The use of property for purposes of irrigation has been held as a public one especially in those sections where the rainfall is uncertain or confined to limited periods of time.[327] The taking of property for the construction of a system of drainage is considered proper under this power[328] although some cases have re-

Lowe, 114 U. S. 525. The court in referring to the opinion rendered in Kohl v. United States, 91 U. S. 367, said: "All the judges of the court agreed in the possession by the general government of this right, although there was a difference of opinion whether provision for the exercise of the right had been made in that case. The court, after observing that lands in the states are needed for forts, armories, and arsenals, for navy yards and light houses, for custom houses and court houses, and for other public uses, said: 'If the right to acquire property for such uses may be made a barren right by the unwillingness of property holders to sell, or by the action of a state prohibiting a sale to the Federal government, the constitutional grants of power may be rendered nugatory, and the government is dependent for its practical existence upon the will of a state, or even upon that of a private citizen.'" Burt v. Merchants' Ins. Co., 106 Mass. 356; Darlington v. United States, 82 Pa. 382.

[318] Kohl v. United States, 91 U. S. 367; Ft. Leavenworth R. Co. v. Lowe, 114 U. S. 525; Morris v. Heppenheimer, 54 N. J. Law, 268; In re Military Parade Ground, 60 N. Y. 319.

[319] United States v. Fox, 94 U. S. 315; Chappel v. United States, 160 U. S. 499; United States v. Rauers, 70 Fed. 748; Gilmer v. Lime Point, 18 Cal. 229; People v. Humphrey, 23 Mich. 471.

[320] United States v. Fox, 94 U. S. 315.

321 Kohl v. United States, 91 U. S. 367.

322 Kohl v. United States, 91 U. S. 367; United States v. Fox, 94 U. S. 315; Ft. Leavenworth R. Co. v. Lowe, 114 U. S. 525.

323 Orr v. Quimby, 54 N. H. 590. But see People v. Humphrey, 23 Mich. 471.

324 City of Pasadena v. Stimson, 91 Cal. 238, 27 Pac. 604; Cone v. City of Hartford, 28 Conn. 363; McDaniel v. City of Columbus, 91 Ga. 462, 17 S. E. 1011; Leeds v. City of Richmond, 102 Ind. 372; Hildreth v. City of Lowell, 77 Mass. (11 Gray) 345; City of Boston v. Richardson, 95 Mass. (13 Allen) 146; Warren v. City of Grand Haven, 30 Mich. 24; Joplin Consol. Min. Co. v. City of Joplin, 124 Mo. 129; White v. Yazoo City, 27 Miss. 357; Glasby v. Morris, 18 N. J. Eq. (3 C. E. Green) 72; City of Hoboken v. Chamberlain, 37 N. J. Law, 51; Herbert v. City of Bayonne, 63 N. J. Law, 532, 42 Atl. 833; Village of South Orange v. Whittingham, 58 N. J. Law, 655, 35 Atl. 407; City of Cincinnati v. Penny, 21 Ohio St. 499. But see Allen v. Jones, 47 Ind. 438, construing Ind. Act 1867 for the incorporation of cities and holding that it does not confer power upon them to take lands for the construction of sewers. See, also, §§ 437 et seq.

325 Burden v. Stein, 25 Ala. 455; St. Helena Water Co. v. Forbes, 62 Cal. 182; People v. Stephens, 62 Cal. 209; Spring Valley Water Works v. San Mateo Water Works, 64 Cal. 123; McCrary v. Beaudry, 67 Cal. 120; Spring Valley Water Works v. Drinkhouse, 92 Cal. 528, 28 Pac. 681; Riche v. Bar Harbor Water Co., 75 Me. 91; Reddall v. Bryan, 14 Md. 444; Kane v. City of Baltimore, 15 Md. 240; Lumbard v. Stearns, 58 Mass. (4 Cush.) 60; Ipswich Mills v. Essex County Com'rs, 108 Mass. 363; City of Duluth v. Duluth Gas & Water Co., 45 Minn. 210, 47 N. W. 781; Thorn v. Sweeney, 12 Nev. 251; Olmsted v. Proprietors of Morris Aqueduct, 46 N. J. Law, 495, affirmed 47 N. J. Law, 311; Slingerland v. City of Newark, 54 N. J. Law, 62, 23 Atl. 129; In re Malone Water Works Co., 15 N. Y. Supp. 649; In re New Rochelle Water Co., 46 Hun (N. Y.) 525; Pocantico Water Works Co. v. Bird, 130 N. Y. 249, 29 N. E. 246; Fleming's Appeal, 65 Pa. 444; State v. City of Eau Claire, 40 Wis. 533. See, also, §§ 463 et seq.

326 Bloomfield & R. Natural Gaslight Co. v. Richardson, 63 Barb. (N. Y.) 437; State v. City of Toledo, 48 Ohio St. 112, 26 N. E. 1061, 11 L. R. A. 729; Appeal of Johnston (Pa.) 7 Atl. 167. See, also, § 459.

327 Oury v. Goodwin, 3 Ariz. 255, 26 Pac. 376; Directors of Alfalfa Irr. Dist. v. Collins, 46 Neb. 411, 64 N. W. 1086. But see Bradley v. Fallbrook Irr. Dist., 68 Fed. 948.

328 Sweet v. Rechel, 159 U. S. 380. "In the present case, the statute vests the title in the city of Boston from, at least, the time it filed in the office of the registry of deeds a description of the lands taken by it describing them with as much certainty as is required in a common conveyance of lands, and stating that the same were taken pursuant to the provisions of the statute. As soon as they were so taken, the city—invested from that time with the title—had the right forthwith to raise the grade, and could not throw the property back upon the former owner, or compel him to pay the cost of raising the grade;

garded the establishment of such works, especially where designed for the drainage of low and flooded lands, as authorized under an exercise of the police power rather than that of eminent domain.[329] The authorities cited in the notes will be found to cover the ground fully. The construction of works to prevent the overflow of agricultural or timber lands is for a public purpose and the power of eminent domain may be properly exercised in connection with it.[330]

and the owner became from the moment the property was taken absolutely entitled to reasonable compensation, the amount to be ascertained without undue delay, in the mode prescribed, and its payment to be assured, if necessary, by decree against the city, which could be effectively enforced.

We are of opinion that, upon both principle and authority, it was competent for the legislature, in the exercise of the police powers of the commonwealth, and of its power to appropriate private property for public uses, to authorize the city to take the fee in the lands described in the statute, prior to making compensation, and that the provision made for compensating the owner was certain and adequate." Heick v. Voight, 110 Ind. 279, 11 N. E. 306; Duke v. O'Bryan, 100 Ky. 710; Dingley v. City of Boston, 100 Mass. 544; Bancroft v. Cambridge, 126 Mass. 438; Kinnie v. Bare, 68 Mich. 625, 36 N. W. 672; People v. Nearing, 27 N. Y. 306; Norfleet v. Cromwell, 70 N. C. 634, holding constitutional N. C. Rev. St. c. 40, permitting land to be condemned for drains.

Brown v. Keener, 74 N. C. 714; Askam v. King County, 9 Wash. 1, 36 Pac. 1097; Lewis County v. Gordon, 20 Wash. 80, 54 Pac. 779; Pettigrew v. Village of Evansville, 25 Wis. 223; Smeaton v. Martin, 57 Wis. 364, 15 N. W. 403; In re Theresa Drainage Dist., 90 Wis. 301, 63 N. W. 288. But see Poundstone v. Baldwin, 145 Ind. 139, 44 N. E. 191; Jenal v. Green Island Draining Co., 12 Neb. 163, 10 N. W. 547; McQuillen v. Hatton, 42 Ohio St. 202. See, also, the subject fully considered with many authorities cited in Lewis, Em. Dom. (2d Ed.) §§ 185–199 inclusive.

[329] Murphy v. City of Wilmington, 6 Houst. (Del.) 108; Zigler v. Menges, 121 Ind. 99, 22 N. E. 782; Lowell v. City of Boston, 111 Mass. 454; Coster v. Tide Water Co., 18 N. J. Eq. (3 C. E. Green) 54; Pool v. Trexler, 76 N. C. 297; Donnelly v. Decker, 58 Wis. 461.

[330] Coster v. Tidewater Co., 18 N. J. Eq. (3 C. E. Green) 54. "The purpose contemplated is to reclaim and bring into use a tract of land covering about one fourth of the county of Hudson and several thousand acres in the county of Union. This large district is now comparatively useless. In its present condition it impairs very materially the benefits which naturally belong to the adjacency of the territory of the state to its navigable waters. It is difficult, from the great expense of such works, to build roads across it, and consequently it has heretofore interposed a barrier to anything like easy access, except by means of railroads, from one

Public cemeteries. Land can also be acquired under the power of eminent domain for use as a public cemetery;[331] it is only necessary that the right of burial is public and general. Although its cost may operate to the exclusion of a portion of the public, this is no objection.[332]

§ 764. Definition of a taking.

The word "taking" was the one originally and most commonly used in statutory or constitutional provisions relative to the exercise of the power of eminent domain. Its meaning has been the subject of a decisive conflict of authority and extended discussion. The extent of compensation to which one is entitled and the proper exercise of the power depend upon what is taken and whether there is a taking. The question of what is property has been considered in a previous section.[333] The early meaning given to the word under discussion embodied the idea that before compensation could be recovered by the individual or in order to constitute a taking, there must be an actual physical dispossession of the thing taken from its original owner. This meaning was probably based upon a narrow construction of the word "prop-

town to another situated upon its borders. To remove these evils and to make this vast region fit for habitation and use seems to me plainly within the legitimate province of legislation; and, to effect such ends, I see no reason to doubt that both the prerogatives of taxation and eminent domain may be resorted to. From the earliest times, the history of the legislation of this state exhibits many examples of the exercise of both these powers for purposes not dissimilar, and by these means, without question, many improvements have been effected. The principle is similar to that which validates the transfer, by legislative authority, of private property to private corporations for the construction of railroads and canals, or the construction of sewers and streets, and the imposition of the expense upon the lands benefited." Norfleet v. Cromwell, 70 N. C. 634.

[331] Evergreen Cemetery Ass'n v. Beecher, 53 Conn. 551, 5 Atl. 353; Application of St. Bernard & St. L. Cemetery Ass'n, 58 Conn. 91; Westfield Cemetery Ass'n v. Danielson, 62 Conn. 319; Farneman v. Mt. Pleasant Cemetery Ass'n, 135 Ind. 344; Barrett v. Kemp, 91 Iowa, 296; Balch v. Essex County Com'rs, 103 Mass. 106; Board of Health of Portage Tp. v. Van Hoesen, 87 Mich. 533, 14 L. R. A. 114; Fore v. Hoke, 49 Mo. App. 254; Crowell v. Londonderry, 63 N. H. 42; Henry v. Shelby County, 48 Ohio St. 671; Edgecumbe v. City of Burlington, 46 Vt. 218; Fork Ridge Baptist Cemetery Ass'n v. Redd, 33 W. Va. 262.

[332] Evergreen Cemetery Ass'n v. Beecher, 53 Conn. 551.

[333] See § 749, ante.

erty'' but with the adoption of a broader interpretation of that word, the meaning of the word ''taken'' has been correspondingly enlarged and the modern view is that to constitute a taking an actual physical divesting or dispossession of property is not necessary but a damage to or deprivation of any of the essential rights of property will be sufficient to constitute a taking and entitle the owner to compensation under the constitutional provision.[334] These essential rights have already been stated as being those of occupation, exclusion, disposition and transmission.[335] It is not necessary to here state more than general principles or doctrines but a reference to some of the leading cases and authorities will be found useful. One of the earliest cases adopting the modern and liberal theory in respect to the meaning of the word ''taking'' is from New Hampshire.[336] The defendant in this

[334] Lewis, Em. Dom. §§ 52–59.

[335] See § 749, ante.

[336] Eaton v. Boston, C. & M. R. Co., 51 N. H. 504. "To constitute 'a taking of property,' it seems to have sometimes been held necessary that there should be 'an exclusive appropriation,' 'a total assumption of possession,' 'a complete ouster,' an absolute or total conversion of the entire property, 'a taking of the property altogether.' These views seem to us to be founded on a misconception of the meaning of the word 'property,' as used in the various state constitutions.

In a strict legal sense, land is not 'property,' but the subject of property. The term 'property,' although in common parlance frequently applied to a tract of land or a chattel, in its legal signification 'means only the rights of the owner in relation to it.' 'It denotes a right * * * over a determinate thing.' 'Property is the right of any person to possess, use, enjoy, and dispose of a thing.' Selden, J., in Wynehamer v. The People, 13 N. Y. 378, 433; 1 Blackstone, Com. 138; 2 Austin, Jurisprudence (3d Ed.) 817, 818. If property in land consists in certain essential rights, and a physical interference with the land substantially subverts one of those rights, such interference 'takes,' pro tanto, the owner's 'property.' The right of indefinite user (or of using indefinitely) is an essential quality or attribute of absolute property, without which absolute property can have no legal existence. 'Use is the real side of property.' This right of user necessarily includes the right and power of excluding others from using the land. See 2 Austin, Jurisprudence (3d Ed.) 836; Wells, J., in Walker v. Old Colony & N. R. Co., 103 Mass. 10, 14. From the very nature of these rights of user and of exclusion, it is evident that they cannot be materially abridged without, ipso facto, taking the owner's 'property.' If the right of indefinite user is an essential element of absolute property or complete ownership, whatever physical interference annuls this right takes 'property,'—although the owner may still have

case, a railroad company, in constructing its road through the plaintiff's farm made a cut, through which in times of freshet, water passed carrying quantities of debris upon the farm and rendering it unfit for cultivation. The question of whether this constituted a taking of any of the plaintiff's property so as to entitle him to compensation was at issue and the court held in the affirmative. The same court in a later case [337] approved and reviewed the Eaton case, and its principles have been substantially approved in all recent cases and reference to some of which is found in the notes.[338]

left to him valuable rights (in the article) of a more limited and circumscribed nature. He has not the same property that he formerly had. Then, he had an unlimited right; now, he has only a limited right. His absolute ownership has been reduced to a qualified ownership. Restricting A's unlimited right of using one hundred acres of land to a limited right of using the same land, may work a far greater injury to A than to take from him the title fee simple to one acre, leaving him the unrestricted right of using the remaining ninety-nine acres. Nobody doubts that the latter transaction would constitute a 'taking of property.'"

[337] Thompsen v. Androscoggin River Imp. Co., 54 N. H. 545.

[338] Conniff v. City and County of San Francisco, 67 Cal. 45; City of Denver v. Bayer, 7 Colo. 113. "Property in its broader and more appropriate sense, is not alone the chattel or the land itself, but the right to freely possess, use and alienate the same, and many thing are considered property which have no tangible existence, but which are necessary to the satisfactory use and enjoyment of that which is tangible. The people and the courts of Colorado are constantly treating as property the right to a use of water acquired by priority of appropriation. The right of user would, of course, be of no value without the water; but it is this right that is mainly the subject of ownership, Incorporeal hereditaments, particularly those denominated easements, have always been considered property, both by the civil and the common law. They are generally attached to things corporeal, and are said to 'issue out of or concern' them; but any wrongful interference therewith has been promptly recognized and punished by the courts. No good reason is observed for discriminating against the easement in a street connected with the lot of an abutting owner. We are disposed to say that it is property within the meaning of our constitution, and any interference therewith, which results in injury to the realty, must, with the exceptions hereinafter stated, be justly compensated; if in such a case there be no technical 'taking,' of private property, there is a damaging thereof within the constitutional inhibition. Whatever permanently prevents the adjacent owner's free use of the street for ingress or egress to or from his lot, and whatever interference with the

§ 765. Constitutional provisions.

The uncertainty attached to both the meaning of the word "property" as well as "taking" led to the adoption in many states of constitutional amendments changing the original provision with reference to the taking of private property for a public use and adding to the word "taking" or "taken," as almost universally used, others such as "damages," "destroyed," "injured," or "injuriously affected." The effect of such constitutional changes, it has been held, is to increase and enlarge, in those states where the more liberal definitions of the word "property" and "taken" do not prevail, the owner's right to compensation. The modern theory in respect to what is a taking and the meaning of the word "property" proceed upon the condition that, as a fact, a person may be in some one of the essential rights of property seriously damaged without an actual physical taking of any part or portion of that property, a deprivation of or a damage to essential rights for which an individual is as clearly entitled to compensation as though his property was actually and physically taken.[339]

street permanently diminishes the value of his premises, is as much a damage to his private property as though some direct physical injury were inflicted thereon. But sometimes these interferences and resulting injury may properly, even in this state, be held to be damnum absque injuria; as where they are occasioned by the reasonable improvement of the street by the proper authority for the greater convenience of the public, or where a mere temporary inconvenience or injury results from a legitimate use thereof by the public." Town of Idaho Springs v. Woodward, 10 Colo. 104; Bradley v. New York & N. H. R. Co., 21 Conn. 294; Nevins v. City of Peoria, 41 Ill. 502; City of Elgin v. Eaton, 83 Ill. 535; Rigney v. City of Chicago, 102 Ill. 64; Grand Rapids Booming So. v. Jarvis, 30 Mich. 308; Vanderlip v. City of Grand Rapids, 73 Mich. 522; 41 N. W. 677, 3 L. R. A. 247; O'Brien v. City of St. Paul, 25 Minn. 331; Peters v. Town of Fergus Falls, 35 Minn. 549; Thurston v. City of St. Joseph, 51 Mo. 510; Broadwell v. Kansas City, 75 Mo. 213; City of St. Louis v. Hill, 116 Mo. 527, 21 L. R. A. 226; People v. Otis, 90 N. Y. 48; Story v. New York El. R. Co., 90 N. Y. 122; Seifert v. City of Brooklyn, 101 N. Y. 136; Forster v. Scott, 136 N. Y. 577, 32 N. E. 976, 18 L. R. A. 543; Arimond v. Green Bay & Miss. Canal Co., 31 Wis. 316.

In Maine the tendency seems to be toward the old and narrow rule. See Cushman v. Smith, 34 Me. 247, and Nichols v. Somerset & K. R. Co., 43 Me. 356.

[339] Pumpelly v. Green Bay & Miss. Canal Co., 80 U. S. (13 Wall. 166. In the decision it is said: "It is not necessary that property should be

§ 766. Eminent domain proceedings.

Through the exercise of the power of eminent domain by the state or any of its delegated agencies, the private property of an individual is arbitrarily and forcibly taken in order to supply the demands of some great and urgent public need. It is elementary to say that under such circumstances, the authority to exercise the power must be strictly followed. It must also be, as already stated,[340] expressly given and is not usually included among the implied powers of public corporations although a few cases have held that in order to do some act expressly authorized or di-

absolutely taken, in the narrowest sense of the word, to bring the case within the protection of this constitutional provision. There may be such serious interruption to the common and necessary use of property as will be equivalent to a taking, within the meaning of the statute." And the court further say in its opinion: "The declaration states that, by reason of the dam, the water of the lake was so raised as to cause it to overflow all his land, and that the overflow remained continuously from the completion of the dam, in the year 1861, to the commencement of the suit in the year 1867, and the nature of the injuries set out in the declarations are such as show that it worked an almost complete destruction of the value of the land.

The argument of the defendant is that there is no taking of the land within the meaning of the constitutional provision, and that the damage is a consequential result of such use of a navigable stream as the government had a right to for the improvement of its navigation.

It would be a very curious and unsatisfactory result, if in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the government, and which has received the commendation of jurists, statesmen, and commentators as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not taken for the public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen, as those rights stood at the common law, instead of the government, and make it an authority for invasion of private rights under the pretext of the public good, which had no warrant in the laws or practices of our ancestors." Crocker v. City of New York, 15 Fed. 405. But see Northern Transp. Co. v. City of Chicago, 99 U. S. 635.

[340] See § 749, ante

rected, it is absolutely necessary to acquire property in this manner; the right to do so will be implied. Through the action of a legislative body the conditions precedent to a valid exercise of the power are prescribed and these consist of statutes directing the manner under which the power is to be exercised. It is needless to say that where property is taken against the consent or will of the owner, the authority for so doing must be strictly construed. The authority must be expressly given;[341] must be strictly construed,[342] and the manner of its exercise as prescribed by law strictly followed.[343] Essential provisions should be strictly followed and all statutory requirements are considered essential. The fact that they are prescribed by law in connection with the exercise of the power gives them this character and not their relative importance. It is not for the judiciary to say that because a

[341] Common Council of Houghton v. Huron Copper Min. Co., 57 Mich. 547; Trowbridge v. City of Detroit, 99 Mich. 443, 58 N. W. 368; Freeman v. Price, 63 N. J. Law, 151, 43 Atl. 432; Russell v. Leatherwood, 114 N. C. 683.

[342] Shields v. Ross, 158 Ill. 214, 41 N. E. 985; McKernan v. Indianapolis, 38 Ind. 223; Barnes v. City of Springfield, 86 Mass. (4 Allen) 488; Sperry v. Flygare, 80 Minn. 325, 83 N. W. 177, 49 L. R. A. 757; County of Cooper v. Geyer, 19 Mo. 257; City of Springfield v. Whitlock, 34 Mo. App. 642; Henry v. Ward, 49 Neb. 392, 68 N. W. 518; Kearney Tp. v. Ballantine, 54 N. J. Law, 194, 23 Atl. 821; Wharton v. Sorden, 59 N. J. Law, 356, 36 Atl. 672; Atlantic Coast Elec. R. Co. v. Griffin, 64 N. J. Law, 513, 46 Atl. 1062; Salsbury v. Gaskin, 66 N. J. Law, 111, 48 Atl. 531. The grant of the right to lay out and open streets, roads, alleys and highways is exclusive. Morse v. Williamson, 35 Barb. (N. Y.) 472; In re City of New York, 158 N. Y. 668, 52 N. E. 1125, affirming 33 App. Div. 365, 53 N. Y. Supp. 875.

[343] City of Stockton v. Whitmore, 50 Cal. 554; Humbolt County v. Dinsmore, 75 Cal. 604; Frank v. City of Atlanta, 72 Ga. 428; Dempsey v. Donnelly, 58 Ill. 40; Hyslop v. Finch, 99 Ill. 171; Brown v. Robertson, 123 Ill. 631; Barnard v. Haworth, 9 Ind. 103; Hughes v. Milligan, 42 Kan. 396, 22 Pac. 313; City of New Orleans v. Sohr, 16 La. Ann. 393; Inhabitants of Cape Elizabeth v. Cumberland County Com'rs, 64 Me. 456; People v. Kimball, 4 Mich. 95; Specht v. City of Detroit, 20 Mich. 168; Matter of Powers, 29 Mich. 504; Soulard v. City of St. Louis, 36 Mo. 546; State v. Poland, 50 N. J. Law, 367; Clark v. City of Elizabeth, 61 N. J. Law, 565; Newall v. Wheeler, 48 N. Y. 486; Harbeck v. City of Toledo, 11 Ohio St. 219; York County v. Fewell, 21 S. C. 106; Paris Mountain Water Co. v. City Council of Greenville, 53 S. C. 82; Woodworth v. Spirit Mound Tp., 10 S. D. 504, 74 N. W. 443. Statutory provisions for the benefit of private individuals may be waived by the parties in interest. Adams v. Town of Clarksburg, 23 W. Va. 203.

statutory requirement is unimportant or relates to a matter of detail that it is not essential.[344] This last principle, however, does not mean that the authority must be so literally followed or so strictly construed as to defeat the result sought to be obtained through its grant.[345] A strict but substantial compliance with the statutes only is necessary.

§ 767. Attempt to agree.

Many local requirements considered as conditions precedent are found. One of the most common is that requiring an attempt on the part of the one exercising the power to agree with the property owner as to the value and transfer of his property. The law compels a bona fide attempt for the purchase of property before the right of eminent domain can be exercised.[346] Where this condition exists, not only must it be complied with but the subsequent proceedings must show the attempt and its failure. It is a jurisdictional condition and this statement can be applied as a rule to all the statutory provisions relative to setting in motion the necessary legal machinery for the exercise of the power.[347]

Eminent domain is a sovereign right and whether exercised by the state or one of its delegated agencies, it is practically in the nature of an inquisition on the part of the state to ascertain the compensation to be paid the owner for property which he is obliged to surrender to the greater needs of the public. The

[344] People v. Village of Whitney's Point, 32 Hun (N. Y.) 508.

[345] Canyon County v. Toole, 8 Idaho, 501, 69 Pac. 320; Town v. Town of Blackberry, 29 Ill. 137; Allison v. Highway Com'rs, 54 Ill. 170; State v. Pitman, 38 Iowa, 252; State v. Kinney, 39 Iowa, 226; Inhabitants of Monticello v. Aroostook County, 59 Me. 391; Nickerson v. Lynch, 135 Mo. 471; Howard v. Dakota County Com'rs, 25 Neb. 229, 41 N. W. 185; State v. Richmond, 26 N. H. 232; People v. Dolge, 45 Hun (N. Y.) 310. An irregularity will not, however, effect the validity of the proceedings. Bewley v. Graves, 17 Or. 274, 20 Pac. 322; Allen v. Parker County, 23 Tex. Civ. App. 536, 57 S. W. 703; Race v. State, 43 Tex. Cr. R. 438, 66 S. W. 560; Baier v. Hosmer, 107 Wis. 380, 83 N. W. 645; Ruhland v. Hazel Green Sup'er, 55 Wis. 664.

[346] Town of Harwinton v. Catlin, 19 Conn. 520; Shelton v. Town of Derby, 27 Conn. 414; Village of Byron v. Blount, 97 Ill. 62; Laue v. City of Saginaw, 53 Mich. 442; Dyckman v. City of New York, 5 N. Y. 434.

[347] Wabaunsee County Com'rs v. Muhlenbacker, 18 Kan. 129; Leslie v. City of St. Louis, 47 Mo. 474; Douglas County Road Co. v. Abraham, 5 Or. 318; Porter v. City of Abilene (Tex. App.) 16 S. W. 107.

power and the necessity for the taking being established, it should be the purpose of the state to gain through subsequent proceedings a fair value of the property for the owner and to prevent through prejudice or passion the securing of an extortionate amount.

§ 768. Parties to the proceedings.

The statutes may prescribe the necessary parties; then a compliance with the statute is sufficient. It has been stated that the modern tendency is to enlarge the right of compensation through a liberal construction of the words "property" and "taking." This leads directly to the proposition that an interest, however slight, if it is considered as property in a particular jurisdiction, either by constitutional provision or court construction, cannot be taken from the owner without compensation and that this be secured, it is necessary that in some way he be made a party to the proceedings.[348] This statement of the general principle is sufficient without referring in detail to the particular owners of various property interests or rights.[349] Such rights may be tangible

[348] Ryder v. Horsting, 130 Ind. 104, 29 N. E. 567, 16 L. R. A. 186; Gist v. Owings, 95 Md. 302, 52 Atl. 395. The mode of procedure as established by Code, Pub. Gen. Laws, art. 25, § 86, for the acquisition of land by condemnation proceedings for the establishment of a public highway does not apply to land already in possession of a county. Brush v. City of Detroit, 32 Mich. 43. Proceedings to condemn private land for a public highway are an entirety and the failure to give proper notice to any of the land owners will render the proceedings invalid. Clarke v. Town Council of South Kingstown, 18 R. I. 283, 27 Atl. 336. The consent of the state to the laying out of a highway over its land is not a condition precedent: it may be subsequently given.

[349] Beck v. Biggers, 66 Ark. 292; Damrell v. San Joaquin County Com'rs, 40 Cal. 154; Smith v. Hudson Highway Com'rs, 150 Ill. 385, 36 N. E. 967; Murphy v. Beard, 138 Ind. 560, 38 N. E. 33. A mortgagee not entitled to personal notice; that by publication is sufficient. Chicago, R. I. & P. R. Co. v. Ellithrope, 78 Iowa, 415, 43 N. W. 277; Alcott v. Acheson, 49 Iowa, 569; Goodrich v. Atchison County Com'rs, 47 Kan. 355, 18 L. R. A. 113; State v. Bogardus, 63 Kan. 259, 65 Pac. 251. A railroad company is to be regarded as a resident of any county in which it operates the road or exercises its franchises.

Cool v. Crommet, 13 Me. 250; Inhabitants of Monson v. County Com'rs, 84 Me. 99, 24 Atl. 672. If during the pendency of proceedings land is sold, no notice need be given to the vendee if the vendor was properly served. Abbott v.

or inchoate, perpetual or temporary in duration, and unrestricted or limited in their extent. Whatever their nature or character, the owner may be entitled to compensation though slight.[350] On the contrary, one not a property owner or interested is not a proper party.[351]

§ 769. Petition.

A petition or application by the one having right to exercise the power is usually necessary,—addressed to the court or tribunal designated by law.[352] It should set forth all jurisdictional facts including the authority [353] and necessity [354] for the exercise of the

Cottage City, 143 Mass. 521, 10 N. E. 325. Evidence is admissible on the question of damages that the premises had been by the owner dedicated at common law to the public for a park and the dedication accepted.

Town of Lyle v. Chicago, M. & St. P. R. Co., 55 Minn. 223; Chisago County v. Nelson, 81 Minn. 443, 84 N. W. 301; Sherman v. Peterson, 91 Mich. 480, 51 N. W. 1122; Nedow v. Porter, 122 Mich. 456, 81 N. W. 256. One who has acquired title by prescription is regarded as the owner upon whom statutory notice is to be served. Welsh v. Hodge, 94 Mich. 493, 54 N. W. 175; In re Parker's Petition, 36 N. H. 84. A mortgagee in possession is entitled to notice as a land owner. Witcher v. Town of Benton, 48 N. H. 157. Tenants in common are each entitled to notice. Bitting v. Douglas County, 24 Or. 406; Towns v. Klamath County, 33 Or. 225; Evans v. Santana Live-Stock & Land Co., 81 Tex. 622, 17 S. W. 232. A corration is not made a party to proceedings by an insufficient notice. LaFarrier v. Hardy, 66 Vt. 200; Tench v. Abshire, 90 Va. 768.

[350] Warren v. Gibson, 40 Mo. App. 569. In proceedings for the establishment of a new road, a mortgagee it not a necessary party.

[351] Creswell v. Greene County Com'rs, 24 Ala. 282; Inhabitants of Windsor v. Field, 1 Conn. 279; Huff v. Donehoo, 109 Ga. 638, 34 S. E. 1035; Akin v. Riley County Com'rs, 36 Kan. 170. One not injured by want of notice cannot object that others were not properly served. Thompson v. Town of Berlin, 87 Minn. 7, 91 N. W. 29.

[352] Hentzler v. Bradbury, 5 Kan. App. 1, 47 Pac. 330; Commonwealth v. Peters, 3 Mass. 229; Commonwealth v. Inhabitants of Cambridge, 7 Mass. 158; New Jersey Junction R. Co. v. City of Jersey City, 68 N. J. Law, 108, 52 Atl. 352; Thompson v. Multnomah County, 2 Or. 34.

[353] Allen v. City of Chicago, 176 Ill. 113, 52 N. E. 33; Oliphant v. Atchison County Com'rs, 18 Kan. 386; Sullivan v. Cline, 33 Or. 260, 54 Pac. 154.

[354] In re Grove St., 61 Cal. 438; City of Los Angeles v. Waldron, 65 Cal. 382; Morris v. Salle, 14 Ky. L. R. 117, 19 S. W. 527; Nischen v. Hawes, 15 Ky. L. R. 40, 21 S. W. 1049; City of Helena v. Harvey, 6 Mont. 114; Colville v. Judy, 73 Mo. 651; Leath v. Summers, 25 N. C. (3 Ired. Law) 108.

power, an accurate description of the property [355] sought to be taken, with the names of the owners,[356] and such other statements as may be specifically required by law.[357] If a particular form or phraseology is provided by statute, the petition should follow this form, and if other requirements are necessary, such as the filing of a bond or the giving of security to preserve to property owners the compensation which may be awarded them,[358] these are essentials, as they are considered, and should not be omitted. The rule that the authority must be strictly followed cannot be ignored, especially in the preparation,[359] filing [360] and presentation of the petition. Statutory provisions may also prescribe the me-

[355] Crouse v. Whitlock, 46 Ill. App. 260; McDonald v. Payne, 114 Ind. 359, 16 N. E. 795; Farmer v. Pauley, 50 Ind. 583; Shute v. Decker, 51 Ind. 241; Gascho v. Sohl, 155 Ind. 417, 58 N. E. 547. A highway cannot be located on a half section line under Ind. Rev. St. 1881, § 5016, as amended by acts 1895, p. 14.

Clift v. Brown, 95 Ind. 53; Monroe County Com'rs v. Harrell, 147 Ind. 500; Ballou v. Elder, 95 Iowa, 693, 64 N. W. 622; Casey v. Kilgore, 14 Kan. 478; Packard v. Androscoggin County Com'rs, 80 Me. 43, 12 Atl. 788; Inhabitants of Hebron v. Oxford County Com'rs, 63 Me. 314; Hayford v. Aroostook County Com'rs, 78 Me. 153. Description of highways too indefinite to give jurisdiction. Selectmen of Andover v. Oxford County, 86 Me. 185, 29 Atl. 982. The description of a highway is sufficient where the termini are fixed and certain and the general route cannot be mistaken.

Carr v. Town of Berkley, 145 Mass. 539, 14 N. E. 746; Inhabitants of Hyde Park v. Norfolk County Com'rs, 117 Mass. 416; Heck v. Essex School Dist., 49 Mich. 551; State v. Hulick, 33 N. J. Law, 307; People v. Taylor, 34 Barb. (N. Y.) 481; Johns v. Marion County, 4 Or. 46; Sime v. Spencer, 30 Or. 340, 47 Pac. 919; In re Sterrett Tp. Road, 114 Pa. 627; Woodworth v. Spirit Mound Tp., 10 S. D. 504, 74 N. W. 443; Galveston, H. & S. A. R. Co. v. Baudat, 18 Tex. Civ. App. 595, 45 S. W. 939; Shell v. Poulson, 23 Wash. 535, 63 Pac. 204; State v. O'Connor, 78 Wis. 282, 47 N. W. 433; Jackson v. Rankin, 67 Wis. 285.

[356] Hughes v. Sellers, 34 Ind. 537. A petition is fatally defective which describes owners of land as "the heirs of a designated person." Cowing v. Ripley, 76 Mich. 650, 43 N. W. 648; Godchaux v. Carpenter, 19 Nev. 415, 14 Pac. 140; State v. Stilwell, 50 N. J. Law, 530.

[357] Humboldt County v. Dinsmore, 75 Cal. 604, 17 Pac. 710; In re Buel, 168 N. Y. 423, 61 N. E. 700.

[358] Humboldt County v. Dinsmore, 75 Cal. 604, 17 Pac. 710; Hill v. Ventura County Sup'rs, 95 Cal. 239, 30 Pac. 385; Horton v. Town of Norwalk, 45 Conn. 237; Carroll County Com'rs v. Justice, 133 Ind. 89, 30 N. E. 1085; Shull v. Brown, 25 Neb. 234, 41 N. W. 186; County of Douglas v. Clark, 15 Or. 3, 13 Pac. 511. Where no bond is provided by statute, none can be required.

[359] Kahn v. San Francisco County Sup'rs (Cal.) 25 Pac. 403; Good-

chanical part of the petition, namely, its technical form,[361] not substance, the phraseology to be used, and its signatures. A strict compliance with the requirements relative to signatures is necessary.[362] A substantial compliance with other provisions is sufficient.

In the exercise of the power by municipalities for the purpose of securing land for the laying out of streets or making local improvements, the adoption of an ordinance or resolution relative to the proposed action is frequently substituted for or authorizes the filing and presentation of a petition and the ordinance instead of the petition then sets in motion the legal procedure necessary to an exercise of the power.[363] The contents and form of such an ordinance may be prescribed by law and the same rules relative to a compliance therewith and to the construction and sufficiency of the ordinance apply as determining the same questions raised in connection with a petition.[364]

win v. Sagadahoc County Com'rs, 60 Me. 328; Cox v. Hartford Tp. Highways Com'rs, 83 Mich. 193, 47 N. W. 122. A petition confers no jurisdiction which prays for the discontinuance of one highway, the opening of another, and the building of a new bridge. Sheehan v. Bath Sup'rs, 80 Minn. 355, 83 N. W. 352; Huntress v. Effingham, 17 N. H. 584; Sussex & Morris County Road, 13 N. J. Law, 157.

[360] Reynolds v. Village of Barre, 63 Vt. 541, 22 Atl. 596.

[361] Lehmann v. Rinehart, 90 Iowa, 346, 57 N. W. 866.

[362] Kahn v. San Francisco County Sup'rs (Cal.) 25 Pac. 403; Thatcher v. Crisman, 6 Colo. App. 49, 39 Pac. 887; Barnes v. City of Springfield, 86 Mass. (4 Allen) 488; Auditor General v. Fisher, 84 Mich. 128, 47 N. W. 574. An administrator has no authority to bind the lands of the estate which he represents and cannot be included as one of the petitioners. Zimmerman v. Snowden, 88 Mo. 218.

[363] City of St. Louis v. Lang, 131 Mo. 412, 33 S. W. 54; State v. Town of Union, 32 N. J. Law, 343; Matter of Schreiber, 3 Abb. N. C. (N. Y.) 68; Ryan v. Preston, 32 Misc. 92, 66 N. Y. Supp. 162. New York Laws 1899, c. 152, authorizing of bicycle side paths and providing that none shall be constructed upon or along a sidewalk except by the consent of the abutting owner do not prevent the construction of a bicycle path adjoining or beside a sidewalk as the word "along" should be construed as synonymous with "upon."

[364] City of Stockton v. Whitmore, 50 Cal. 554; City of Los Angeles v. Waldron, 65 Cal. 283; In re City of Rochester, 10 N. Y. Supp. 436. The same principle will apply for the taking of lands for public parks and the charter provision relative to the adoption of a resolution to the effect "that the city intends to take the land" is mandatory.

In re Buffalo, 78 N. Y. 362. An order appointing commissioners to

§ 770. Notice; when necessary.

It is fundamental that a person cannot be legally or justly deprived of a personal or property right without notice to him of the action leading to this result. This is especially true of property interests. It is usually, therefore, a jurisdictional condition that the owner whose property is sought to be taken must be apprised in some way of the pendency of the proceedings by which this end is sought to be attained.[365] It is a question for the leg-

assess damages for lands supposed to be taken for a street improvement will be set aside when there is no proof that two-thirds of the members of the common council voted for the improvement as required by the city charter. The defect is jurisdictional not simply an irregularity and the fact that no objections appear on the face of the record does not preclude one from taking advantage of the lack of authority. City of Scranton v. Barnes, 147 Pa. 461, 23 Atl. 777.

[365] Grinstead v. Wilson, 69 Ark. 587, 65 S. W. 108; Town of Winchester v. Hinsdale, 12 Conn. 88; In re Isaacs' Petition, 1 Pen. (Del.) 61, 39 Atl. 588; Fulton County v. Amorous, 89 Ga. 614, 16 S. E. 201; Oran Highway Com'rs v. Hoblit, 19 Ill. App. 259; Johnson v. Stephenson, 39 Ill. App. 88; Schuchman v. Jefferson County Highway Com'rs, 52 Ill. App. 497. Where the petition and notice are not posted as required by law, all the proceedings are void for want of jurisdiction. Frizell v. Rogers, 82 Ill. 109; Wild v. Deig, 43 Ind. 455; Schmidt v. Wright, 88 Ind. 56; Wells County Com'rs v. Fahlor, 132 Ind. 426, 31 N. E. 1112; State v. Iowa Cent. R. Co., 91 Iowa, 275, 59 N. W. 35; Starry v. Treat, 102 Iowa, 449, 71 N. W. 350; Stephens v. Leavenworth County Com'rs, 39 Kan. 664, 14 Pac. 175. A general appearance will operate as a waiver of a failure to serve notice.

Hughes v. Mulligan, 42 Kan. 396, 22 Pac. 313; Chase County Com'rs v. Cartter, 30 Kan. 581; State v. Bogardus, 63 Kan. 259, 65 Pac. 251; State v. Farry, 23 Kan. 731; Weymouth v. York County Com'rs, 86 Me. 391, 29 Atl. 1100; Haskell v. Bristol County Com'rs, 75 Mass. (9 Gray) 341; Dupont v. Hamtramck Highway Com'rs, 28 Mich. 362; Purdy v. Martin, 31 Mich. 455; Kundinger v. City of Saginaw, 59 Mich. 355; Dixon v. Highway Com'rs, 75 Mich. 225, 42 N. W. 814; Wilson v. Burr Oak Tp. Board, 87 Mich. 240, 49 N. W. 572; Brown v. Greenfield Tp. Board, 109 Mich. 557; In re Gardner's Petition, 41 Mo. App. 589; Monroe v. Crawford, 163 Mo. 178, 63 S. W. 373; Self v. Gowin, 80 Mo. App. 398; Hull v. Miller, 6 Neb. 128; Doody v. Vaughn, 7 Neb. 28; Grand Trunk R. Co. v. Town of Berlin, 68 N. H. 168, 36 Atl. 554; Ex parte Shough, 16 N. J. Law, 264; State v. City of Paterson, 47 N. J. Law, 15; Pursell v. Edison Portland Cement Co., 65 N. J. Law, 541, 47 Atl. 587; People v. Smith, 7 Hun (N. Y.) 17; People v. Allen, 162 N. Y. 615, 57 N. E. 1122, affirming 37 App. Div. 248, 55 N. Y. Supp. 1057. Highway law, § 85, p. 697, 1 Rev. St. (9th ed.), requires notice of the proceedings for the establishment of highways

islature to determine the character and extent of the notice necessary;[366] the legality of its action measured, of course, by that constitutional provision among others which prohibits the taking

be personally served on the occupant and owner of all lands through which it runs. A failure in this respect will render them void. Rector v. Clark, 78 N. Y. 21; Sawyer v. Hamilton, 5 N. C. (1 Murph.) 253; Heddleston v. Hendricks, 52 Ohio St. 460; Gaines v. Linn County, 21 Ore. 425, 28 Pac. 131; Grady v. Dundon, 30 Or. 333, 47 Pac. 915; Ross v. Town of North Providence, 10 R. I. 461; Cunningham v. San Saba County, 1 Tex. Civ. App. 480, 20 S. W. 941; Crouch v. State, 39 Tex. Cr. R. 145, 45 S. W. 578; La Farrier v. Hardy, 66 Vt. 200, 28 Atl. 1030; Walbridge v. Cabot, 67 Vt. 114, 30 Atl. 805; Lynch v. Town of Rutland, 66 Vt. 570, 29 Atl. 1015; State v. Logue, 73 Wis. 598, 41 N. W. 1061.

Notice held sufficient in the following cases: Behrens v. Melrose Highway Com'rs, 169 Ill. 558, 48 N. E. 578; Fulton v. Cummings, 132 Ind. 453, 30 N. E. 949; Manor v. Jay County Com'rs, 137 Ind. 367, 34 N. E. 959; Town of Hardinsburg v. Cravens, 148 Ind. 1; Starry v. Treat, 102 Iowa, 449; Jones v. City of Portland, 57 Me. 42; City of Baltimore v. Little Sisters of the Poor, 56 Md. 400; Lawrence v. Inhabitants of Nahant, 136 Mass. 477; Coquard v. Boehmer, 81 Mich. 445, 45 N. W. 996; Thompson v. Town of Berlin, 87 Minn. 7, 91 N. W. 25; Ter. v. Lannon, 9 Mont. 1, 72 Pac. 495; Toppan's Petition, 24 N. H. 43; Kennett's Petition, 24 N. H. 139; Sweek v. Jorgensen, 36 Or. 270, 54 Pac. 156; Issenhuth v. Baum, 11 S. D. 223, 76 N. W. 928; Williams v. Turner Tp., 15 S. D. 182, 87 N. W. 968; Vogt v. Bexar County, 16 Tex. Civ. App. 567, 42 S. W. 127; State v. O'Connor, 87 Wis. 282, 47 N. W. 433.

Notice held insufficient in the following cases: Quackenbush v. District of Columbia, 20 Mackey (D. C.) 300; Molett v. Keenan, 22 Ala. 484; In re Parker, 2 Pen. (Del.) 336, 45 Atl. 347; Hammon v. Highway Com'rs, 38 Ill. App. 237; State v. Waterman, 79 Iowa, 360, 44 N. W. 677; People v. Nankin Highway Com'rs, 14 Mich. 528; Truax v. Sterling, 74 Mich. 160, 41 N. W. 885; Barlow v. Oscoda Highway Com'rs, 59 Mich. 443; Beatty v. Beethe, 23 Neb. 210, 36 N. W. 494; Freeman v. Cornish, 52 N. H. 141; State v. Town of Orange, 32 N. J. Law, 49; State v. City of Elizabeth, 32 N. J. Law, 357; Cameron v. Wasco County, 27 Or. 318, 41 Pac. 160; Bitting v. Douglas County, 24 Or. 406, 33 Pac. 981; In re Mt. Pleasant Ave., 10 R. I. 320; Austin v. Allen, 6 Wis. 134; Babb v. Carver, 7 Wis. 124; State v. O'Connor, 78 Wis. 282.

[366] Humboldt County v. Dinsmore, 75 Cal. 604, 17 Pac. 710. Notice provided for by code of Cal. § 2685. Need not be in writing. Gifford v. Baker, 158 Ind. 339, 62 N. E. 690; Daugherty v. Brown, 91 Mo. 26, 3 S. W. 210. Notice need not be signed. People v. Stedman, 57 Hun, 280, 10 N. Y. Supp. 787; Lane v. Cary, 19 Barb. (N. Y.) 537. On general principles the notice in a legal proceeding should be in writing.

of property without due process of law.[367] Notice is universally considered one of the essentials of due process of law. It need not be, however, in all cases, actual,[368] and in fact in many instances where the power is exercised by public corporations for the purpose of laying out highways and streets, constructive notice alone is given and is regarded by the courts as sufficient.[369] The publication or passage of an ordinance which authorizes the opening of a street is frequently the only notice to property owners, resident or otherwise, which is required by the charter of the corporation or an act of the legislature authorizing such action.[370]

§ 771. Service of notice.

Eminent domain is made available through legislative action, by the establishment of necessary and precedent steps to be taken by the one exercising the power. The manner in which notice, when required by statute, must be served upon the property owner may be prescribed by the legislature and a strict compliance with statutory requirements in this respect is essential.[371]

[367] Chicago, R. I. & P. R. Co. v. Ellithrope, 77 Iowa, 415, 43 N. W. 277; McBurney v. Graves, 66 Iowa, 314; Barry v. Deloughrey, 47 Neb. 354, 66 N. W. 410; People v. Mosier, 56 Hun, 64, 8 N. Y. S. 621. An act relative to laying out of highways is unconstitutional when it makes no provision for giving notice to property owner before appropriating property. Seifert v. Brooks, 34 Wis. 443.

[368] Crane v. Camp, 12 Conn. 464. Personal notice to owners residing outside of the state is unnecessary; that by mail being reasonable and sufficient.

[369] Carr v. Fayette County, 37 Iowa, 608; Wilson v. Hathaway, 42 Iowa, 173; State v. Chicago, M. & St. P. R. Co., 80 Iowa, 586, 46 N. W. 741; Fair v. Buss, 117 Iowa, 164, 90 N. W. 527; Goodnow v. Ramsey County Com'rs, 11 Minn. 31 (Gil. 12); Forster v. Winona County Com'rs, 84 Minn. 308, 87 N. W. 921; Pawnee County v. Storm, 34 Neb. 735, 52 N. W. 696. While constructive notice may conter jurisdiction, it will not deprive the owner who has failed to receive actual notice of his right to compensation within a reasonable time after he has received actual notice of the appropriation of his property.

[370] Burk v. City of Baltimore, 77 Md. 469, 26 Atl. 868; McMicken v. City of Cincinnati, 4 Ohio St. 394; Borough of Verona v. Allegheny Val. R. Co., 152 Pa. 361. Proceedings for the opening of a street will be void where the council fail to prepare sufficient plans and publish their determination of the location as required by law though the landowner had actual knowledge of the proposed action by the council. See, also, note 32 Am. & Eng. Corp. Cas. 88 et seq. on the establishment of highways by municipalities.

[371] Kimmey's Case, 5 Har. (Del.) 18; Rutherford v. Davis, 95 Ind. 245; Tucker v. O'Neal, 130 Ind.

As stated in the preceding section, it need not be actual and personal in all cases but may be constructive.[372] The manner of service prescribed by the legislature is conclusive so long as it conforms to the well recognized legal principles respecting due process of law as appropriate to the conditions and circumstances under consideration.[373] The absence of a statutory requirement

597; Lyman v. Plummer, 75 Iowa, 353; State v. Waterman, 79 Iowa, 360; Morris v. Salle, 14 Ky. L. R. 117, 19 S. E. 527; Dorman v. City Council of Lewiston, 81 Me. 411, 17 Atl. 316; Cox v. Highway Com'rs, 83 Mich. 193, 47 N. W. 122; Welch v. Hodge, 94 Mich. 493, 54 N. W. 175; Overmann v. City of St. Paul, 39 Minn. 120; Lingo v. Burford, 112 Mo. 149, 20 S. W. 459, affirming 18 S. W. 1081. The finding by a court of competent jurisdiction in a proceeding to establish a highway that due notice had been given according to law is conclusive evidence as against a collateral attack in another court of a compliance with the statute regarding notice. Ter. v. Lannon, 9 Mont. 1; Pawnee County v. Storm, 34 Neb. 735; McClure v. Groton, 50 N. H. 49. Proceedings are not rendered invalid by the fact that the copy served of a petition was made by the petitioner himself. Vanatta v. Town of Morristown, 34 N. J. Law, 445; Boice v. Inhabitants of Plainfield, 38 N. J. Law, 95; People v. Kniskern, 54 N. Y. 52. In proceedings for the appropriation of private property for a public use, all notices and hearings that may tend to give the party to be affected any semblance of benefit must be carefully observed. Vedder v. Marion County, 22 Or. 264.

[372] Humboldt County v. Dinsmore, 75 Cal. 604; Wells v. Hicks, 27 Ill. 343; Wright v. Middlefork Highway Com'rs, 144 Ill. 48, 33 N. E. 876; Afton Highway Com'rs v. Elwood, 193 Ill. 304, 61 N. E. 1033; Tucker v. Sellers, 130 Ind. 514, 30 N. E. 531; Pittsburgh, C., C. & St. L. R. Co. v. Machler, 158 Ind. 159, 63 N. E. 210; Hobbs v. Tipton County Com'rs, 116 Ind. 376, 19 N. E. 186; State v. Chicago, B. & Q. R. Co., 68 Iowa, 135; Mitchell v. Bond, 74 Ky. (11 Bush) 614; State v. Beeman, 35 Me. 242; Truax v. Sterling, 74 Mich. 160; Wentworth v. Town of Farmington, 51 N. H. 128; Cupp v. Seneca County Com'rs, 19 Ohio St. 173; Vedder v. Marion County, 22 Or. 264, 29 Pac. 619; In re Road in Sterrett Tp., 114 Pa. 627, 7 Atl. 765; In re Redstone Private Road, 112 Pa. 183. Personal notice required. State v. O'Connor, 78 Wis. 282, 47 N. W. 433. Service may be had upon a station agent as an occupant of grounds. Green v. State, 56 Wis. 583. Personal service required.

[373] Wilson v. Hathaway, 42 Iowa, 173. The legislature has the power to provide for the appropriation of a right of way for public highways upon notice by publication in newspapers or by the posting of notices. The proceeding is one in rem in which the court acquires jurisdiction of the power which is the subject of adjudication. Fair v. Buss, 117 Iowa, 164, 90 N. W. 527; Dutillet v. Blanchard, 14 La. Ann. 97; Fitchburg R. Co. v. City of Fitchburg, 121 Mass. 132; Detroit

calling for service of notice does not necessarily relieve one exercising the power from the giving of notice, many cases holding that, independent of statutory provisions, the fundamental provision obtains that private property cannot be taken without due process of law, and this includes, as one of its essentials, the giving of notice.[374]

§ 772. Objections.

A petition for the appropriation of property under eminent domain proceedings should state in substance the petitioner's right to exercise the power, the necessity for its exercise, and give the names of the property owners whose interests may be affected by the proceedings. It is upon this petition when presented to the proper tribunal that commissioners are appointed to determine the amount of compensation to which those whose interests are taken are entitled. At this time the property owner can exercise the right of making certain objections to the pending proceedings in respect to the appropriation of his property.[375] The question of compensation is one to be determined later by the commissioners and cannot be raised at this time. The necessity for the exercise of the power or the lack of it is a judicial question and can be determined by the tribunal passing upon the petition of its own motion or otherwise.[376] The rule almost universally obtains that where the right to exercise the power is given by the legislature to an individual or corporation, the necessity for the exercise of

Sharpshooter's Ass'n v. Hamtranck Highway Com'rs, 34 Mich. 37; James v. City of St. Paul, 58 Minn. 459, 60 N. W. 21; Forster v. Winona County Com'rs, 84 Minn. 308, 87 N. W. 921; Graham v. Flynn, 21 Neb. 229, 31 N. W. 742. The service of notice is not necessary upon one of the petitioners for a proposed highway. Knox v. Town of Epsom, 56 N. H. 14; In re Reserve Tp. Road, 80 Pa. 165; Towns v. Klamath County, 33 Or. 225, 53 Pac. 604.

[374] Curran v. Shattuck, 24 Cal. 427.

[375] Burnett v. City of Sacramento, 12 Cal. 76; Thompson v. Emmons, 24 N. J. Law (4 Zab.) 45. One whose land has not been taken cannot object to the proceedings because of an irregularity affecting another party to the proceeding.

[376] Town of Greensburg v. International Trust Co. (C. C. A.) 94 Fed. 755; Fields v. Colby, 102 Mich. 449; Forster v. Winona County Com'rs, 84 Minn. 308, 87 N. W. 921; King v. Blackwell, 96 N. C. 322; Paine v. Town of Leicester, 22 Vt. 44; Gallup v. Town of Woodstock, 29 Vt. 347; Lewis v. Washington, 5 Grat. (Va.) 265.

that right rests in the judgment and the discretion of the grantee of the power and that it is only in cases where there is a clear abuse or an unreasonable use of the power that the tribunal passing upon the petition will also determine the question of the necessity for an exercise of the power on that particular occasion.[377] It is for the one possessing the privilege to determine when its necessities are so great as to compel the use of the privilege. In the laying out of highways the law frequently imposes, however, upon some official body, a determination of the necessity and feasibility for its opening.[378] This is especially true where the proceedings are set in motion by the filing of a petition of property owners for the establishment of the highway.[379]

The character of the use is also a legislative question and the grant of the right is ordinarily conclusive that the appropriation of property by a particular grantee and in a particular instance is a public one such as will justify the exercise of the power of eminent domain.[380] The legislative determination of the character of the use is not final or conclusive, however, but is to be determined ultimately by the judicial department of government whose duty it is to determine the constitutionality of all legislation.

Waiver or loss of right to object. The principle has been stated several times relative to a strict construction and a literal

[377] San Mateo County v. Coburn, 130 Cal. 631, 63 Pac. 78. The location, necessity, and extent of a public highway are matters of a political or legislative character and the power to determine such questions have been vested in county boards of supervisors, their decision is not subject to collateral attack and cannot be reviewed in a subsequent proceeding brought for the condemnation of necessary lands. Inhabitants of Windsor v. Field, 1 Conn. 279; Crow v. Judy, 139 Ind. 562, 38 N. E. 415; Morse v. City of Westport (Mo.) 33 S. W. 182; Pope v. Town of Union, 18 N. J. Eq. (3 C. E. Green) 282. But see Campau v. City of Detroit, 14 Mich. 276. See, also, cases cited in the following note.

[378] Wells v. Rhodes, 114 Ind. 467, 16 N. E. 830; Larson v. Fitzgerald, 87 Iowa, 402; Spalding v. Town of Groton, 68 N. H. 77, 44 Atl. 88. The judgment of such officials of the public use and necessity is conclusive and cannot be collaterally attacked. In re Four Corner Road, 59 Hun, 618, 13 N. Y. Supp. 458; In re Road in Ohio & Ross Tps., 166 Pa. 132, 31 Atl. 74; Kopecky v. Daniels, 9 Tex. Civ. App. 305, 29 S. W. 533. See, also, authorities cited in the following section.

[379] Shaffer v. Weech, 34 Kan. 595. Such a petition is jurisdictional.

[380] Fanning v. Gilliland, 37 Or. 369, 61 Pac. 636. Rehearing denied, 62 Pac. 209.

following of all statutory provisions relative to the exercise of the power. Upon the presentation of a petition, objections to all preceding action should be taken.[381] The form of the petition, with its necessary allegations,[382] its mechanical execution,[383] the form and manner of service of the notice,[384] may be inquired into, and the usual rule obtains that an appearance by the property owner at this time and the failure to raise objections will be regarded as a waiver on his part of a right to afterwards urge

[381] Williams v. Town of Stonington, 49 Conn. 229; Smith v. Alexander, 24 Ind. 454; Abbott v. Johnson County Com'rs, 5 Kan. App. 162; Inhabitants of Raymond v. Cumberland County Com'rs, 63 Me. 110; Inhabitants of Freetown v. Bristol County Com'rs, 26 Mass. (9 Pick.) 51; Inhabitants of Rutland v. Worcester County Com'rs, 37 Mass. (20 Pick.) 71; Hamblin v. Barnstable County Com'rs, 82 Mass. (16 Gray) 256; Thorndike v. Norfolk County Com'rs, 117 Mass. 566; Inhabitants of Watertown v. Middlesex County Com'rs, 176 Mass. 22, 56 N. E. 971; Davis v. Boone County Com'rs, 28 Neb. 837, 45 N. W. 249; Carpenter's Petition, 67 N. H. 574, 32 Atl. 773; State v. Inhabitants of Trenton, 53 N. J. Law, 178, 20 Atl. 738; Wharton v. Sorden, 59 N. J. Law, 356; Wilson v. City of Scranton, 141 Pa. 621, 21 Atl. 779; In re Frederick Street, 155 Pa. 623, 26 Atl. 773; Doddridge County Sup'rs v. Stout, 9 W. Va. 703.

[382] Crossley v. O'Brien, 24 Ind. 325; Sowle v. Cosner, 56 Ind. 276; Smith v. Goldsborough, 80 Md. 49, 30 Atl. 574; White v. Landaff, 35 N. H. 128; Hardy v. Town of Keene, 54 N. H. 449; In re Widening of Washington St., 60 Hun, 580, 14 N. Y. Supp. 470.

[383] Miller v. Burks, 146 Ind. 219, 43 N. E. 930; Turley v. Oldham, 68 Ind. 114.

[384] Walker v. City of Aurora, 140 Ill. 402, 29 N. E. 741; Orton v. Tilden, 110 Ind. 131, 10 N. E. 936; Gifford v. Baker, 158 Ind. 339, 62 N. E. 690; Akin v. Riley County Com'rs, 38 Kan. 170, 13 Pac. 2; Stephens v. Leavenworth County Com'rs, 36 Kan. 664; Hedeen v. State, 47 Kan. 402, 28 Pac. 203. The presentation of a claim for damages will operate as a waiver of the failure to give notice. Hanson v. Cloud County, 8 Kan. App. 857, 55 Pac. 468; Condon v. County Com'rs, 89 Me. 409, 36 Atl. 626; Gill v. Inhabitants of Scituate, 100 Mass. 200; Inhabitants of Hyde Park v. Wiggin, 157 Mass. 94, 18 L. R. A. 188; Kieckenapp v. Town of Wheeling Sup'rs, 64 Minn. 547; Anderson v. Town of Decoria, 74 Minn. 339; Hurst v. Town of Martinsburg, 80 Minn. 40, 82 N. W. 1099; Town of Gilford's Petition, 25 N. H. (5 Fost.) 124; Peavey v. Town of Wolfborough, 37 N. H. 286; Roberts v. Stark, 47 N. H. 223; Issenhuth v. Baum, 11 S. D. 223, 76 N. W. 928; McIntire v. Lucker, 77 Tex. 259, 13 S. W. 1027. A special appearance is not a waiver of the giving of notice. Robinson v. Winch, 66 Vt. 110, 28 Atl. 884; Brock v. Town of Barnet, 57 Vt. 172; Tench v. Abshire, 90 Va. 768, 19 S. E. 779; State v. Langer, 29 Wis. 68.

them.[385] This statement does not apply, however, to jurisdictional question; the usual rule obtains that they can be raised at any time.[386]

§ 773. Appointment of viewers.

Ordinarily, the determination of the existence of the necessity for the exercise of the power is left to the one to whom the right is granted. Statutes, however, frequently provide for the laying out[387] of highways through proceedings originating upon the pe-

[385] Taylor v. Marcy, 25 Ill. 518; Crouse v. Whitlock, 46 Ill. App. 260; Osborn v. Sutton, 108 Ind. 443, 9 N. E. 141; Robinson v. Rippey, 111 Ind. 112, 12 N. E. 141; Little v. Thompson, 24 Ind. 146; Smyth v. State, 158 Ind. 332, 62 N. E. 449; Washington Ice Co. v. Lay, 103 Ind. 48; Bronnenburg v. O'Bryant, 139 Ind. 17; Stronsky v. Hickman, 116 Iowa, 651, 88 N. W. 825, 57 L. R. A. 243; Ford v. Cullins, 22 Ky. L. R. 251, 56 S. W. 993; Inhabitants of Hyde Park v. Wiggin, 157 Mass. 94, 31 N. E. 693, 17 L. R. A. 188; McKusick v. City of Stillwater, 44 Minn. 372, 46 N. W. 769. Objections must be taken in the manner and at the time prescribed by law or they will be deemed waived. Kieckenapp v. Wheeling Sup'rs, 64 Minn. 547, 67 N. W. 662; In re Essex Av. 121 Mo. 98, 25 S. W. 891; Bacheler v. Town of New Hampton, 60 N. H. 207; Rettinger v. City of Passaic, 45 N. J. Law, 146; In re One Hundred and Eighty First St., 63 Hun, 629, 17 N. Y. Supp. 917; In re Lexington Ave., 64 Hun, 632, 18 N. Y. Supp. 828; In re Woolsey, 95 N. Y. 135; Tingley v. City of Providence, 9 R. I. 388; Skinner v. State, (Tex. Civ. App. 65 S. W. 1073. But see Pagel v. Fergus County Sup'rs, 17 Mont. 586, 44 Pac. 86; Damp v. Town of Dane, 29 Wis. 419.

[386] Thatcher v. Crisman Co., 6 Colo. App. 49; Hankins v. Calloway, 88 Ill. 155. A proceeding to establish a highway cannot be collaterally attacked for errors not going to the jurisdiction. Ely v. Morgan County Com'rs, 112 Ind. 361, 14 N. E. 236. Proceedings not showing want of jurisdiction on their face cannot be collaterally impeached State v. Rye, 35 N. H. 368. Where proceedings show jurisdiction they cannot be collaterally attacked. People v. Allen, 163 N. Y. 559, 57 N. E. 1122; Grady v. Dundon, 30 Or. 333, 47 Pac. 915. Where the original highway proceedings were without jurisdiction, a curative act by the legislature is without effect. In re Abington Road, 14 Serg. & R. (Pa.) 31; Howell v. City of Tacoma, 3 Wash. St. 711; Griggs v. City of Tacoma, 3 Wash. St. 785, 29 Pac. 449; Damp v. Town of Dane, 29 Wis. 419.

[387] Brown v. McCord, 20 Ind. 270; Ralston v. Beall (Ind.) 30 N. E. 1095; Thrall v. Gosnell, 28 Ind. App. 174, 62 N. E. 462; McClure v. Franklin County Com'rs, 124 Ind. 154, 7 L. R. A. 684; Patterson v. Baumer, 43 Iowa, 477; Stewart v. Wyandotte County Com'rs, 45 Kan.

tition of a prescribed number of property owners interested, praying for its establishment.[388] The court or body having jurisdiction of the petition thereupon appoints commissioners or viewers upon whom is imposed the duty of determining the necessity

708, 26 Pac. 683; Howell v. Redlon, 44 Kan. 558, 24 Pac. 1109, 10 L. R. A. 537; Butts v. Geary County Com'rs, 7 Kan. App. 302, 53 Pac. 771; Schroeder v. Village of Onekama, 95 Mich. 25, 54 N. W. 642. The record should contain and show the petition for the highway, the notice and its service. A recital regarding these facts in the return of the commissioners is not sufficient.

State v. Macdonald, 26 Minn. 445; Banse v. Town of Clark, 69 Minn. 53, 71 N. W. 819. Oral evidence is competent to show that the petition for the establishment of a highway was signed by the necessary number of qualified petitioners. Fisher v. Davis, 27 Mo. App. 321. The residence of petitioners is a jurisdictional fact and should be shown by the county record. Warren v. Gibson, 40 Mo. App. 469; Whitely v. Platte County, 73 Mo. 30; Craft v. De Soto County Sup'rs, 79 Miss. 618, 31 So. 204; State v. Morgan, 79 Miss. 659, 31 So. 338; Pope v. Town of Union, 32 N. J. Law, 343; People v. Village of Port Jervis, 100 N. Y. 283; Campbell v. Park, 32 Ohio St. 544. It is not necessary that all the signatures should be attached to one petition if all the signatures combined make the required number, it is sufficient. Makemson v. Kauffmann, 35 Ohio St. 444; Bewley v. Graves, 17 Or. 274, 20 Pac. 322; Bockoven v. Lincoln Tp. Sup'rs, 13 S. D. 317, 83 N. W. 335, 50 L. R. A. 351.

[388] Hill v. Ventura County Sup'rs, 95 Cal. 239; Bradford v. Cole, 8 Fla. 263; Canyon County v. Toole (Idaho) 69 Pac. 320; Warne v. Baker, 35 Ill. 382; Behrens v. Melrose Highway Com'rs, 169 Ill. 558, 48 N. E. 578; Afton Highway Com'rs v. Ellwood, 193 Ill. 304, 61 N. E. 1033; Monroe County Com'rs v. Harrell, 147 Ind. 500, 46 N. E. 124. A single petition, under acts 1895, p. 145, § 2, may ask for the establishment of several disconnected roads.

Bronnenburg v. O'Bryant, 139 Ind. 17; Keyes v. Tait, 19 Iowa, 123. A failure to recite in a petition for the establishment of highways that the petitioners are householders, is not a fatal defect. McCollister v. Shuey, 24 Iowa, 362; Curtis v. Pocahontas County, 72 Iowa, 151, 33 N. W. 616. A petition asking that a highway "be open for travel" is insufficient. Larson v. Fitzgerald, 87 Iowa, 402; Lehman v. Rinehart, 90 Iowa, 346; Rawlings v. Biggs, 8 Ky. L. R. 919, 3 S. W. 147; Nischen v. Hawes, 15 Ky. L. R. 40, 21 S. W. 1049; Cole v. County Com'rs, 78 Me. 532, 7 Atl. 397; Bryant v. County Com'rs, 79 Me. 128, 8 Atl. 460; Smith v. Goldsborough, 80 Md. 49; Inhabitants of Dartmouth v. Bristol County Com'rs, 153 Mass. 12; People v. Judge of Recorder's Ct., 40 Mich. 64; Wilson v. Burr Oak Tp. Board, 87 Mich. 240, 49 N. W. 572. A petition is insufficient which does not purport to be signed by free holders. Burkelo v. Washington County Com'rs, 38 Minn. 441, 38 N. W. 108. A petition for a county road may be presented at an adjourned or extra session of the

and feasibility of the establishment of the highway petitioned for.[389] Their action is based upon a personal examination of the proposed highway and such evidence as may be offered touching the questions at issue.[390] Their report, in the absence of fraud, is conclusive in respect to the necessity and feasibility of the highway except in those cases where local statutes give the petitioners, in the case of an adverse decision, the right of appeal or to secure

board of county commissioners provided the statutory notice has been given. Banse v. Town of Clark, 69 Minn. 53, 71 N. W. 819. A petition for a highway may include more than one proposed road.

Crowley v. Gallatin County Com'rs, 14 Mont. 292, 36 Pac. 313; Throckmorton v. State, 20 Neb. 647. An elector residing within five miles of a proposed highway is qualified as a petitioner on the ground of interest. Baker v. City of Ashland, 50 N. H. 27. Two distinct highways should not be prayed for in the same petition. In re Barrett, 7 App. Div. 482, 40 N. Y. Supp. 266; Satterly v. Winne, 101 N. Y. 218; People v. Village of Whitney's Point, 102 N. Y. 81; Woodruff v. Douglas County, 17 Or. 314, 21 Pac. 49; In re Franconia Tp. Road, 78 Pa. 316; Appeal of Toland, 147 Pa. 471; Kopecky v. Daniels, 9 Tex. Civ. App. 305, 29 S. W. 533. A commissioner's court may, of its own volition, appoint viewers to lay out a proposed highway and report upon its necessity. Sneed v. Falls County, 91 Tex. 168, 41 S. W. 481; Robinson v. Winch, 66 Vt. 110, 28 Atl. 884; Gilley v. City of Barre, 69 Vt. 374; State v. O'Connor, 78 Wis. 282. In respect to the establishment of roads in different jurisdictions see the following cases: Philbrick v. Town of University Place, 106 Iowa, 352; In re Burdick, 27 Misc. 298, 58 N. Y. Supp. 759; Gilley v. City of Barre, 69 Vt. 374.

[389] Kimball v. Alameda County Sup'rs, 46 Cal. 19; Brannan v. Mecklenburg, 49 Cal. 672; Wright v. Middlefork Highway Com'rs, 145 Ill. 48; Goshen Highway Com'rs v. Jackson, 165 Ill. 17, 45 N. E. 1000, affirming 61 Ill. App. 381; White v. Fleming, 114 Ind. 560, 16 N. E. 487; Gold v. Pittsburgh, C., C. & St. L. R. Co., 153 Ind. 232, 53 N. E. 285; Carroll County Com'rs v. Justice, 133 Ind. 89; Hughes v. Milligan, 42 Kan. 396; Higgins v. Hamor, 88 Me. 25, 33 Atl. 655. County petitioners must act upon the petition with reasonable dispatch. Sanger v. Kennebec County Com'rs, 25 Me. 291; Haywood v. Town of Charlestown, 34 N. H. 23; Conover v. Bird, 56 N. J. Law, 228, 28 Atl. 428; Garretson v. Baker, 65 N. J. Law, 184, 46 Atl. 705; In re Main St., 30 Hun (N. Y.) 424; In re Road in Plum Creek Tp., 110 Pa. 544, 1 Atl. 431; Huggins v. Hurt, 23 Tex. Civ. App. 404, 56 S. W. 944. A commissioner's court, under Rev. St. art. 4671, has the power of its own motion to lay out and open public roads when necessary.

[390] Raymond v. Griffin, 23 N. H. (3 Fost.) 340; In re Johnson, 49 N. J. Law, 381, 8 Atl. 113. Meetings should be held at the place advertised or their action will be void. In re Pugh, 22 Misc. 43, 49 N. Y. Supp. 398.

the appointment of another body of a similar character, to repass upon the petition.[391] The rules applying to the character and qualifications of the viewers,[392] their report on the petition in respect to its accuracy and clearness,[393] the giving of notice to the property owners whose interests may be taken,[394] the admission of evidence and other details of the proceedings,[395] are those which apply to ordinary procedure under an exercise of the power of eminent domain and are to be found in the proper sections and the cases cited.

[391] People v. Smith, 15 Ill. 326; Gray v. Jones, 178 Ill. 169, 52 N. E. 941; Smith v. Boisvert, 183 Ill. 318, 55 N. E. 631; In re Inhabitants of Byron, 57 Me. 340; Warlick v. Lowman, 111 N. C. 532, 16 S. E. 336; In re Road in Upper Yoder Tp., 129 Pa. 640, 18 Atl. 551; In re Road in Leet Tp., 159 Pa. 72, 28 Atl. 238; Williams v. Turner Tp., 15 S. D. 182, 87 N. W. 968; Lafollette v. Tiller, 105 Tenn. 536, 58 S. W. 1065.

[392] Keenan v. Dallas County Com'rs, 26 Ala. 568; Beck v. Biggers, 66 Ark. 292, 50 S. W. 514; Town of Groton v. Hurlburt, 22 Conn. 178; Betts v. New Hartford, 25 Conn. 180; Highway Com'rs v. Jackson, 61 Ill. App. 381; Crossett v. Owens, 110 Ill. 378; Kieckenapp v. Wheeling Sup'rs, 64 Minn. 547, 67 N. W. 662. The action of a town board of supervisors in laying out a highway by one of them disinterested through the ownership of land taken is voidable, a majority being impartial and not interested. State v. Auchard, 22 Mont. 14; Crowley v. Gallatin County Com'rs, 14 Mont. 292, 36 Pac. 313; Conover v. Bird, 56 N. J. Law, 228, 28 Atl. 428; Tiffany v. Gifford, 7 N. Y. Supp. 43; Dunstan v. City of Jamestown, 7 N. D. 1; Attorney General v. McCaughey, 2 R. I. 341, 43 Atl. 646; Vogt v. Bexar County, 16 Tex. Civ. App. 567.

[393] Beck v. Biggers, 66 Ark. 292, 50 S. W. 514; Freshour v. Hihn, 99 Cal. 443, 34 Pac. 87; State v. Rapp, 39 Minn. 65; Halverson v. Bell, 39 Minn. 240; Sonnek v. Town of Minnesota Lake, 50 Minn. 558; Adams v. Rulon, 50 N. J. Law, 526; Dunstan v. City of Jamestown, 7 N. D. 1, 72 N. W. 899; Sime v. Spencer, 30 Or. 340, 47 Pac. 919; In re Road in Lower Merion Tp., 8 Pa. Dist. R. 581; Clarke v. Town of South Kingstown, 18 R. I. 283, 27 Atl. 336; Kidder v. Jenison, 21 Vt. 108.

[394] Baker v. Town of Windham, 25 Conn. 597; Gifford v. Town of Norwich, 30 Conn. 35; Gold v. Pittsburgh, C., C. & St. L. R. Co., 153 Ind. 232, 53 N. E. 285; Woolsey v. Hamilton County Sup'rs, 32 Iowa, 130; Banse v. Town of Clark, 69 Minn. 53, 71 N. W. 819; Crenshaw v. Snyder, 117 Mo. 167; State v. Schanck, 9 N. J. Law (4 Halst.) 107; In re De Camp, 19 App. Div. 564, 46 N. Y. Supp. 293; Fravert v. Finfrock, 43 Ohio St. 335; In re Locust St., 153 Pa. 276, 25 Atl. 816. A report of viewers that holds the giving of notice according to law is sufficient proof in the absence of contradictory evidence. State v. Harland, 74 Wis. 11, 41 N. W. 1060.

[395] Goshen Highway Com'rs v.

§ 774. Report of viewers and orders establishing highways.

Upon the making of a report by road viewers or commissioners favorable to the establishment of the proposed highway, the power then becomes vested in the official body or court to whom such report is made and having jurisdiction to proceed with its formal laying out, and an order to this effect legally and naturally follows.[396] Since, in the laying out of a highway, private property is taken, to render the proceedings valid and the highway a legal one, it is necessary that both the reports of subordinate officials or bodies and final orders shall include an accurate description of the proposed highway or the property to be taken in its construction[397] and that it should be the same as that asked for in

Jackson, 165 Ill. 17, 45 N. E. 1000, affirming 61 Ill. App. 381; Yankton County v. Klemisch, 11 S. D. 170, 76 N. W. 312. A petition for the establishment of a highway may be considered by county commissioners at an adjourned meeting, proper notice having been given.

[396] Hopkins v. Contra Costa County, 106 Cal. 566; Shepherd v. Turner, 129 Cal. 530, 62 Pac. 106. A proper petition is jurisdictional to the making of a valid order establishing a road. Highway Com'rs v. People, 69 Ill. App. 326. The presumption exists that all preliminary proceedings are regular. Imhoff v. Highway Com'rs, 89 Ill. App. 66. Jurisdiction of tribunals of special and limited jurisdiction must appear on the face of the record. O'Connell v. Chicago Terminal Transfer Co., 184 Ill. 308, 56 N. E. 355; State v. Barlow, 61 Iowa, 572; Louisville, H. & St. L. R. Co. v. Com., 20 Ky. L. R. 371, 46 S. W. 207. Curative acts may be passed by the legislature in respect to all jurisdictional irregularities. Inhabitants of North Berwick v. York County Com'rs, 25 Me. 69; Albaugh v. Goldsborough, 80 Md. 49, 30 Atl. 574; Folsom v. Middlesex County Com'rs, 173 Mass. 48, 53 N. E. 155; Lincoln v. Com., 164 Mass. 1; Price v. Stagray, 68 Mich. 17 Brewer v. Gerow, 83 Mich. 250, 47 N. W. 113. Highways on township lines must be laid out by the joint action of the commissioners of both townships and a proceeding prosecuted by one township alone is illegal and void.

Jones v. Zink, 65 Mo. App. 409. An order should affirmatively show a compliance with jurisdictional conditions. McNair v. State, 26 Neb. 257, 41 N. W. 1099; Rose v. Washington County, 42 Neb. 1, 60 N. W. 352. Under Neb. Comp. St. c. 78, § 46, the filing of a petition is not necessary to confer jurisdiction on the county brought to open a section line road. Warren v. Brown, 31 Neb. 8, 47 N. W. 633; Barry v. Deloughrey, 47 Neb. 354, 66 N. W. 410; Jones v. Polk County, 36 Or. 539, 60 Pac. 204; Platt v. Town of Milton, 55 Vt. 490; Williams v. Giblin, 86 Wis. 147, 56 N. W. 645. A record for the establishment of a highway should contain prima facie evidence of the regularity of all prior proceedings.

[397] Shinkle v. McGill, 58 Ill. 422; Erwin v. Fulk, 94 Ind. 235; Barnes

the petition.[398] If there are special requirements by statutes in respect to the form or the recitals of such a report or order, these must be strictly followed,[399] under the rule which requires a strict construction and a literal following of the authority for the exercise of the power of eminent domain. The legality of a report or

v. Fox, 61 Iowa, 18. An order directing the road established according to the petition is insufficient where the petition asked for its location between certain points on the "nearest and most suitable ground." Thompson v. Trowe, 82 Minn. 471, 85 N. W. 169; In re Essex Ave., 121 Mo. 98; Crowley v. Gallatin County Com'rs, 14 Mont. 292. A deficiency in an order establishing a road may be supplemented by the statute under which the proceedings are had. Pagel v. Fergus County Com'rs, 17 Mont. 586, 44 Pac. 86; Warren v. Brown, 31 Neb. 8, 47 N. W. 633; Wentworth v. Town of Milton, 46 N. H. 448; Inhabitants of Mt. Olive Tp. v. Hunt, 51 N. J. Law, 274, 17 Atl. 291; People v. Village of Haverstraw, 137 N. Y. 88, 32 N. E. 1111; In re Road in Borough of Verona (Pa.) 12 Atl. 456; Terrell v. Terrant County, 8 Tex. Civ. App. 563, 28 S. W. 367.

[398] Deer v. Sidney Highway Com'rs, 109 Ill. 379; Farrelly v. Town of Kane, 172 Ill. 415, 50 N. E. 118; Layman v. Hughes, 152 Ind. 484; Inhabitants of Pembroke v. Plymouth County Com'rs, 66 Mass. (12 Cush.) 351; State v. Thompson, 46 Minn. 302, 48 N. W. 1111. Under Gen. St. Minn. 1878, c. 13, § 33, the supervisors are not required to follow literally the course of the highway as given in the petition for its establishment. Wiggin v. Exeter, 13 N. H. 304; Eames v. Northumberland, 44 N. H. 67; Flanders v. Colebrook, 51 N. H. 300; Young v. Laconia, 59 N. H. 534. A description in the petition may be amended after the highway is laid out. State v. Vreeland, 50 N. J. Law, 386; In re Feeney, 20 Misc. 272, 45 N. Y. Supp. 830; Woodruff v. Douglas County, 17 Or. 314, 21 Pac. 49; French-Glenn Live-Stock Co. v. Harney County (Or.) 58 Pac. 36; State v. Kendall, 54 S. C. 192; Robson v. Byler, 14 Tex. Civ. App. 374, 37 S. W. 872. A mere verbal discrepancy between the description on a petition and the order based upon it will not render the latter invalid. Megrath v. Nickerson, 24 Wash. 235, 64 Pac. 163. But see Inhabitants of Wayne v. Kennebec County Com'rs, 37 Me. 558.

[399] Davenport Mut. Sav. F. & L. Ass'n v. Schmidt, 15 Iowa, 213. The filing of a petition and service of notice according to the statute confers jurisdiction upon the county court and thereafter every presumption is in favor of the legality of its further proceedings. Schade v. Theel, 45 Kan. 628, 26 Pac. 38. It is not necessary that the board of county commissioners in their order establishing a road expressly recite that the petitioners were householders. Craig v. North, 60 Ky. (3 Metc.) 187; Peck v. Whitney, 45 Ky. (6 B. Mon.) 117; State v. Parsons, 53 Mo. App. 135. But see State v. Richmond, 26 N. H. 232.

of the final order may depend upon the manner or the time when it is adopted or made.[400] The question of the validity of official action taken by an officer or a public body has already been considered elsewhere.[401] The rules controlling the validity of official action in these respects do not differ from those ordinarily applied. The fact that the proceeding is one for the laying out of a highway does not change the principles regulating official action except, perhaps, to require a closer construction of power and a more literal following of statutory authority for the exercise of a power or the performance of an act.

§ 775. The tribunal.

After a favorable judicial decision upon the sufficiency of the petition and the right for appointment of commissioners, a tribunal is then selected for the determination of compensation to be awarded property owners.[402] This may be secured either through appointment by the court [403] passing upon the petition, or a selecting in some manner prescribed by statute. The mode of selection is dependent upon provisions of local statutes. The question of the character and personnel of the tribunal, however, raises other and broader questions. It is a familiar and axiomatic principle that no person shall be the judge of his own cause [404] and further that in the determination of all questions, those who are to consider and pass upon them should be competent and qualified for

[400] Town of Windham v. Litchfield, 22 Conn. 226; Loesnitz v. Seelinger, 127 Ind. 442, 25 N. E. 1037, 26 N. E. 887; White v. Fleming, 114 Ind. 560, 16 N. E. 487; Fleener v. Claman, 126 Ind. 166, 25 N. E. 900.

[401] See §§ 643 et seq., ante.

[402] Tehama County v. Bryan, 68 Cal. 57.

[403] Abney v. Clark, 87 Iowa, 727, 55 N. W. 6. Claimants are entitled to be present when appointments are made and to be heard in relation thereto. Evans v. Santana Live-Stock & Land Co., 81 Tex. 622, 17 S. W. 232.

[404] Epler v. Niman, 5 Ind. 459; High v. Big Creek Ditching Ass'n, 44 Ind. 356; Bradley v. City of Frankfort, 99 Ind. 417; In re Clifford, 59 Me. 262; Lyon v Hamor, 73 Me. 56. Sons or nephews of a petitioner of a highway are not disinterested and its location by them is void. Hall v. Thayer, 105 Mass. 219; Locke v. Wyoming Tp. Highway Com'rs, 107 Mich. 631, 65 N. W. 558; Kieckenapp v. Wheeling Sup'rs, 64 Minn. 547, 67 N. W. 662; Town v. Stoddard, 30 N. H. 23; In re Hilltown Road, 18 Pa. 233. But see the following cases: Fulton v. Cummings, 132 Ind. 453; Chase v. Town of Rutland, 47 Vt. 393. See, also, Lewis, Eminent Domain, §§ 405 and 406, citing many cases.

their work.[405] The tribunal, therefore, for the determination of compensation, must be disinterested and impartial,[406] competent[407] and qualified,[408] and a failure to observe statutory requirements or fundamental rules in this respect may invalidate an award.

§ 776. Hearing.

The purpose of the hearing considered in this section is the determination of the amount of compensation. Private property cannot be taken without the payment of just compensation and its character may be determined by the manner in which it was secured. Many of the questions raised in eminent domain proceedings, courts have held, cannot be urged by the property owner.

[405] Lewis, Eminent Domain, §§ 405 and 406.

[406] Pond v. Town of Milford, 35 Conn. 32; Shreve v. Town of Cicero, 129 Ill. 226; Chase v. City of Evanston, 172 Ill. 403, 50 N. E. 241; Carroll County Com'rs v. Justice (Ind.) 30 N. E. 1085. A landowner failing to object to one of the commissioners is bound by his action. Thompson v. Goldthwait, 132 Ind. 20, 31 N. E. 451; High v. Big Creek Ditching Ass'n, 44 Ind. 356; Bradley v. City of Frankfort, 99 Ind. 417; Friend v. Abbott, 56 Me. 262. A party who by inattention or by want of care allows an interested person otherwise qualified to be appointed to conduct proceedings affecting his property cannot afterwards move to have a substitute appointed on the ground of such interest. In re Clifford, 59 Me. 262; Taylor v. Worcester County Com'rs, 105 Mass. 225; Locke v. Wyoming Tp. Highway Com'r, 107 Mich. 631, 65 N. W. 558; Wilson v. Burr Oak Tp. Board, 87 Mich. 240, 49 N. W. 572; Crowley v. Gallatin County Com'rs, 14 Mont. 292, 36 Pac. 313; State v. Wright, 54 N. J. Law, 23 A. 116; Inhabitants of Readington Tp. v. Dilley, 24 N. J. Law (4 Zab.) 209; State v. Jersey City, 25 N. J. Law, (1 Dutch.) 309; In re City of Rochester, 10 N. Y. Supp. 436; Thompson v. Love, 42 Ohio St. 61; In re Radnor Road, 5 Bin. (Pa.) 612; Hazard v. Town Council of Middletown, 12 R. I. 227; Anthony v. Town Council of South Kingston, 13 R. I. 129; Williams v. Mitchell, 49 Wis. 284.

[407] Osborn v. Sutton, 108 Ind. 443, 9 N. E. 410; Garrett v. Hedges, 13 Ky. L. R. 647, 17 S. W. 871; People v. Potter, 36 Hun (N. Y.) 181.

[408] State v. Elmer, 1 N. J. Law (Coxe) 55; Vreeland v. City of Bayonne, 54 N. J. Law, 488, 24 Atl. 486; State v. Bergen, 24 N. J. Law (4 Zab.) 548; Coward v. City of North Plainfield, 63 N. J. Law, 61, 42 Atl. 805; In re Lexington Ave., 63 Hun, 629, 17 N. Y. Supp. 870; People v. Strevell, 27 Hun (N. Y.) 218; Northern Pac. Terminal Co. v. City of Portland, 14 Or. 24; In re App's Tavern Road, 17 Serg. & R. (Pa.) 388; Davidson v. State, 16 Tex. App. 336.

The agency employed by the state, the character of a particular use, the necessity for the exercise of the power in the absence of constitutional or statutory provisions, are for the consideration of the legislature or a judicial tribunal, and the property owner, it has been held many times, is not legally interested in these propositions.[409] The question, however, of compensation, is one in which he is vitally concerned and upon which he must have his day in court. An award of commissioners is invalid, however legal the proceedings may be in other respects, if made without an opportunity being given the property owner for a presentation of the evidence which he considers necessary to substantiate the amount of his claim for damages.[410]

A hearing before commissioners for the determination of compensation is necessarily informal in its character. This rule applies to the presentation of evidence,[411] the number of witnesses upon the question of values,[412] the place and times of meeting,[413] and other details forming this part of an appropriation of property under eminent domain. Witnesses must be sworn and an opportunity given for cross-examination. Action by either party to the proceedings of a character that may have a tendency to unduly influence or prejudice the commissioners is not permissible and if indulged in will justify setting aside an award.[414] The

[409] Tucker v. Sellers, 130 Ind. 514, 30 N. E. 531. See § 772.

[410] Lent v. Tillson, 72 Cal. 404, 14 Pac. 71; City of Santa Ana v. Brunner, 152 Cal. 234, 64 Pac. 287; Perry v. Bozarth, 95 Ill. App. 566; Hobbs v. Tipton County Com'rs, 102 Ind. 575; Stinson v. Dunbarton, 46 N. H. 385.

[411] Cobb v. City of Boston, 109 Mass. 438; Goodwin v. Milton, 25 N. H. (5 Fost.) 458. The admission of incompetent evidence will not invalidate the report when it was directly withdrawn and disregarded by the commissioners.

[412] Preston v. City of Cedar Rapids, 95 Iowa, 71, 63 N. W. 577.

[413] Vogel v. Bridges, 15 Ky. L. R. 6, 22 S. W. 82; Inhabitants of Sumner v. Oxford County Com'rs, 37 Me. 112; Weymouth v. York County Com'rs, 86 Me. 391, 29 Atl. 1100; In re Newland Ave., 60 Hun, 581, 15 N. Y. Supp. 53. But see Wilson v. Atkin, 80 Mich. 247, 45 N. W. 94.

[414] Harris v. Town of Woodstock, 27 Conn. 567; Beardsley v. Town of Washington, 39 Conn. 265. Every reasonable precaution should be taken to guard against the possibility of improper influence and to insure a fair trial. Goodwin v. Town of Weathersfield, 43 Conn. 437; Greene v. Town of East Haddam, 51 Conn. 547; Anderson v. Wood, 80 Ill. 15; Peavey v. Wolfborough, 37 N. H. 286; In re Petition for Newport Highway, 48 N. H. 433; In re Road in Drumore Tp. (Pa.) 7 Atl. 193. It is not a valid objection that road viewers were

well recognized informality of the proceedings does not, however, permit a disregard of statutory provisions in respect to any of the subjects noted above. If the law makes special provision for any of them, the usual rule of strict compliance will apply.[415]

§ 777. Report or award.

The report or award of commissioners or viewers in eminent domain proceedings should substantially follow all statutory provisions relative to its form and execution. The law is not, as a rule, satisfied by a substantial compliance with its provisions in these respects although in some states a more liberal rule is adopted and a report or award will not be set aside though it does not literally follow the provisions of the law. The exercise of the power of eminent domain results in an arbitrary taking of private property upon a pecuniary basis and the rule of strict construction in respect to the validity of the various steps in connection with it is the one customarily followed.[416] If the statutes prescribe a form for the report, one not conforming to the requirements is void, but the courts consider the distinction between mere directory or immaterial provisions and those regarded as mandatory and adopt the usual rule applying to the particular circumstances. The necessary official signatures and the requisite number are material essentials of a valid report or award, and if lacking in either of these respects, one will be set aside.[417]

entertained provided no sinster purpose or effort to influence them is shown. But see Blake v. Norfolk County Com'rs, 114 Mass. 583. The fact that county commissioners during the proceedings for the location of a highway were supplied with lunches by the petitioners will not furnish a ground for quashing the proceedings.

[415] Wilson v. Atkin, 80 Mich. 247, 45 N. W. 94.

[416] City of Elkhart v. Simonton, 71 Ind. 7.

[417] Smith v. Town of New Haven, 59 Conn. 203, 22 Atl. 146. The duties of such a board may be performed legally by a majority. Galbraith v. Littiech, 73 Ill. 209. The presumption of law, however, is in favor of the legality of the action of the viewers as a whole. Bronnenberg v. O'Brien, 139 Ind. 17, 38 N. E. 416; Crommett v. Pearson, 18 Me. 344; Inhabitants of Dartmouth v. Bristol County Com'rs, 153 Mass. 12, 26 N. E. 425; Eatontown Tp. v. Wooley, 48 N. J. Law, 386, 8 Atl. 517; Griscom v. Gilmore, 16 N. J. Law (1 Har.) 105; State v. Parker, 53 N. J. Law, 183, 20 Atl. 1074; In re Road in Borough of Verona (Pa.) 12 Atl. 456; In re New Hanover Road, 18 Pa. 220; In re Paschall St., 81 Pa. 118; In re State Road, 60 Pa. 330.

§ 778. Its recitals.

The technical and mechanical execution of a report or award was considered in the last section. Some necessary recitals of substance will now be suggested. Since a board of viewers or commissioners is an official body of inferior jurisdiction and quasi judicial in its character, it is essential to the validity of a report that it show the existence of all jurisdictional facts and conditions [418] including the giving of a required notice.[419] The authority under which they proceeded and the performance of the necessary steps [420] must be stated in the report to give it legality. Jurisdictional conditions vary in different states. One of the customary questions and that most commonly submitted for consideration and determination by a board of viewers or commissioners is the public necessity for the establishment of the highway or the construction of the improvement in question. Where this is a jurisdictional fact, a report must clearly show a consideration of the question by the commissioners and its positive determination.[421] A failure to agree with the property owner is a necessary recital under the law in some states.[422] The taking of the oath required and the proceedings from time to time should ordinarily be set out in detail in order to show affirmatively a proper qualification of the board [423] and the regularity of the

[418] State v. Lippincott, 25 N. J. Law (1 Dutch.) 434; Miller v. Brown, 56 N. Y. 383; French-Glenn Livestock Co. v. Harney County, 38 Or. 315, 58 Pac. 36. The fact that a record does not show all the steps required by statute will not invalidate highway proceedings as it will be presumed that the court did all necessary to the validity of its action. In re O'Hara Tp. Road, 152 Pa. 318, 25 Atl. 602; Missouri K. & T. R. Co. of Texas v. Austin (Tex. Civ. App.) 40 S. W. 35.

[419] State v. Inhabitants of Trenton, 47 N. J. Law, 489; Gaines v. Linn County, 21 Or. 430, 28 Pac. 133.

[420] Spurgeon v. Bartlett, 56 Mo. App. 349; Jones v. Zink, 65 Mo. App. 409.

[421] Pierce v. Town of Southbury, 29 Conn. 490; Butts v. Geary County Com'rs, 7 Kan. App. 302, 53 Pac. 771; Truax v. Sterling, 74 Mich. 160, 41 N. W. 885; Crowley v. Gallatin County Com'rs, 14 Mont. 292; Vedder v. Marion County, 28 Or. 77, 36 Pac. 535; In re Road in Upper St. Claire & Snowden Tps. (Pa.) 11 Atl. 625; Tench v. Abshire, 90 Va. 768, 19 S. E. 779. But see Humboldt County v. Dinsmore, 75 Cal. 604, 17 Pac. 710; Campbell v. Fogg, 132 Ind. 1, 31 N. E. 454.

[422] Chicago, R. I. & P. R. Co. v. Young, 96 Mo. 39, 8 S. W. 776; Lingo v. Burford, 112 Mo. 149, 20 S. W. 459.

[423] Town of Huntington v. Birch, 12 Conn. 142; Warren v. Gibson, 40 Mo. App. 469; In re Cambria St.,

meetings[424] held for the purpose of hearing the evidence submitted upon the subject of damages or other questions left for their decision. The report or award is prima facie evidence of the facts it contains and the burden of proof is upon those objecting to its sufficiency or legality or the regularity of the proceedings.[425]

§ 779. Description of improvement.

An accurate description of the location of the highway or the proposed improvement is essential to the validity of a report.[426] It need not necessarily be understood by all but one technically correct is sufficient,[427] and some authorities have held that where

75 Pa. 357; In re East Donegal Road, 90 Pa. 190; State v. Hoelz, 69 Wis. 84, 33 N. W. 597. But see Dollarhide v. Muscatine County, 1 G. Greene (Iowa) 158.

[424] Cox v. Highway Com'rs of East Fork Tp., 194 Ill. 355, 62 N. E. 791; Hobbs v. Tipton County Com'rs, 116 Ind. 276, 19 N. E. 186; Thompson v. Conway, 53 N. H. 622. The sufficiency of the evidence will not be inquired into on an apepal. In re Springbrook Road, 64 Pa. 451; Adams v. Town of Derby, 73 Vt. 258, 50 Atl. 1063.

[425] Gifford v. Baker, 158 Ind. 339, 62 N. E. 690; Inge v. Police Jury, 14 La. Ann. 117; Town of Randall v. Rovelstad, 105 Wis. 410, 81 N. W. 819. But see In re Opening of 30th Street, 147 Pa. 245, 23 Atl. 555.

[426] Blakeslee v. Tyler, 55 Conn. 387, 11 Atl. 291; Dumoss v. Francis, 15 Ill. 543; File v. St. Jacob Highway Com'rs, 34 Ill. App. 538; Tower v. Pitstick, 55 Ill. 115; De Long v. Schimmel, 58 Ind. 64; Bronnenburg v. O'Bryant, 139 Ind. 17; Abbott v. Johnson County Com'rs, 5 Kan. App. 162, 49 Pac. 922; Simonds v. Walker, 100 Mass. 112; State v. Thompson, 46 Minn. 302; Sonnek v. Town of Minnesota Lake, 50 Minn. 558, 52 N. W. 961. An order laying out a road defective in part is defective as to the whole. The proposed highway must be regarded as an entirety. A description following a specified line "as near as practicable" does not locate a road anywhere. Rose v. Kansas City, 128 Mo. 135; State v. Schanck, 9 N. J. Law (4 Halst.) 107; State v. Burnet, 14 N. J. Law (2 J. S. Green) 385; Charlier v. Woodruff, 36 N. J. Law, 204; Taylor v. Hulick, 37 N. J. Law. 70; In re Bean's Road, 35 Pa. 280; In re Lackawanna Tp. Road, 112 Pa. 212; In re O'Hara Tp. Road, 152 Pa. 319, 25 Atl. 602; In re Leet Tp. Road, 159 Pa. 72, 28 Atl. 338; Clarke v. Council of South Kingstown, 18 R. I. 283, 27 Atl. 336; Cummings v. Kendall County, 7 Tex. Civ. App. 164; Sneed v. Falls County, 91 Tex. 168, 42 S. W. 121; Walbridge v. Cabot, 67 Vt. 114; State v. O'Connor, 78 Wis. 282. But see Adams v. Rulon, 50 N. J. Law, 526, 14 Atl. 881; Tench v. Abshire, 90 Va. 768, 19 S. E. 779.

[427] McDonald v. Payne, 114 Ind. 359, 16 N. E. 795; Tingle v. Tingle, 75 Ky. (12 Bush) 160; Garrett v. Hedges, 13 Ky. L. R. 647, 17 S. W. 871; Vogle v. Bridges, 15 Ky. L. R. 6, 22 S. W. 82; Rochester v. Sledge, 82 Ky. 344; Inhabitants of Dart-

the location of the highway can be determined by an inspection of all records and proceedings, including the report of viewers or commissioners, it will not be regarded as deficient in this respect.[428] The rule also applies to this part of a report or award that the highway located or found necessary for the public use should be the indentical one sought to be established by the petition or act originating the proceedings.[429]

(a) Description of property taken. The courts require as an essential to a valid report not only a correct description of the highway or the proposed improvement, but also an accurate description of the property and interests which will be taken or damaged through the pending proceedings.[430] The requirement of an accurate and definite description does not, however, exclude those technically accurate but so worded as not to be commonly understood.

(b) Owners' names. A report, to be complete and valid, must further contain the names of the owners of all property or property interests taken or damaged through the force of the proceedings, coupled with its description.[431]

§ 780. Award of damages.

In many of the steps connected with the exercise of the power of eminent domain the property owner is not concerned, and the law gives him no right to raise questions affecting their validity. In the subject of damages, he is, however, vitally interested, and the details of the exercise of the power relating to this are under

mouth v. Bristol County Com'rs, 153 Mass. 12, 26 N. E. 425; State v. English, 22 N. J. Law (2 Zab.) 291; In re Kingston Tp. Road, 134 Pa. 409; State v. Hogue, 71 Wis. 384, 36 N. W. 860. But see Blair v. Milwaukee Light, Heat & Traction Co., 110 Wis. 64, 85 N. W. 675.

[428] State v. Prine, 25 Iowa, 231; Wilson v. Simmons, 89 Me. 242, 36 Atl. 380; Hall v. City of Manchester, 39 N. H. 295.

[429] Dunstan v. City of Jamestown, 7 N. D. 1, 72 N. W. 899; In re Benzinger Tp. Road, 115 Pa. 436, 10 Atl. 35; Flint v. Horsley, 25 Wash. 648, 66 Pac. 59. But see Hill v. Ventura County Sup'rs, 95 Cal. 239, 30 Pac. 385; Crowley v. Gallatin County Com'rs, 14 Mont. 292, 36 Pac. 313.

[430] Hays v. City of Vincennes, 82 Ind. 178.

[431] Talliaferro v. Roach, 11 Ky. L. R. 665, 12 S. W. 1039. The omission of a name of an interested member from the award will not vitiate the proceedings as to others. Morris v. Salle, 14 Ky. L. R. 117, 19 S. W. 527. But see Granger v. City of Syracuuse, 38 How. Pr. (N. Y.) 308.

[432] Fanning v. Gilliland, 37 Or.

his constant scrutiny.[432] The report or award should show, therefore, affirmatively, that the amount of damages, if any, suffered by each property owner has been considered by the commissioners or viewers and passed upon, though not necessarily affirmatively or in favor of an award of damages.[433] It is necessary also that that portion of the report dealing with the question of damages should show the amount awarded to the owner of each separate and distinct interest taken or affected by the proceedings.[434] The courts do not countenance inaccurate and indefinite descriptions, looseness of phraseology or lump awards of damages in condemnation proceedings.

§ 781. Conclusiveness of report or award and the doctrine of collateral attack.

The essential recitals of a report or award have been considered in the preceding sections; the right of one to object to its character or sufficiency may be affected by his laches or through action by him considered as a waiver.[435] The rule also obtains that a report or award will be held sufficient and legal when an attack is made upon it in a collateral proceeding which would not be so regarded if the questions were raised in a proceeding directly involving them,[436]—an application of the familiar doctrine of collateral attack to the subject under discussion.

369, 61 Pac. 636, rehearing denied, 62 Pac. 209.

[433] Butte County v. Boydston, 64 Cal. 110; Forsyth v. Wilcox, 143 Ind. 144, 41 N. E. 371; Troutman v. Cooper, 23 N. J. Law (3 Zab.) 381; Dunham v. Runyon, 24 N. J. Law (4 Zab.) 256; Kelley v. Garretosn, 23 N. J. Law (3 Zab.) 388.

[434] McKernan v. City of Indianapolis, 38 Ind. 223; Rentz v. City of Detroit, 48 Mich. 544; Gregg v. French, 67 Minn. 402, 69 N. W. 1102. An award of damages is not uncertain if it sufficiently indicates a means through an arithmetical calculation by which it can be definitely ascertained. State v. Oliver, 24 N. J. Law (4 Zab.) 129; Combs v. Blauvelt, 33 N. J. Law, 36; Kopecky v. Daniels, 9 Tex. Civ App. 305, 29 S. W. 533.

[435] Pearce v. Town of Gilmer, 54 Ill. 25; State v. Minneapolis & St. L. R. Co., 88 Iowa, 689, 56 N. W. 400; Oliver v. Monona County, 117 Iowa, 43, 90 N. W. 510; Duncan v. City of Louisville, 71 Ky. (8 Bush) 98. But see Seavey v. City of Seattle, 17 Wash. 361, 49 Pac. 517.

[436] Fenwick Hall Co. v. Town of Old Saybrook, 69 Conn. 32, 36 Atl. 1068; Goodwillie v. City of Lake View, 137 Ill. 51, 27 N. E. 15; Bailey v. McCain, 92 Ill. 277; Gordon v. Highway Com'rs, 169 Ill. 510, 48 N. E. 451; Strieb v. Cox, 111 Ind. 299, 12 N. E. 481; Adams v. Harrington, 114 Ind. 66, 14 N. E. 603; Wells v.

§ 782. Filing of the award or report.

Commissioners or viewers constituting a body of limited and special jurisdiction and powers must act within their authority that their action be considered valid and, therefore, binding.[437] The law usually requires a prompt consideration of the questions submitted and the making of their official determination in a report or award. This is customarily required to be filed within a prescribed time [438] and with a designated person.[439] The service of a notice of filing upon those interested for the purpose of in-

Rhodes, 114 Ind. 467, 16 N. E. 830; Chicago & A. R. Co. v. Sutton, 130 Ind. 405, 30 N. E. 291; Tucker v. Sellers, 130 Ind. 514, 30 N. E. 531; Helms v. Bell, 155 Ind. 502, 58 N. E. 707; Pittsburgh, C., C. & St. L. R. Co. v. Machler, 158 Ind. 159, 63 N. E. 210; McIntyre v. Marine, 93 Ind. 193; Evans v. West, 138 Ind. 621; Bowen v. Hester, 143 Ind. 511, 41 N. E. 330; State v. Minneapolis & St. L. R. Co., 88 Iowa, 689; Small v. Pennell, 31 Me. 267; Mitchell v. Kansas City & I. R. T. R. Co., 138 Mo. 326, 39 S. W. 790; Taft v. Commonwealth, 158 Mass. 526, 33 N. E. 1046; St. Paul, M. & M. R. Co. v. City of Minneapolis, 35 Minn. 141; Lingo v. Burford (Mo.) 18 S. W. 1081; Daugherty v. Brown, 91 Mo. 26; Baubie v. Ossman, 142 Mo. 499, 44 S. W. 338; Bryant v. Tamworth, 68 N. H. 483, 39 Atl. 431; Horne v. Town of Rochester, 62 N. H. 347; Humphreys v. City of Woodstown, 48 N. J. Law, 588, 7 Atl. 301; Dana v. Craddock, 66 N. H. 593, 32 Atl. 757; Weinckie v. New York Cent. & Hudson River R. Co., 61 Hun (N. Y.) 619; State v. Joyce, 121 N. C. 610, 28 S. E. 366; Smith v. Lebanon, 8 Pa. Sup. Ct. 481; State v. Kendall, 54 S. C. 192, 32 S. E. 300; Yankton County v. Klemisch, 11 S. D. 170, 76 N. W. 312. Jurisdictional questions may be raised, however, in a collateral attack. Robson v. Byler, 14 Tex. Civ. App. 374, 37 S. W. 872; Vogt v. Bexar County, 16 Tex. Civ. App. 567, 42 S. W. 127; State v. Town of Vernon, 25 Vt. 244.

[437] Blaisdell v. Inhabitants of Winthrop, 118 Mass. 138.

[438] Wright v. Middlefork Highway Com'rs, 145 Ill. 48, 33 N. E. 876; Forster v. Winona County Com'rs, 84 Minn. 308, 87 N. W. 921; Rose v. Garrett, 91 Mo. 65, 3 S. W. 828; Rose v. Kansas City, 128 Mo. 135, 30 S. W. 518; Frame v. Boyd, 35 N. J. Law, 457; Savage v. City of Buffalo, 131 N. Y. 568, 30 N. E. 226, affirming 14 N. Y. Supp. 101. Title 8, § 8, of the city charter of Buffalo requiring commissioners to make their report within sixty days is directory and a report will be sustained made after the expiration of this time where no public or private right has been prejudiced by the delay. In re Morewood Ave., 159 Pa. 39, 28 Atl. 130.

[439] State v. O'Laughlin, 29 Kan. 20. The fact that a report of commissioners cannot be found twelve years after a highway has been duly established affords no ground for disputing its legal existence. New Jersey So. R. Co. v. Chandler, 65 N. J. Law, 173, 46 Atl. 732

forming them of the board's official action may be also necessary. Provisions of this character are ordinarily considered mandatory, not directory, and a failure to observe the plain requirements of the law may result in a failure of the proceedings.

§ 783. Review.

The action of commissioners or of viewers either in making or filing their report or in respect to other questions submitted for their determination or action may be reviewed and the errors complained of corrected [440] or their proceedings set aside.[441] The common-law writ of certiorari is the remedy commonly used for this purpose.[442] In some states special remedies are given by statutory provision and the rule then obtains that these must be followed.[443]

[440] Rees v. City of Chicago, 38 Ill. 322; Everett v. Pottawattamie County Sup'rs, 93 Iowa, 721; In re Penley, 89 Me. 313, 36 Atl. 396; State v. Vandervere, 25 N. J. Law, 669; Vedder v. Marion County, 28 Or. 77; In re Wilson's Appeal, 152 Pa. 136, 25 Atl. 530.

[441] In re North Union Tp. Road, 150 Pa. 512, 24 Atl. 749.

[442] Grinstead v. Wilson, 69 Ark. 587, 65 S W. 108; Imhoff v. Highway Com'rs, 89 Ill. App. 66. The failure to show the taking of any land for use in the laying out of a new highway will warrant a quashing of the writ since no invasion of any right of the relator was shown. Bailey v. McClain, 92 Ill. 277; Perry v. Bozarth, 95 Ill. App. 566; Behrens v. Highway Com'rs, 169 Ill. 558, 48 N. E. 578; Butler Grove Highway Com'rs v. Barnes, 195 Ill. 43, 62 N. E. 775; Hupert v. Anderson, 35 Iowa, 579; Abney v. Clark, 87 Iowa, 727, 55 N. W. 6; Tiedt v. Carstenson, 61 Iowa, 334; Janvrin Poole, 181 Mass. 463, 63 N. E. 1066; Names v. Highway Com'rs, 30 Mich. 490; Grand Trunk R. Co. v. Town of Berlin, 68 N. H. 168, 36 Atl. 554; Freeman v. Price, 63 N. J. Law, 151, 43 Atl. 432; Morris & Cummings Dredging Co. v. Jersey City & G. & H. R. Co., 64 N. J. Law, 142, 45 Atl. 917; People v. Schell, 5 Lans. (N. Y.) 352. One must say that his property or rights are immediately or directly involved in order to have such an interest as will entitle him to a writ of certiorari to review proceedings.

People v. Ireland, 75 Hun, 600, 27 N. Y. Supp. 582; In re Palmer Road Tp., 109 Pa. 274; In re Diamond St., 196 Pa. 254, 46 Atl. 428; Cowan's Case, 1 Tenn. (1 Overt) 311; Prince v. Town of Braintree, 64 Vt. 540, 26 Atl. 1095; State v. Wallman, 110 Wis. 312, 85 N. W. 975. But see Detroit & Bay City R. Co. v. Graham, 46 Mich. 642; People v. Onondaga County Court, 4 App. Div. 542, 38 N. Y. Supp. 920, affirmed 152 N. Y. 214, 46 N. E. 325, and People v. Turner, 8 App. Div. 395, 40 N. Y. Supp. 839.

[443] Siskiyou County v. Gamlich, 110 Cal. 94, 42 Pac. 468. An order

§ 784. Appeals.

A report of commissioners or road viewers may include findings and recitals upon questions other than those relative to the compensation or damages to be paid property owners; or it may consider the latter question alone with a recital of the facts necessary to sustain jurisdiction in this respect. In either case a property owner or interested party alone is entitled to an appeal from the decision or award [444] and only those questions can be considered on appeal which are and can legally be raised in the notice of ap-

approving the report of viewers by the board of supervisors under Political Code, §§ 2681–2690 cannot be collaterally attacked on the ground of insufficient evidence. Cutler v. Sours, 80 Ill. App. 618; Ravatte v. Race, 152 Ill. 672, 38 N. E. 933; Chicago, S. F. & C. R. Co. v. Lorance, 180 Ill. 180, 54 N. E. 284; Wells v. Rhodes, 114 Ind. 467, 16 N. E. 830; Manor v. Jay County Com'rs, 137 Ind. 367, 34 N. E. 959; Monroe County Com'rs v. Conner, 155 Ind. 484, 58 N. E. 828; Eastman v. Inhabitants of Stowe, 37 Me. 86; Overmann v. City of St. Paul, 39 Minn. 120, 39 N. W. 66.

[444] Gray v. Lott, 18 Ill. 251; Whittaker v. Gutherridge, 52 Ill. App. 460; Butler Grove Highway Com'rs v. Barnes, 195 Ill. 43, 62 N. E. 775. An appeal by one not adjoining the road sought to be established confers no jurisdiction on the appellate body. Odell v. Jenkins, 8 Ind. 522; Rassier v. Grimmer, 130 Ind. 219, 28 N. E. 866. The judgment of the board of commissioners cannot be collaterally attacked for any error or irregularity. Fleming v. Hight, 95 Ind. 78; Hight v. Claman, 121 Ind. 447, 23 N. E. 279; Wilson v. Wheeler, 125 Ind. 173, 25 N. E. 190; Spray v. Thompson, 9 Iowa, 40; Commonwealth v. Kimberlin, 71 Ky. (8 Bush) 444. The commonwealth of Kentucky may prosecute an appeal from the judgment of the county court establishing an alteration in a public road. Shurtleff v. Chase County Com'rs, 63 Kan. 645, 66 Pac. 654; Alexander v. City of Baltimore, 5 Gill (Md.) 383; Brown v. Greenfield Tp. Board, 92 Mich. 294, 52 N. W. 614; Schuster v. Town of Lemond, 27 Minn. 253; State v. Barton, 36 Minn. 145, 30 N. W. 454; Runyon v. Alton, 78 Minn. 31; Aldridge v. Spears, 40 Mo. App. 527, 101 Mo. 400; Schroeder v. Jabin, 94 Mo. App. 111, 67 S. W. 949; Union School Dist. v. Keene, 63 N. H. 623, 7 Atl. 380; Morse v. Wheeler, 69 N. H. 292, 45 Atl. 561; State v. Kearney Tp., 51 N. J. Law, 473, 18 Atl. 349; McDowell v. Western N. C. Insane Asylum, 101 N. C. 656, 8 S. E. 118; Losch's Appeal, 109 Pa. 72. An owner is the one who possesses the property at the time the proceedings are instituted; the claim for damages is a personal one. State v. Town of Geneva, 107 Wis. 1, 82 N. W. 550. But see Brown v. Robertson, 123 Ill. 631, 15 N. E. 30. The right to review the amount agreed upon for damages between the owner and highway commissioners does not exist. Smith v. City of St. Paul, 69 Minn. 276, 72 N. W. 104.

peal.[445] Ordinarily, an appeal will affect the proceedings only in respect to the property of the appellant or the one objecting [446] and conversely an appellant can only avail himself of errors or irregularities affecting his own interests.[447] The right of appeal may be limited to cases where more than a specific minimum damage has been sustained.[448]

Appeal from a report on questions other than those of damages. Where the appeal is taken from a report on questions other than that of damages, exception is usually made to the report or award either upon technical grounds [449] or those which require a reconsideration of the merits of the proceeding.[450] The determination

[445] Osborn v. Sutton, 108 Ind. 443, 9 N. E. 410; Shafer v. Bardener, 19 Ind. 294; Wilson v. Whitsell, 24 Ind. 306; Wabaunsee County Com'rs v. Bisby, 37 Kan. 253, 15 Pac. 241; Briggs v. Labette County Com'rs, 39 Kan. 90, 17 Pac. 331; Rawlings v. Biggs, 85 Ky. 251, 3 S. W. 147; Harding v. Putman, 14 Ky. L. R. 677, 21 S. W. 100; Long v. Talley, 91 Mo. 305, 3 S. W. 389; Bennett v. Woody, 137 Mo. 377, 38 S. W. 972; Nickerson v. Lynch, 135 Mo. 471, 37 S. W. 128. Where a record does not show any exception or alleged error on the question of damages in the court below, it cannot be considered an appeal by the circuit court. King v. Reed, 9 N. Y. Supp. 616; Anders v. Anders, 49 N. C. (4 Jones Law) 243; Lower Merion Road, 18 Pa. 238; Williams v. Turner Tp., 15 S. D. 182, 87 N. W. 968. Where a notice of appeal attacks proceedings as being without jurisdiction and fraudulent, it is competent for the appellant to prove any fact tending to show them irregular, without jurisdiction or fraudulent.

[446] Rees v. City of Chicago, 38 Ill. 322; Stipp v. Claman, 123 Ind. 532, 24 N. E. 131; Fleener v. Claman, 126 Ind. 166, 25 N. E. 900; Hire v. Kniseley, 130 Ind. 295; Van Bentham v. Osage County Com'rs, 49 Kan. 30. But see Quackenbush v. Dist. of Columbia, 20 Mackey (D. C.) 300; Jewell v. Kirk, 20 Ky. L. R. 853, 47 S. W. 766; Underwood v. Bailey, 56 N. H. 187.

[447] Inhabitants of Leeds v. Androscoggin County Com'rs, 75 Me. 533.

[448] Gorman v. St. Mary Sup'rs, 20 Minn. 392 (Gil. 343); Restad v. Town of Scambler, 33 Minn. 515. But see State v. Rapp, 39 Minn. 65, 38 N. W. 926.

[449] Johnston v. Glenn County Sup'rs, 104 Cal. 390, 37 Pac. 1046; Goshen Highway Com'rs v. Jackson, 165 Ill. 17, 45 N. E. 1000; Ford v. Collins, 108 Ky. 553, 56 S. W. 993. The court of appeals has jurisdiction only of matters of law arising of record. Town of Wayne v. Caldwell, 1 S. D. 483, 47 N. W. 547.

[450] Hughes v. Beggs, 114 Ind. 427, 16 N. E. 817; Sanger v. Brownstown Tp., 118 Mich. 19; Pairier v. Itasca County Com'rs, 68 Minn. 297, 71 N. W. 382; Gurnsey v. Town of Keene, 68 N. H. 243; Towns v. Klamath County, 33 Or. 255. The presumption arises on appeal that qualified viewers were appointed unless the contrary is shown by the

that the highway is necessary, feasible, or will be of public utility, may be the controverted one,[451] or the legality of the manner and time of the execution or filing of a report or award placed in issue.[452]

§ 785. Appeal from award or report on damages awarded.

The property owner may appeal from that portion of an award or report that gives or refrains from giving compensation upon the ground of insufficiency.[453] The right to take private property

record. In re O'Hara Tp. Road, 152 Pa. 319, 25 Atl. 602; In re Diamond St., 196 Pa. 254, 46 Atl. 428. Under writ of certiorari, evidence cannot be considered upon questions of whether the petition for widening a street was signed by a majority of property owners. Painter v. St. Clair, 98 Va. 85, 34 S. E. 989; Pearson v. Island County, 3 Wash. St. 497, 28 Pac. 1108.

[451] Parham v. Justices of Inferior Ct., 9 Ga. 341; Sonora Highway Com'rs v. Carthage Sup'rs, 27 Ill. 140; Genesee Highway Com'rs v. Harper, 38 Ill. 103; People v. Highway Com'rs, 188 Ill. 150, 58 N. E. 989; Jones v. Duffy, 119 Ind. 440, 21 N. E. 348. A finding by viewers that a proposed highway is not of public utility is not appealable. Potter v. McCormack, 127 Ind. 439, 26 N. E. 883; Moore v. Auge, 125 Ind. 562, 25 N. E. 816; Forsyth v. Wilcox, 143 Ind. 144, 41 N. E. 371; Cole v. County Com'rs, 78 Me. 532, 7 Atl. 397; Harkness v. Waldo County Com'rs, 26 Me. 353; Donnell v. York County Com'rs, 87 Me. 223; Fohl v. Common Council of Sleepy Eye Lake, 80 Minn. 67, 82 N. W. 1097; Forster v. Winona County Com'rs, 84 Minn. 308, 87 N. W. 921; Howard v. Clay County Sup'rs, 54 Neb. 443, 74 N. W. 953. The propriety and necessity of establishing road lines and public roads is committed wholly to the discretion of county commissioners and its decision is not subject to review. Petition of Groton, 43 N. H. 91. The motives, principles or inducements behind a report ordering a road cannot be shown. People v. Onondaga County Ct., 152 N. Y. 214, 46 N. E. 325. A decision of a county court though it is final upon the necessity of a proposed highway can be reviewed on appeal upon questions affecting its jurisdiction. See, also, to the same effect the case of In re De Camp, 151 N. Y. 557, 45 N. E. 1039, reversing 77 Hun, 478, 29 N. Y. Supp. 99; King v. Blackwell, 96 N. C. 322, 1 S. E. 485; In re Road in Ohio & Ross Tps., 166 Pa. 132, 31 Atl. 74. The determination of viewers upon the question of public necessity is not appealable. Robson v. Byler, 14 Tex. Civ. App. 374, 37 S. W. 872; Snow v. Town of Sandgate, 66 Vt. 451; Morris v. Ferguson, 14 Wis. 266. But see State v. Rapp, 39 Minn. 65; City of Pittsburg's Petition, 179 Pa. 630, 36 Atl. 293. See, also, § 785, post.

[452] Gordon v. Highway Com'rs, 169 Ill. 510, 48 N. E. 451; Gurnsey v. Town of Keene, 68 N. H. 243, 34 Atl. 742.

[453] Schuchman v. Highway Com'rs, 52 Ill. App. 497; Manor v.

for a public use is only granted upon the payment of full and just compensation for the property interests taken or damaged. The owner is more deeply interested and concerned in the question of damages and, as has been stated, this alone in many instances, is the only one in which he is by law permitted to concern himself; the question of the taking and its agency being reserved for the sole determination of the state.[454] Where an appeal is taken from the amount of damages awarded, it is customary to provide for a trial by jury de novo,[455] and the proceeding is controlled by the usual rules of law and practice that govern the trial of cases.[456]

§ 786. Time of appeal.

The right to appeal or raise exceptions in respect to the manner and time of its exercise is usually limited by law and a strict compliance with statutory provisions is necessary.[457] Statutory rights are never liberally construed and if a property owner does not avail himself of one in the manner and at the time granted, he cannot complain and will be concluded by his neglect.[458] A

Jay County Com'rs, 137 Ind. 367; Umbarger v. Bean, 15 Iowa, 256; Abney v. Clark, 87 Iowa, 727; Wabaunsee County Com'rs v. Bisby, 37 Kan. 253, 15 Pac. 241; Lyon County Com'rs v. Kiser, 26 Kan. 279; In re Conant, 83 Me. 42, 21 Atl. 172; Grimshaw v. City of Fall River, 160 Mass. 483; Driscoll v. City of Taunton, 160 Mass. 486; Fowler v. Larabee, 59 N. J. Law, 259, 35 Atl. 911; Russell v. Leatherwood, 114 N. C. 683; Adkins v. Smith, 94 Iowa, 758, 64 N. W. 761; Hare v. Rice, 142 Pa. 608, 21 Atl. 976; Appeal of City of Philadelphia, 191 Pa. 153, 43 Atl. 88. A finding by viewers is conclusive of the fact and the extent of injury to private property by the construction of a just, not merely to the individual public improvement. But see Hildreth v. Rutherford, 52 N. J. Law, 501, 20 Atl. 60.

[454] Symons v. City & County of San Francisco, 115 Cal. 555, 42 Pac. 913, 47 Pac. 453. The determination by the proper officials to open certain streets cannot be reviewed by the courts under the grant of the power "to open and close streets whenever the public convenience or interest may require." Lockman v. Morgan County, 32 Ill. App. 414; Tomlinson v. Peters, 120 Ind. 237, 21 N. E. 910; City of New Orleans v. Steinhardt, 52 La. Ann. 1043, 27 So. 586. Where the authority is given to a city to open and widen streets, courts will not interfere except in cases of gross abuse of authority since the propriety of this action is a matter of legislative rather than judicial discretion.

Moore's Appeal, 68 Me. 405; Wilson v. Township Board of Burr Oak, 87 Mich. 240, 49 N. W. 572; Sutherland v. Holmes, 78 Mo. 399. The appellate court need not inquire whether the petition, notice and prior pro-

ceedings are sufficient when it is limited to a consideration of the assessment of damages. Bennett v. Woody, 137 Mo. 377; Goff v. Nolan, 62 How. Pr. (N. Y.) 323; Town of Dell Rapids v. Irving, 9 S. D. 222; Bell v. Palo Pinto County (Tex. Civ. App.) 29 S. W. 929; Galveston, H. & S. A. R. Co. v. Baudat, 18 Tex. Civ. App. 595, 45 S. W. 939; Huggins v. Hurt, 23 Tex. Civ. App. 404, 56 S. W. 944; King County v. Neely, 1 Wash. T. 241; Selde v. Lincoln County, 25 Wash. 198, 65 Pac. 192. The question of public utility is not appealable. State v. Superior Ct. of Adams County, 29 Wash. 1, 69 Pac. 366; State v. Wallman, 110 Wis. 312, 85 N. W. 975. See, also, authorities cited in last preceding note but one.

[455] Washington Tp. v. Butler, 13 Ind. 390; Turley v. Oldham, 68 Ind. 114; Sigafoos v. Talbot, 25 Iowa, 214; Remy v. Municipality No. 2, 12 La. Ann. 500; Inhabitants of Wrentham v. Corey, 159 Mass. 93, 34 N. E. 179; City of Grand Rapids v. Luce, 92 Mich. 92, 52 N. W. 635; Common Council of Houghton v. Huron Copper Min. Co., 57 Mich. 547; Fohl v. Common Council of Sleepy Eye Lake, 80 Minn. 67, 82 N. W. 1097. Where property sought to be included in a proposed street is already appropriated to a public use, the question of whether the subsequent use is destructive of the first can be raised on appeal Hammer v. Polk County, 15 Or. 578, 16 Pac. 420; Lafollette v. Road Com'r, 105 Tenn. 536, 58 S. W. 1065. But see Morris v. Salle, 14 Ky. L. R. 117, 19 S. W. 527; Smith v. McMeekin, 79 Ky. 24; Bruggerman v. True, 25 Minn. 123.

[456] Hook v. Chicago & A. R. Co., 133 Mo. 313, 34 S. W. 549; City of Kansas v. Street, 36 Mo. App. 666. The jury are not bound to accept the judgment of witnesses in respect to the value of property. In re Gardner, 41 Mo. App. 598. The question of whether the road is or is not a public necessity can also be determined on appeal. Beebe v. City of Newark, 24 N. J. Law (4 Zab.) 47; Tingley v. City of Providence, 8 R. I. 493; Bosworth v. City of Providence, 17 R. I. 58, 20 Atl. 97; Seavey v. City of Seattle, 17 Or. 361, 49 Pac. 517.

[457] Kirsh v. Braun, 153 Ind. 247, 53 N. E. 1082; Larson v. Fitzgerald, 87 Iowa, 402, 54 N. W. 441; Rennick v. Lyon County Com'rs, 45 Kan. 442, 25 Pac. 856; Russell v. Franklin County Com'rs, 51 Me. 384; Burnett v. Swaney, 114 Mich. 609, 72 N. W. 599; Campau v. La Blanc, 127 Mich. 179, 86 N. W. 535; Pairier v. Itasca County Com'rs, 68 Minn. 297; State v. Waldron, 17 N. J. Law (2 Har.) 368; Brands v. Craig, 49 N. J. Law, 185; In re Glenside Woolen Mills, 92 Hun, 188, 36 N. Y. Supp. 593; Lambe v. Love, 109 N. C. 305, 13 S. E. 773; In re Wells County Road, 7 Ohio St. 16; Geddes v. Rice, 24 Ohio St. 60. The rule does not apply to directory provisions. In re Road in Cheltenham County (Pa.) 13 Atl. 93; Hunter v. City of Newport, 5 R. I. 325; State v. Dexter, 10 R. I. 341. But the right of appeal may be extended by resolution of the general assembly.

[458] Searl v. Lake County School Dist. No. 2, 133 U. S. 553. The court in its opinion by the Chief Justice said: "The right of eminent domain is the offspring of political necessity and is inseparable from sovereignty unless denied to it by its fundamental law. It can-

notice of the owner's intention to appeal is generally necessary and this must comply with statutory requirements, if any, both in respect to its form, its time of service and filing.[459]

§ 787. The question of compensation.

To the property owner is secured by constitutional provision the payment of just compensation for property taken or injuriously affected through the exercise of the power of eminent domain. This right is now fully established and protected either by direct constitutional provision[460] or by judicial holdings in the absence of the former to the effect that under other constitutional

not be exercised except upon condition that just compensation shall be made to the owner, and it is the duty of the state, in the conduct of the inquest by which the compensation is ascertained, to see that it is just, not merely to the individual whose property is taken, but to the public which is to pay for it." Baugher v. Rudd, 53 Ark. 417, 14 S. W. 623; Fulton v. Town of Dover, 8 Houst. (Del.) 78, 12 Atl. 394, 31 Atl. 974; Wilkinson v. Lemasters, 122 Ind. 82, 23 N. E. 688; Piercy v. Morris, 24 N. C. (2 Ired.) 168.

[459] McPherson v. Holdridge, 24 Ill. 38; Ross Highway Com'rs v. Town of Newell Sup'rs, 53 Ill. 320; French v. Springwells Highway Com'rs, 12 Mich. 267; People v. Hamtramck Tp., 38 Mich. 558; Brazee v. Raymond, 59 Mich. 548; Sanger v. Brownstown Tp. Board, 118 Mich. 19, 76 N. W. 121; Restad v. Town of Scambler, 33 Minn. 515; State v. St. John, 47 Minn. 315, 50 N. W. 200. It is not necessary that an application for appeal should contain statements not required by statutes. Construing Gen. St. Minn. 1878, c. 13, § 60; Bowers v. Boroughs of Braddock, 172 Pa. 596, 33 Atl. 759; Bexar County v. Terrell (Tex.) 14 S. W. 62. The rule also applies to a statutory bond required to be given on appeal. But see Karnes County v. Nichols (Tex. Civ. App.) 54 S. W. 656. This case also holds that by the acceptance of damages, one is estopped from appealing.

[460] Smith v. Inge, 80 Ala. 283; Colton v. Rossi, 9 Cal. 595; Potter v. Ames, 43 Cal. 73; Whiting v. City of New Haven, 45 Conn. 303; Edgerton v. Town of Green Cove Springs, 10 Fla. 140. The source of the compensation is immaterial to the owner of the property. City of Chicago v. Spoor, 190 Ill. 340, 60 N. E. 540; City of Logansport v. Seybold, 59 Ind. 225. Constitutional provisions prohibiting the taking of private property for public uses without just compensation apply to the exercise of the power of eminent domain; not that of taxation. Dinwiddie v. Roberts, 1 G. Greene (Iowa) 363; Dunlap v. Pully, 28 Iowa, 469; Carbon, Coal & Min. Co. v. Drake, 26 Kan. 345; City of Ludlow v. Mackintosh, 21 Ky. L. R. 924, 53 S. W. 524; Moale v. City of Baltimore, 5 Md. 314; Proprietors of Locks & Canals v. City of Lowell, 73 Mass. (7 Gray) 223. The dis-

clauses prohibiting the taking of property without due process of law, property interests cannot be taken under the exercise of the power without the payment of just compensation; thus holding, in effect, that the payment of compensation is an essential part of the taking of property by due process of law. Only a brief state-

charge of sewage into a canal can amount to a taking for which compensation can be recovered.

Foster v. City of Boston, 39 Mass. (22 Pick.) 33; Attorney General v. Williams, 174 Mass. 476, 55 N. E. 77, 47 L. R. A. 314. A provision prohibiting the erection of buildings over ninety feet high may amount to a taking of property for which the owner is entitled to compensation. People v. La Grange Tp. Board, 2 Mich. 187. A township is not liable for interest on damages for the laying out of a highway. People v. Lowell Tp. Board, 9 Mich. 144; Turner v. Village of Stanton, 42 Mich. 506. One petitioning for the opening of a street is not estopped from claiming compensation for his land taken.

Phelps v. City of Detroit, 120 Mich. 447, 79 N. W. 640. The construction of an approach to an aqueduct constructed by the city may amount to a taking of property for which damages can be recovered. Teick v. Carver County Com'rs, 11 Minn. 292; State v. Rapp, 39 Minn. 65, 38 N. W. 926; Copiah County v. Lusk, 77 Miss. 136, 24 So. 972; Turlow v. Ross, 144 Mo. 234, 45 S. W. 1125. Construing Mo. Const. art. 2, § 21; Dooley v. Kansas City, 82 Mo. 444; State v. Kansas City, 89 Mo. 34, 14 S. W. 515; Hudson County L. Imp. Co. v. Seymour, 35 N. J. Law, 47; Simmons v. City of Passaic, 42 N. J. Law, 619; Cherry v. Town of Keyport Com'rs, 52 N. J. Law, 544, 20 Atl. 970; Gould v. Glass, 19 Barb. (N. Y.) 179. A statute providing for the establishment of roads over wild or unimproved land is unconstitutional and void unless a mode is prescribed for compensating the owner.

Crooke v. Flatbush Waterworks Co., 29 Hun (N. Y.) 245. A laying of water pipes in a public street involves no additional burden for which the abutting owner is entitled to receive compensation. Matter of Ninth Avenue, 45 N. Y. 729. Considering the compensation to which a public corporation is entitled for its property appropriated. In re One Hundred & Twenty-Seventh St., 56 How. Pr. (N. Y.) 60; In re Opening of Edgecomb Road, 72 N. Y. Supp. 1073. A municipality is entitled to compensation for land owned by it. Spears v. City of New York, 87 N. Y. 359; Benedict v. State, 120 N. Y. 228, 24 N. E. 314; Patrick v. Cross Roads Com'rs, 4 McCord (N. C.) 541; Johnston v. Rankin, 70 N. C. 550; Ferris v. Bramble, 5 Ohio St. 109; Hickox v. City of Cleveland, 8 Ohio, 543. Where a particular mode of ascertaining and making compensation for private property taken for a public use is provided, that remedy is exclusive.

City of Cincinnati v. Sherike, 47 Ohio St. 217, 25 N. E. 169. In order to create a forfeiture or bar of an owner's claim for damages, it must appear that the conditions upon which such forfeiture or bar depends have been strictly performed. City of Dayton v. Bauman, 66 Ohio

ment and discussion of the general principles will be given controlling the payment of compensation, both in respect to manner and time and what constitutes damages for which compensation can be recovered. In view of the constitutional protection afforded in every state in the Union, as well as by the Federal courts, the law can be considered as conclusively settled on the question of compensation and the possible questions involved in the subject are those which relate to the time and the manner of payment and the measure of damages. The authorities almost universally hold that legislative action providing the machinery for the exercise of the power must contain provisions for the payment of compensation, that otherwise they are void, as courts can-

St. 379, 64 N. E. 433; Panning v. Gilliland, 37 Or. 369, 62 Pac. 209, denying rehearing, 61 Pac. 636; Borough of Strasburgh v. Bachman (Pa.) 14 Atl. 148. An ordinance which provides that a borough may maintain drains and ditches on private property is unconstitutional being in contravention of Pa. Const. art. 16, § 8, prohibiting the taking of private property without the payment of compensation. In re Widening of Burnish Street, 140 Pa. 531, 21 Atl. 500. An act relating to the laying out of highways which makes no provision for damages is unconstitutional.

In re New Washington Road, 23 Pa. 485. The neglect of viewers to assess damages is ground for quashing a confirmation of their report. Butchers' Ice & Coal Co. v. City of Philadelphia, 156 Pa. 54. The owner of a wharf is entitled to compensation for the injury caused through the building of a sewer by the city whereby the sewage was deposited in the dock although the sewer is on land belonging to the city and there was no want of skill it its construction. Fuller v. Edings, 11 Rich. Law (S. C.) 239. Compensation for loss of income from a private wharf in consequence of the establishment of a public wharf cannot be recovered by the property owner. Lawrence County v. Deadwood & G. T. R. Co., 11 S. D. 74, 75 N. W. 817; Wooldridge v. Eastland County, 70 Tex. 680, 8 S. W. 503; Watkins v. Walker County, 18 Tex. 585; City of Dallas v. Miller, 7 Tex. Civ. App. 503, 27 S. W. 498; Hamilton County v. Garrett, 62 Tex. 602; Com. v. Beeson, 3 Leigh (Va.) 821; Hutchinson v. City of Parkersburg, 25 W. Va. 226; Hood v. Finch, 8 Wis. 381; Squires v. Village of Neenah, 24 Wis. 588; Dolphin v. Pedley, 27 Wis. 469. But see Livermore v. Town of Jamaica, 23 Vt. 361. The taking of land for a public highway is not such an appropriation of the property to the public use within the meaning of Const. Part 1, art. 2, as necessarily required compensation in money to be made. To bring a case within this constitutional provision there should be such a taking of property as will divest the owner of all title to or control over a one which amounts to an unqualified appropriation of it to the public.

not supply the omission,[461] but a mode providing for compensation is not necessarily invalid because it casts the initiative upon the property owner and requires him to act within a specified time or lose his rights.[462]

§ 788. Medium of payment.

The medium of payment, it is clear, must be that which affords the property owner the compensation to which he is entitled and this, from a strictly legal standpoint, excludes all forms of payment except that which is regarded as a legal tender by the laws of the country.[463] In practice, however, this rule is modified to the extent that private property may be taken by the state and paid for by a pledge of its credit.[464] Some cases also hold that this modification of the rule extends to municipal or public quasi corporations.[465] It is doubtless true that if a tender of payment

[461] In re Manderson (C. C. A.) 51 Fed. 501; Ex parte Martin, 13 Ark. 198; Curran v. Shattuck, 24 Cal. 427; Brunswick & W. R. Co. v. City of Waycross, 94 Ga. 102, 21 S. E. 145; Ash v. Cummings, 50 N. H. 591; People v. Nearing, 27 N. Y. 306; Sage v. City of Brooklyn, 89 N. Y. 189; Watson's Ex'r v. Pleasant Tp., 21 Ohio St. 667; In re Burnish St., 140 Pa. 531, 21 Atl. 500; Tuttle v. Knox County, 89 Tenn. 157, 14 S. W. 486; Snohomish County v. Hayward, 11 Wash. 429, 39 Pac. 652; Lewis, Em. Dom. (2d Ed.) § 452.

[462] Sweet v. Rechel, 159 U. S. 380; Draper v. Mackey, 35 Ark. 497; Dunlap v. Pully, 28 Iowa, 469; Whitman v. Inhabitants of Nantucket, 169 Mass. 147; Banse v. Town of Clark, 69 Minn. 53. But see Yazoo-Miss. Delta Levee Com'rs v. Dancy, 65 Miss. 335, 3 So. 568, where it is said: "No act which devolves on the owner the duty of initiating proceedings for compensation for his property, as the condition of his obtaining it, is allowable. He cannot be required to become an actor under the penalty of losing his property and 'due compensation' for it, if he shall not. He may enjoy his own, secure under constitutional guaranty, until an inquest by public authority determines that it is required for public use, and fixes the price to be paid him for the sale of it, and this price must be paid or tendered before his right can be divested, and a right to ask for compensation in three months or three years is not a valid substitute for the constitutional right to 'due compensation first being made."

[463] Sanborn v. Belden, 51 Cal. 266; Com. v. Peters, 2 Mass. 125; Carson v. Coleman, 11 N. J. Eq. (3 Stockt.) 106; Butler v. Ravine Road Sewer Com'rs, 39 N. J. Law, 665; In re Sedgeley Ave., 88 Pa. 509.

[464] Great Falls Mfg. Co. v. Garland, 25 Fed. 521; Talbot v. Hudson, 82 Mass. (16 Gray) 417. But see State v. Beackmo, 8 Blackf. (Ind.) 246; Connecticut River. R. Co. v. Franklin County Com'rs, 127 Mass. 50, 34 Am. Rep. 338.

[465] Lowndes County Com'rs Ct. v.

is made by these corporations in form different from that provided by the laws relating to legal tender and accepted by the private property owner, it will be regarded as a sufficient payment of compensation,[466] but on principle, the payment of compensation through the issuance of municipal bonds or other evidence of indebtedness is not warranted or legal.[467]

§ 789. Time of payment.

The property owner is amply secure in the payment to him of compensation for property which may be legally appropriated for public use and, as already suggested, the questions at the present time considered are those which relate to the medium and time of payment. In respect to the time of payment of compensation, the subject naturally resolves itself into a discussion of the necessity for a payment before or after entry upon the property by the agent exercising the power of eminent domain.[468]

(a) Payment before entry. Constitutional or statutory provisions ordinarily prohibit the taking of private property without the payment of just compensation first paid or secured.[469] The trans-

Bowie, 34 Ala. 461; Loweree v. City of Newark, 38 N. J. Law, 151; In re Yost's Report, 17 Pa. 524. But see Butler v. Ravine Road Sewer Com'rs, 39 N. J. Law, 665.

[466] Prescott v. Patterson, 49 Mich. 622; Cortlandville Highway Com'rs v. Peck, 5 Hill (N. Y.) 215.

[467] City of Lafayette v. Shultz, 44 Ind. 97; Chapman v. Gates, 54 N. Y. 140; Sage v. City of Brooklyn, 89 N. Y. 189; In re Church, 92 N. Y. 1.

[468] Bauman v. Ross, 167 U. S. 548. The mere recording of a map or plat for the extension of a permanent system of highways does not entitle the owner of lands proposed to be taken to any compensation of damages.

[469] Grigsby v. Burtnett, 31 Cal. 406; German Sav. & Loan Soc. v. Ramish, 138 Cal. 120, 69 Pac. 89, 70 Pac. 1067; City of Delphi v. Evans, 36 Ind. 90; Helms v. Bell, 155 Ind. 502, 58 N. E. 707; Montgomery County Com'rs v. Miller, 82 Ind. 572; Shaw v. City of Charlestown, 8[illegible] Mass. (3 Allen) 538; Corey v. Inhabitants of Wrentham, 164 Mass. 18, 41 N. E. 101; Weber v. Stagray, 75 Mich. 32, 42 N. W. 665; Long v. Talley, 91 Mo. 305; Lewis v. City of Lincoln, 55 Neb. 1, 75 N. W. 154; Carpenter v. City of New York, 27 Misc. 272, 58 N. Y. Supp. 421; City of Dallas v. Miller, 7 Tex. Civ. App. 503, 27 S. W. 498. Where a city wrongfully appropriates land without first paying therefore, the damages for which it is liable are an obligation arising from the commission of a tort.

As will be seen from the authorities cited that while it is not uniformly held that compensation should precede the appropriation, yet, it is universally held that com-

action is regarded somewhat of the nature of a forced sale from the standpoint of the attitude of the parties to it and an application of strict legal principles requires, therefore, that the compensation should be paid or secured before entry upon the premises for the purpose of their appropriation.[470] The compensation and the transfer of possession should be cotemporaneous acts.[471]

(b) Payment after entry. The discussion of questions involving the entry upon the premises exclude acts by the one exercising the power that have for their purpose a determination of the extent of property to be taken, for example, the running of preliminary surveys, and which are usually authorized by some statute.[472] An entry upon the appropriation of property by private agencies before the payment of compensation is usually discountenanced,[473] the credit or promise of such an agency being regarded as insufficient and as not affording a perfect protection to the property owner for the compensation to which he is entitled. This rule does not, however, ordinarily obtain where the party exercising the power is a state or a public corporation. These are regarded agencies of such a stable and substantial character as to warrant the courts in permitting an entry upon or an appropriation of

pensation must be so certainly provided that the owner can secure it without unnecessary or unreasonable delay. Where the state permits the seizure of property without the concurrent payment of compensation, the security provided must be certain, adequate and safe. See the following cases: Taylor v. Marcy, 25 Ill. 518; Langford v. Ramsey County Com'rs, 16 Minn. 375 (Gil. 333); Gaines v. Hudson County Ave Com'rs, 37 N. J. Law, 12; Mulligan v. City of Perth Amboy, 52 N. J. Law, 132; Calking v. Baldwin, 4 Wend. (N. Y.) 667; Long v. Fuller, 68 Pa. 170.

[470] Jones v. Carragan, 36 N. J. Law, 52.

[471] Hawley v. Harrall, 19 Conn. 142; City of Chicago v. Shepard, 8 Ill. App. 602; County of Peoria v. Harvey, 18 Ill. 364; City of Lafayette v. Shultz, 44 Ind. 97; Grant County Com'rs v. Small, 61 Ind. 318; Blake v. City of Dubuque, 13 Iowa, 66; Abney v. Clark, 87 Iowa, 727; Comins v. Bradbury, 10 Me. 447. Compensation must be made under the constitution when property is taken. Wilkerson v. Buchanan County, 12 Mo. 328; Ackerman v. Thummel, 40 Neb. 95; Matter of Anthony Street, 20 Wend. (N. Y.) 618. No vested right is required in respect to damages assessed until the final confirmation of the report of commissioners laying out the streets. Lowmiller v. Fouser, 52 Ohio St. 123, 39 N. E. 419; Franklin County v. Brooks, 68 Tex. 679, 5 S. W. 819; Seibert v. Linton, 5 W. Va. 57.

[472] State v. James, 4 Wis. 408.

[473] See cases cited in Lewis, Eminent Domain (2d. Ed.) § 456.

private property in advance of the actual payment or tender of compensation.[474] The latter rule may be carried to an unreasonable extent. The good faith and credit of municipal and public

[474] Great Falls Mfg. Co. v. Garland, 25 Fed. 521. "In Cooley, Const, Lim. 560, it is said to be the rule deducible from adjudged cases that unless there is some constitutional or legislative requirement, it is not essential to the validity of a law for the exercise of eminent domain that provision should be made for payment of compensation before the actual taking of the property, where the taking is by the sovereign power itself; and that when the taking is by the state itself, not by a private corporation under authority from the state, it is sufficient if provision is made by the law by which the party whose property is taken can obtain compensation, and an impartial tribunal provided for assessing it. The same rule is given as the result of the authorities in Mills, Em. Dom. § 126, and in Potter's Dwar. St. 391.

"It must be acknowledged that this doctrine goes to the verge of what can be sanctioned without destroying the essential right of the citizen to have just compensation secured to him before his property is entered upon and he is dispossessed. But there are numerous cases reported in which the courts have relaxed the strict rule applicable to private corporations in favor of the sovereign power itself, where the legislature has deemed the importance and urgency of the public use sufficient to call for taking the property before the compensation is ascertained, and where the solvency of the state was undoubted, its good faith unquestioned, an adequate method of ascertaining the compensation provided, which the party could pursue of his own motion, and the delay in payment only caused by the unavoidable checks and precautions with regard to payments and expenditures of public moneys. Haverhill Bridge Proprietors v. Essex County Com'rs, 103 Mass. 125."

Lowndes County Com'rs v. Bowie, 34 Ala. 461; Sanborn v. Belden, 51 Cal. 266; Coburn v. Ames, 52 Cal. 385. Where damages are paid from a certain fund, the party seeking to condemn must first establish the fact of the existence of the fund, Highway Com'rs v. Deboe, 43 Ill. App. 25; City of Lafayette v. Spencer, 14 Ind. 399; Rudisill v. State, 40 Ind. 485; Cauble v. Hultz, 118 Ind. 13, 20 N. E. 515; In re City of Cedar Rapids, 85 Iowa, 39, 51 N. W. 1142; Hughes v. Milligan, 42 Kan. 396, 22 Pac. 213; Kimball v. City of Rockland, 71 Me. 137; Fernald v. City of Boston, 66 Mass. (12 Cush.) 574; Talbot v. Hudson, 82 Mass. (16 Gray) 417. "That such an appropriation affords a remedy sufficiently adequate and certain is too clear to admit of doubt. It is a pledge of the faith and credit of the Commonwealth, made in the most solemn and authentic manner, for the payment of damages as soon as they are ascertained and located by due process of law." Page v. City of Boston, 106 Mass. 84; Day v. Stetson, 8 Me. 365; State v. Messenger, 27 Minn. 119; Bartleson v. City of Minneapolis, 33 Minn. 468; State v. Minneapolis Park Com'rs, 33 Minn. 524; State v. Otis, 53 Minn.

quasi corporations as experience has proven in the past may not be of such a character as to warrant their being regarded by the owner of the property taken as the equivalent of cash.[475]

318, 55 N. W. 143; Livingston v. Johnson County Com'rs, 42 Neb. 277, 60 N. W. 555; Case v. Thompson, 6 Wend. (N. Y.) 634; Ellis v. City of New York, 11 N. Y. Supp. 394; Rider v. Stryker, 63 N. Y. 136; Sage v. City of Brooklyn, 89 N. Y. 189; Matter of City of New York, 99 N. Y. 569; State v. McIver, 88 N. C. 686; Zimmerman v. Canfield, 42 Ohio St. 463; Branson v. Gee, 25 Or. 462, 36 Pac. 527; Cherry v. Lane County, 25 Or. 487, 36 Pac. 531; City of Pittsburgh v. Scott, 1 Pa. 309; City of Philadelphia v. Miskey, 68 Pa. 49; Appeal of Delaware County, 119 Pa. 159; Morris v. City of Philadelphia, 199 Pa. 357; Mathewson v. Tripp, 14 R. I. 587; Brock v. Hishen, 40 Wis. 674; State v. Hogue, 71 Wis. 384, 36 N. W. 860; State v. City of Superior, 81 Wis. 649, 51 N. W. 1014. Lewis, Eminent Domain (2d Ed.) § 454. But see Hall v. People, 57 Ill. 307. "No man can be compelled to part with his property without his compensation. This is a constitutional right that he cannot be deprived of by any statute. No corporation, public or private, can appropriate the property of any one to their own use without first tendering or paying the damage assessed under forms of law. The party ought not to be driven to his action against a corporation, responsible or irresponsible, for his damages." Smith v. McAdam, 3 Mich. 506; Zimmerman v. Kearney County, 33 Neb. 620, 50 N. W. 1126; Wistar v. Philadelphia, 71 Pa. 44; Tait v. Matthews, 33 Tex. 112; Travis County v. Trogden, 88 Tex. 302, 31 S. W. 358.

[475] Huntington v. Smith, 25 Ind. 486. In proceedings by mandamus to compel the proper officers to levy a tax to pay "damages awarded on account of the construction of a public way, the fact that there was no money in the treasury is no defense."

Covington Short-Route Transfer R. Co. v. Piel, 87 Ky. 267, 8 S. W. 449. "That the citizen would be more likely to receive compensation from the State out of an abundant treasury, and by reason of its power to enforce payment by exactions from its citizens in the form of taxation, than from a private corporation owning its corporation property, or the individual security given by it, will be readily conceded; but in what manner this protects the citizen who has been deprived of his property in his constitutional rights it is difficult to comprehend. The security may be more ample in the one case than in the other, and still his right of property has been destroyed in its appropriation to a public use, without just compensation previously made, and all that is left him, whether due by the municipality, county or corporation, is the right, if a voluntary payment is not made at the end of the litigation, to take coercive measures for the recovery of the value of his property to which he was clearly entitled from the municipality or the private corporation before either could use it for public pur-

§ 790. Time of estimation of damages.

In ascertaining the compensation to which one is entitled, the time of their estimation is important both from the standpoint of the one exercising the power and the one whose property is appropriated. The date when the proceedings are commenced is that usually considered as determining the measure of damages.[476] Some decisions based, in a few cases, upon statutory provisions hold that the date of the award of commissioners is the time with reference to which compensation should be estimated.[477] The

poses." People v. Guggenheimer, 28 Misc. 735, 59 N. Y. Supp. 913; Keene v. Borough of Bristol, 26 Pa. 46. But see In re Cedar Rapids, 85 Iowa, 39, 51 N. W. 1142.

[476] City of Los Angeles v. Pomeroy, 124 Cal. 597, 57 Pac. 585; Shannahan v. City of Waterbury, 63 Conn. 420, 28 Atl. 611; Cook v. South Park Com'rs, 61 Ill. 115; South Park Com'rs v. Dunlevy, 91 Ill. 49; Sanitary Dist. v. Loughran, 160 Ill. 362; City of Terre Haute v. Blake, 9 Ind. App. 403, 36 N. E. 932; Ford v. Lincoln County Com'rs, 64 Me. 408; Parks v. City of Boston, 32 Mass. (15 Pick.) 198; Green v. City of Everett, 179 Mass. 147, 60 N. E. 490; Pitkin v. City of Springfield, 112 Mass. 509; Burt v. Merchant's Ins. Co., 115 Mass. 1. "But the compensation to be paid by the government and received by the owners of the land must be estimated according to the value of the land at the time of the filing of the petition. This affords a definite and invariable rule, which has relation to the time at which the property is designated and set apart for the public use, the owners ascertained who are entitled to be compensated, and the judicial proceedings instituted for the purpose of determining such compensation; and is not liable to be affected by the duration of these proceedings, or by increase or dimuution in value, whether occasioned by the taking itself, or by acts of the owners, lapse of time, or other circumstances. In all these respects it is a juster measure of compensation than a valuation of the estate at any subsequent point of time. And it accords with the rule as settled in this Commonwealth in the analogous cases of lands taken for highways and railroads.'"

Patten v. Fitz, 138 Mass. 456; City of Minneapolis v. Wilkin, 30 Minn. 145. Where a reimbursement is had under special charter provisions, the value of the property must be assessed with reference to its condition and value at the date of the filing of the original and first award. Tenbrooke v. Jahke, 77 Pa. 392. The damages awarded upon the opening of a public highway are a personal claim in favor of the owner at the time of the injury and do not run with the land. See, also, as holding the same rule, Campbell v. City of Philadelphia, 108 Pa. 300.

[477] Lamborn v. Bell, 18 Colo. 346, 32 Pac. 989, 20 L. R. A. 241; Matter of Riverside Park Extension, 27 Misc. (N. Y.) 373. See, also, Matter of Department of Public Works, 53 Hun, 280.

value of property in its condition then is the one which fixes the amount of compensation; not its value as affected by subsequent conditions connected with the proceedings or otherwise which may either depreciate or appreciate it.[478]

§ 791. Measure of damages.

The most simple condition in the estimation of damages is that which exists when the whole of the tract of land or property interest is appropriated. The compensation under such circum-

[478] Albertson v. City of Philadelphia, 185 Pa. 223, 39 Atl. 887; Stafford v. City of Providence, 10 R. I. 567. See, also, authorities cited under the next section.

[479] City of Santa Ana v. Harlin, 99 Cal. 538; City of Atlanta v. Hunnicutt, 95 Ga. 138, 22 S. E. 130; Tedens v. Sanitary Dist., 149 Ill. 87; Sidener v. Essex, 22 Ind. 201; City of Savanna v. Loop, 47 Ill. App. 214; City of Ft. Wayne v. Hamilton, 132 Ind. 487, 32 N. E. 324; Taylor v. City of Baltimore, 45 Md. 576; Dorgan v. City of Boston, 94 Mass. (12 Allen) 223; Green v. City of Everett, 179 Mass. 147, 60 N. E. 490; Cobb v. City of Boston, 112 Mass. 181. Evidence of sales of similar property for a similar purpose, inadmissible to show the market value of the land taken. Lawrence v. City of Boston, 119 Mass. 126; Read v. City of Cambridge, 126 Mass. 427. The owner of the land is entitled to recover its entire value without any deduction on account of mortgages and liens thereon.

City of Grand Rapids v. Luce, 92 Mich. 92; Wagner v. Gage County, 3 Neb. 237; Lowe v. City of Omaha, 33 Neb. 587, 50 N. W. 760; City of Omaha v. Howell Lumber Co., 30 Neb. 633, 46 N. W. 919; Walker v. City of Manchester, 58 N. H. 438. When a legal appropriation of land is made for streets, the property which has already been surveyed and laid out into blocks and streets, the owner can recover no more than nominal damages.

In re Dept. of Public Parks, 6 Hun (N. Y.), 486. The owner of a fee in lands which have been properly dedicated to public uses for a street is entitled only to nominal damages when the lands are formerly by statutory provisions for the same purpose. In re Central Park Extension, 16 Abb. Pr. (N. Y.) 56; Kingsland v. City of New York, 45 Hun (N. Y.) 198; Weeks v. State, 48 App. Div. 357, 63 N. Y. Supp. 203; People v. City of Syracuse, 63 N. Y. 291; Smith v. City of Goldsboro, 121 N. C. 350, 28 S. E. 479. One is not entitled to damages from a city for using the streets in furnishing water and light to the inhabitants. Whitaker v. Borough of Phœnixville, 141 Pa. 327, 21 Atl. 604; In re Negley Ave., 146 Pa. 456; Howard v. City of Providence, 6 R. I. 514. What has been paid in settlement of a similar claim is no evidence of market value. Alloway v. City of Nashville, 88 Tenn. 510, 13 S. W. 123, 8 L. R. A. 123; Stewart v. Village of Rutland, 58 Vt. 12. When land is taken for a sewer, damages only for the land actually taken can be awarded.

stances is, according to the great weight of authority, its market value at the time of the commencement of the proceedings.[479] The taking of the entire interest excludes necessarily any consideration of either the question of damages or benefits to a remainder. An appropriation of a portion only of an interest will be considered in a subsequent section. The measure of damages, as already stated, adopted almost universally, is the market value in cash of the premises or interest. This has been defined as being "the market value of property is the price which it will bring when it is offered for sale by one who desires, but is not obliged to sell it, and is bought by one who is under no necessity of having it."[480] In ascertaining this market value the present condition of the property should be considered[481] and its capability and adaptibility for a present and special use.[482] The character of the land and consequently its market value is determined by present conditions and exigencies.[483] From the definition

[480] Lewis, Em. Dom. (2d Ed.) § 478.

[481] Schuster v. Sanitary Dist., 177 Ill. 626; Bartlett v. City of Bangor, 67 Me. 460. The owner of land already used as a private road or way is entitled to not more than nominal damages, if they are taken for a highway. See, also, as holding the same, Stetson, v. City of Bangor, 73 Me. 357; Allen v. City of Boston, 137 Mass. 319; Gamble v. City of Philadelphia, 162 Pa. 413, 29 Atl. 739; Prince v. Town of Braintree, 64 Vt. 540, 26 Atl. 1095. The property owner cannot recover for the cost of constructing a private way which is subsequently appropriated as a public highway. Yakima County v. Tullar, 2 Wash. T. 393, 17 Pac. 885.

[482] United States v. Seufert Bros. Co., 78 Fed. 520; United States v. Taffe, 78 Fed. 524; City of Los Angeles v. Pomeroy, 124 Cal. 597; Village of Hyde Park v. Washington Ice Co., 117 Ill. 233; Neal v. Posey County, 12 Ind. App. 533; First Parish in Woburn v. County of Middlesex, 73 Mass. (7 Gray) 106; Gardner v. Inhabitants of Brookline, 127 Mass. 358; Corey v. Inhabitants of Wrentham, 164 Mass. 18; Teele v. City of Boston, 165 Mass. 88, 42 N. E. 506; Manning v. City of Lowell, 173 Mass. 100; Palmer v. Vance, 44 Neb. 348; Town of Groton v. Haines, 36 N. H. 388; Dana v. Craddock, 66 N. H. 593, 32 Atl. 757; Trustees of College Point v. Dennett, 2 Hun (N. Y.) 669; In re Furman St., 17 Wend. (N. Y.) 649; Bryant v. Pottsville Water Co., 190 Pa. 366; Harwood v. Village of West Randolph, 64 Vt. 41, 24 Atl. 97.

[483] Phillips v. Watson, 63 Iowa, 28; McCormick v. City of Baltimore, 45 Md. 512; Pinkham v. Inhabitants of Chelmsford, 109 Mass. 225; Montgomery County v. Schuylkill Bridge Co., 110 Pa. 54, 20 Atl. 407; Grugan v. City of Philadelphia, 158 Pa. 337, 27 Atl. 1000; Reyenthaler v. City of Philadelphia, 160 Pa. 195.

given above of market value it will be noted that the financial condition or necessities of either party to the transaction is not an element [484] and a characteristic definition also excludes any value based upon purely sentimental or psychological reasons,[485] or that which follows from the construction of the improvement itself.[486] Remote, speculative or fictitious values are also excluded and evidence relative to the profits or income of the property for the purpose of promoting its market value is inadmissible.[487]

§ 792. Measure of damages when a part only is taken.

The compensation to which one may be entitled in case a part only of the property is taken is not limited to the market value of the part taken but includes any depreciation of or damage to the remainder because of the fact that a part of property considered as a whole is taken; this doctrine is thoroughly established by an overwhelming weight of authority.[488] The damage to the prop-

[484] Moulton v. Newburyport Water Co., 137 Mass. 163; Heiser v. City of New York, 104 N. Y. 68; Lewis, Em. Dom. § 478.

[485] Whitney v. City of Lynn, 122 Mass. 338. No recovery can be had for the disquietude, vexation and annoyance experienced by the owner because of the proceedings.

[486] Kerr v. South Park Com'rs, 117 U. S. 379; Sanitary Dist. of Chicago v. Loughran, 160 Ill. 362, 43 N. E. 359; Gordon v. Highways Com'rs of Road Dist. No. 3, 169 Ill. 510, 48 N. E. 451; Benton v. Inhabitants of Brookline, 151 Mass. 250, 23 N. E. 846; Sullivan v. Lafayette County Sup'rs, 61 Miss. 271; In re Condemnation of Land for New State House, 19 R. I. 382, 33 Atl. 523. But see Staggord v. City of Providence, 10 R. I. 567.

[487] Shoemaker v. United States, 147 U. S. 282; Monongahela Nav. Co. v. United States, 148 U. S. 312; Pause v. City of Atlanta, 98 Ga. 92; Burke v. Sanitary Dist. of Chicago, 152 Ill. 125; Prosser v. Wapello County, 18 Iowa, 327; Cobb v. City of Boston, 109 Mass. 438; Fairbanks v. Inhabitants of Fitchburg, 110 Mass. 224; Burt v. Wigglesworth, 117 Mass. 302; Gardner v. Inhabitants of Brookline, 127 Mass. 358; Chosen Freeholders of Hudson County v. Emmerich, 57 N. J. Eq. 535, 42 Atl. 107; Van Buren v. Fishkill & M. W. W. Co., 50 Hun, 448, 3 N. Y. Supp. 336; Eddings v. Seabrook, 12 Rich. Law. (S. C.) 504; Stadler v. City of Milwaukee, 34 Wis. 98.

[488] Colbert County Com'rs v. Street, 116 Ala. 28, 22 So. 629. A proper compensation is the difference in value of a tract before and after the establishment of a highway including the value of the land appropriated. Colusa County v. Hudson, 85 Cal. 633, 24 Pac. 791; City of Durango v. Luttrell, 18 Colo. 123; Shawnee County Com'rs v. Beckwith, 10 Kan. 603. Damages may be recovered for interference

erty or to the remainder includes not only the land itself, but also the improvements, if any,[489] or special franchises, easements or appurtenant privileges and in some cases fixtures.[490] The additional compensation which can thus be recovered not only includes payment for the damage sustained because a part is taken, but also any damage suffered by reason of the use of the part which is taken by the one appropriating it[491] or the construction

with a hedge. Dickinson County Com'rs v. Hogan, 39 Kan. 606, 18 Pac. 611; Van Bentham v. Osage County Com'rs, 49 Kan. 30, 30 Pac. 111. The cost of maintaining new fences rendered necessary by the opening of a highway is a proper element of damages. Richmond & L. T. R. Co. v. Rogers, 62 Ky. (1 Duv.) 135; In re Penley, 89 Me. 313, 36 Atl. 397; Cushing v. City of Boston, 144 Mass. 317, 11 N. E. 93. The probability that a sidewalk must be built involving expense in the construction is a proper element of damages on the taking of land for a street. First Church in Boston v. City of Boston, 80 Mass. (14 Gray) 214; Patterson v. City of Boston, 37 Mass. (20 Pick.) 159; City of Grand Rapids v. Luce, 92 Mich. 92, 52 N. W. 635; City of Detroit v. Brennan, 93 Mich. 338, 53 N. W. 525; Moritz v. City of St. Paul, 52 Minn. 409; Sullivan v. Lafayette County Sup'rs, 58 Miss. 790, 61 Miss. 271; Second Congregational Church Soc. v. City of Omaha, 35 Neb. 103; City of Omaha v. Hansen, 36 Neb. 135; Dalrymple v. Witingham, 26 Vt. 345. See, also, Lewis, Em. Dom. (2d Ed.) § 464.

[489] Newburyport Water Co. v. City of Newburyport, 85 Fed. 723; Id., 168 Mass. 541, 47 N. E. 533; Dalzell v. City of Davenport, 12 Iowa, 437; Briggs v. Labette County Com'rs, 39 Kan. 90; Ford v. Lincoln County Com'rs, 64 Me. 408; Hyde v. Middlesex County, 68 Mass. (2 Gray) 267. The damages caused by the removal of portions of a building are to be included in an assessment of damages. Tufts v. City of Charlestown, 70 Mass. (4 Gray) 537; Central Park Bridge Corp. v. City of Lowell, 81 Mass. (15 Gray) 106; Patterson v. City of Boston, 37 Mass. (20 Pick.) 159; City of Boston v. Robbins, 126 Mass. 384; Kuschke v. City of St. Paul, 45 Minn. 225, 47 N. W. 786; City of St. Louis v. Connecticut Mut. L. Ins. Co., 90 Mo. 135; In re Alexander Ave., 63 Hun, 630, 17 N. Y. Supp. 933; In re Reynolds, 48 State Rep. 627, 21 N. Y. Supp. 592; In re City of New York, 33 App. Div. 640, 54 N. Y. Supp. 1066; City of Portland v. Lee Sam, 7 Or. 397; Little Nestucca Road Co. v. Tillamook County, 31 Or. 1; City of Philadelphia v. Linnard, 97 Pa. 343; Pusey v. City of Alleghany, 98 Pa. 522; Mongomery County v. Schuylkill Bridge Co., 110 Pa. 54, 20 Atl. 407; Westchester & W. Plank Road Co. v. Chester County, 182 Pa. 40.

[490] Edmands v. City of Boston, 108 Mass. 535; Williams v. Com., 168 Mass. 364; Shaw v. City of Philadelphia, 169 Pa. 506, 32 Atl. 593. See, also, Matter of Department of Public Rules, 53 Hun, 280, 6 N. Y. Supp. 750.

[491] District of Columbia v. Robin-

of an improvement.[492] The latter element, however, does not include damages accruing from a wrongful construction of the im-

son, 14 App. D. C. 512; Town of Longmont v. Parker, 14 Colo. 386, 23 Pac. 443; City of Atlanta v. Hunnicutt, 95 Ga. 138; City of East St. Louis v. Wiggins Ferry Co., 11 Ill. App. 254; City of Baltimore v. Rice, 73 Md. 307, 21 Atl. 181; Taylor v. City Council of Baltimore, 45 Md. 576; Damon v. Inhabitants of Reading, 68 Mass. (2 Gray) 274; First Parish in Woburn v. Middlesex County, 73 Mass. (7 Gray) 106; Old Colony & F. R. R. Co. v. Inhabitants of Plymouth, 80 Mass. (14 Gray) 155. Where a public highway is laid out across a railroad the company is entitled to damages for the land taken and for the expense of erecting and maintaining signs and cattle guards at the crossing, but not for any increased liability from accidents. In re Endicott, Petitioner, 41 Mass. (24 Pick.) 339; Bailey v. Inhabitants of Woburn, 126 Mass. 416; Stone v. Inhabitants of Heath, 135 Mass. 561. Evidence of the cost of fencing is admissible on the question of damages for taking land for a highway. Lincoln v. Com., 164 Mass. 368; Harper v. City of Detroit, 110 Mich. 427; City of Albany v. Gilbert, 144 Mo. 224, 46 S. W. 157; City of Plattsmouth v. Boeck, 32 Neb. 297, 49 N. W. 167. A city is liable to a property owner for the depreciation in the value of his property caused by the location and construction of a public sewer built near his lot.

Petition of Mt. Washington Road Co., 35 N. H. 134. Compensation should be given to a landowner not only for the value of the land actually taken but for all damages arising from an inconvenient division of the tract and the necessity for additional fencing. New York & L. B. R. Co. v. Capner, 49 N. J. Law, 555, 9 Atl. 781; Griffin v. Martin, 7 Barb. (N. Y.) 297. Damages allowed are presumed to embrace all the uses of the land for a highway which the law permits. Van Brunt v. Town of Flatbush, 59 Hun, 192, 13 N. Y. Supp. 545. Sewers can be constructed under a public street without the payment of compensation to the abutting owner. In re Lexington Ave., 63 Hun, 630, 17 N. Y. Supp. 872; In re Pugh, 22 Misc. 43, 49 N. Y. Supp. 398. The cost of fencing a highway about to be laid out is an element of damage to the owner. Dodson v. City of Cincinnati, 34 Ohio St. 276; Gray v. City of Knoxville, 85 Tenn. 99; Pettigrew v. Village of Evansville, 25 Wis. 223; Pittelkow v. Herman, 94 Wis. 666, 69 N. W. 803.

[492] City of Pasadena v. Stimson, 91 Cal. 238, 27 Pac. 604; Wilcox v. City of Meriden, 57 Conn. 120, 17 Atl. 366; Estes v. City of Macon, 103 Ga. 780, 30 S. E. 246; Tinker v. City of Rockford, 137 Ill. 123, 27 N. E. 74; Hoag v. Switzer, 61 Ill. 294. One is not entitled to recover damages for the construction of a highway adjoining his premises where no part thereof has been taken. Plympton v. Inhabitants of Woburn, 77 Mass. (11 Gray) 415; Brown v. City of Worcester, 79 Mass. (13 Gray) 31. The expense of removing buildings is a proper element of damages. Hartshorn v. Worcester County, 113 Mass. 111; Marsden v. City of Cambridge, 114 Mass. 490. In laying out highways, the owner of a part of a building

provement or use of property appropriated.[493] When property is taken for a highway which is already subject to a public easement by a dedication or prescription, the owner is ordinarily entitled to only nominal damages.[494] If subject to a private way,

can recover for the loss of support and of shelter caused by a removal of the part he does not own. Howe v. Inhabitants of Weymouth, 148 Mass. 605, 20 N. E. 316.

Joplin Consol. Min. Co. v. City of Joplin, 124 Mo. 129, 27 S. W. 406. The discharge of sewage into a stream running through a farm affords a proper claim for damages as well as the value of the strip of land taken for the actual construction of the sewer. Waldron v. Kansas City, 69 Mo. App. 50; Richardson v. Levee Com'rs, 68 Miss. 539, 9 So. 351; City of Plattsmouth v. Boeck, 32 Neb. 297, 49 N. W. 167; Churchill v. Beethe, 48 Neb. 87, 66 N. W. 992, 35 L. R. A. 442; Inhabitants of Readington v. Dilley, 24 N. J. Law (4 Zab.) 209; Van Riper v. Essex Public Road Board, 38 N. J. Law, 23. Putnam v. Douglas County, 6 Or. 328. The measure of damages to which the owner is entitled on the opening of a public highway includes the value of the land taken, the estimated cost of extra fences and the inconvenience caused to the remainder of the premises.

City of Portland v. Kamm, 10 Or. 383; Pusey v. City of Allegheny, 98 Pa. 522; Patton v. City of Philadelphia, 175 Pa. 88, 34 Atl. 344. The damage caused by the construction of a street at a grade which leaves the remainder of the property in a depression is a damage for which compensation must be made. Darlington v. Allegheny City, 189 Pa. 202, 42 Atl. 112; Cooper v. City of Dallas, 83 Tex. 239, 18 S. W. 565; Leonard v. Village of Rutland, 66 Vt. 105, 28 Atl. 885; Bridgeman v. Village of Hardwick, 67 Vt. 653, 32 Atl. 502. But see Deaton v. Polk County, 9 Iowa, 594; Taft v. Com., 158 Mass. 526, 33 N. E. 1046; Rand v. City of Boston, 164 Mass. 354, 41 N. E. 484; In re Ridge St., 29 Pa. 391; Parke v. City of Seattle, 5 Wash. 1, 31 Pac. 310, 32 Pac. 82, 20 L. R. A. 68. A lot owner can not recover consequential damages arising from a change in the surface of the street through its improvement. Dodge v. Ashland County, 88 Wis. 577, 60 N. W. 830.

[493] Tearney v. Smith, 86 Ill. 391; White v. City of Medford, 163 Mass. 164, 39 N. E. 997; Alloway v. City of Nashville, 88 Tenn. 510, 8 L. R. A. 123; Stewart v. Village of Rutland, 58 Vt. 12. But see Bastian v. City of Philadelphia, 180 Pa. 227, 36 Atl. 746.

[494] Sherer v. City of Jasper, 93 Ala. 530, 9 So. 584; Stetson v. City of Bangor, 60 Me. 313; Bartlett v. City of Bangor, 67 Me. 460; Danforth v. City of Bangor, 85 Me. 423, 27 Atl. 268; Valentine v. City of Boston, 39 Mass. (22 Pick.) 75; Walker v. City of Manchester, 58 N. H. 438; Clark v. City of Elizabeth, 37 N. J. Law, 120; In re Thirty-Second St., 19 Wend. (N. Y.) 128; Baldwin v. City of Buffalo, 35 N. Y. 376; In re City of Brooklyn, 73 N. Y. 179; In re Adams, 141 N. Y. 297, 36 N. E. 318; Village of Olean v. Steyner, 135 N. Y. 341, 32 N. E. 9, 17 L. R. A. 640. See, also, ——, ante.

this fact should be considered in mitigation of damages.[495] If an easement has not been acquired, the owner is entitled to full damages, although the land or part of it may be used by the public as a way.[496]

(a) The measure of damages when property is injuriously affected but no part taken. Constitutional provisions may give a right to a property owner to recover damages when no part of his property is taken but when it is damaged, injured or injuriously affected by the construction or maintenance of the work of improvement.[497] The doctrine of benefits applies in these instances.

(b) Special damages only considered. The damages resulting from the appropriation of property for a particular and public use, as well as benefits, may be either general or special in their nature. General damages are those which are suffered by the community at large; no one individual being able to show that he has been injured in any manner or to any extent different or in excess of the injury suffered by the public at large. Special damages, on the contrary, are those which an individual may have received not only in excess of the damages suffered by the public at large, but also by himself peculiarly and alone.[498] The rule applies that the property owner is not entitled to recover for gen-

[495] Tufts v. City of Charlestown, 70 Mass. (4 Gray) 537; Beale v. City of Boston, 166 Mass. 53, 43 N. E. 1029; Abbott v. Stewartstown, 47 N. H. 228.

[496] Green v. Bethea, 30 Ga. 896; Town of Princeton v. Templeton, 71 Ill. 68; Ayres v. Richards, 41 Mich. 680; In re One Hundred & Seventy-Third St., 78 Hun, 487, 29 N. Y. Supp. 205; City of Buffalo v. Pratt, 131 N. Y. 293, 30 N. E. 233, 15 L. R. A. 413; In re Opening of Wayne Ave., 124 Pa. 135, 16 Atl. 631; In re Opening of Brooklyn St., 118 Pa. 640, 12 Atl. 664.

[497] City Council of Montgomery v. Maddox, 89 Ala. 181; Smith v. Floyd County, 85 Ga. 420, 11 S. E. 850; City Council of Augusta v. Schrameck, 96 Ga. 426, 23 S. E. 400; Osgood v. City of Chicago, 154 Ill. 194, 41 N. E. 40; Parker v. City of Atchison, 46 Kan. 14, 26 Pac. 435; Chase v. City of Portland, 86 Me. 367, 29 Atl. 1104; Washburn & Moen Mfg. Co. v. City of Worcester, 153 Mass. 494, 27 N. E. 664; Markowitz v. Kansas City, 125 Mo. 485, 28 S. W. 642; City of Omaha v. Kramer, 25 Neb. 489, 41 N. W. 295; City of Plattsmouth v. Boeck, 32 Neb. 297, 49 N. W. 167; Chambers v. South Chester Borough, 140 Pa. 510; Riddle v. Delaware County, 156 Pa. 643, 27 Atl. 569; Dawson v. City of Pittsburgh, 159 Pa. 317.

[498] In re Beekman St., 4 Bradf. (N. Y.) 503. When a place of burial is taken for a public street, the expense of removing and re-interring the remains of those buried there is a damage for which compensation can be recovered.

eral damages; that he can claim and receive compensation only for the special and particular damage which he alone has suffered because of the appropriation of the property under the power of eminent domain.[499]

§ 793. The question of benefits.

It is not within the province of this work to consider in detail the constitutional provisions or different judicial rulings relative to either the question of damages or of benefits. The general principles alone it is proper to give, and for a full and detailed consideration of the subject, the works to which reference is made must be consulted.[500] As already stated, the consideration of compensation where the whole of property is taken is the simplest condition. Where part is appropriated of the interest, not only must the question of damage to the remainder be considered and made a part of just compensation, but in the determination of this, other elements than the market value of the property enter. The fact that the property left may be benefited by the taking of a part and the construction of the improvement is to be considered and the resulting benefit taken in connection with the total damage will form a basis for the estimation of what may be termed net damages, or to state the principle more concisely, benefits received may lessen the damage to the remainder.[501] The

[499] Appeal of Campbell (Pa.) 12 Atl. 843.

[500] Mills, Em. Dom.; Lewis, Em. Dom.; Am. & Eng. Enc. Law. (2d Ed.) tit. Eminent Domain.

[501] Bauman v. Ross, 167 U. S. 548. "The just compensation required by the constitution to be made to the owner is to be measured by the loss caused to him by the appropriation. He is entitled to receive the value of what he has been deprived of, and no more. To award him less would be unjust to him; to award him more would be unjust to the public. Consequently, when part only of a parcel of land is taken for a highway, the value of that part is not the sole measure of the compensation or damages to be paid the owner; but the incidental injury or benefit to the part not taken is also to be considered. When the part not taken is left in such shape or condition, as to be in itself of less value than before, the owner is entitled to additional damages on that account. When, on the other hand, the part which he retains is specially and directly increased in value by the public improvement, the damages to the whole parcel by the appropriation of part of it are lessened. If, for example, by the widening of a street, the part which lies next the street, being the most valuable part of the land, is taken for the public use, and what was before in the rear becomes the front part, and upon a

benefits thus to be considered are usually those termed "special." The general benefit and advantage that property may receive as a part of a community from the construction of local improvements is not usually regarded but only the particular and the special advantages which a tract of land may receive or enjoy is to be considered in a determination of the compensation to which the owner is entitled.[502]

wider street, and thereby of greater value than the whole was before, it is neither just in itself, nor required by the constitution, that the owner should be entitled both to receive the full value of the part taken, considered as front land, and to retain the increase in value of the back land, which has been made front land by the same taking."

Piper's Appeal, 32 Cal. 530; Trinity College v. City of Hartford, 32 Conn. 452; Peck v. Borough of Bristol, 74 Conn. 483, 51 Atl. 521; Village of North Alton v. Dorsett, 59 Ill. App. 612. The measure of damages for injury to private property from a public improvement is the depreciation in market value less the benefit conferred. Rassier v. Grimmer, 130 Ind. 219, 29 N. E. 918; Hire v. Kniseley, 130 Ind. 295, 29 N. E. 1132; Hagaman v. Moore, 84 Ind. 496; Grove v. Allen, 92 Iowa, 519; In re Penley, 89 Me. 313, 36 Atl. 397; Commonwealth v. Blue-Hill Turnpike Corp., 5 Mass. 420; Wood v. Inhabitants of Hudson, 114 Mass. 513; Fairchild v. City of St. Paul, 46 Minn. 540; 49 N. W. 325; Lingo v. Burford (Mo.) 18 S. W. 1081; Jackson County v. Waldo, 85 Mo. 637. The special benefits may equal the damages. State v. Miller, 23 N. J. Law, 383. The benefits and damages should be ascertained and paid separately. Betts v. City of Williamsburgh, 15 Barb. (N. Y.) 255. But see Frederick v. Shane, 32 Iowa, 254. Construing Iowa Const. art. 1, § 18, which provides that on assessment of damages for property taken for a public use, the jury shall not take into consideration any advantage that may result to the owner on account of the improvement for which it is taken. McKusick v. City of Stillwater, 44 Minn. 372, 46 N. W. 769; Williamson v. Inhabitants of East Amwell, 28 N. J. Law, 270; Fowler v. Larabee, 59 N. J. Law, 259, 35 Atl. 911; Lewis, Em. Dom. § 471a.

[502] District of Columbia v. Armes, 8 App. D. C. 393; State v. Evans, 3 Ill. 208; Town of Geneva v. Peterson, 21 Ill. App. 454; Brokaw v. Com'rs of Highways, 99 Ill. App. 15; Waggeman v. Village of North Peoria, 155 Ill. 545, 40 N. E. 485, distinguishing City of Bloomington v. Latham, 142 Ill. 462, 32 N. E. 506, 18 L. R. A. 487; Gordon v. Highway Com'rs of Road Dist. No. 3, 169 Ill. 510, 48 N. E. 451; City of Chicago v. Spoor, 190 Ill. 340, 60 N. E. 540; Rassier v. Grimmer, 130 Ind. 219; Goodwin v. Warren County Com'rs, 146 Ind. 164; Pottawattomie County Com'rs v. O'Sullivan, 17 Kan. 58. In the opinion of the court Mr. Justice Brewer said: "Outside of any special constitutional or statutory restrictions, the right of the state to take private property for public use, and the

The courts recognize the existence, therefore, of both general and special damages as well as general and special benefits and the authorities are widely at variance in regard to the extent to which these various elements must be considered in determining

corresponding right of the individual to receive compensation for the property thus taken, may be assumed. * * * But this compensation is secured if the individual receive an amount which, with the direct benefits accruing, will equal the loss sustained by the appropriation. We of course exclude the indirect and general benefits which result to the public as a whole, and therefore to the individual as one of the public; for he pays in taxation for his share of such general benefits. But if the proposed road or other improvement inure to the direct and special benefit of the individual out of whose property a part is taken, he receives something which none else of the public receive, and it is just that this should be taken into account in determining what is compensation. Otherwise, he is favored above the rest, and instead of simply being made whole, he profits by the appropriation, and the taxes of the others must be increased for his special advantage. Upon general principles then, and with due regard to right and justice, it should be held, that the public may show what direct and special benefits accrue to an individual claiming road damages, and that these special benefits should be applied to the reduction of the damages otherwise shown to have been sustained. * * * The word 'damages' is of general import, and is equivalent to compensation. It includes more than the mere value of the property taken, for often the main injury is not in the value of the property absolutely lost to the owner, but in the effect upon the balance of his property of the cutting out of the part taken. He is damaged, therefore, more than in the value of that which is taken. Conversely, the appropriation of the part taken to the new uses for which it is taken may operate to the direct and special improvement and benefit of that not taken. Surely, this direct increase in value, this special benefit resulting from the improvement the public is making, and for which it must be taxed, reduces the damages he has sustained."

Roberts v. Brown County Com'rs, 21 Kan. 247. "That is, the increased value must be founded upon something which affects the land itself directly and proximately. It must be founded upon something which increases the actual or usable value of the land, as well as the market or salable value thereof, and not such as increases merely the market or salable value alone. Increased value founded upon merely increased facilities for travel and transportation by the public in general, is not the kind of increased value which may be taken into consideration in reducing the damages to be awarded to the landowner. That kind of increased value is too indirect and too remote from the original cause, which cause is the laying out of the road. Besides, it is a kind of increased value which is common to the whole community in general, and to each individual thereof to a

what is just compensation.[503] The local decisions of each state must settle the question for the local practitioner, as no general rule can be given.

greater or less extent; and it has no relation to the use of the land as land, but it is merely an increased market value founded upon the extraneous circumstances of increased facilities for public travel and transportation."

Trosper v. Saline County Com'rs, 27 Kan. 391; Nand v. City of Newton, 58 Kan. 229; Chase v. City of Portland, 86 Me. 267, 29 Atl. 1104; Friedenwald v. City of Baltimore, 74 Md. 116, 21 Atl. 555; Boston & M. R. Co. v. County of Middlesex, 83 Mass. (1 Allen) 324; Dwight v. Hampden County Com'rs, 65 Mass. (11 Cush.) 201; Farwell v. City of Cambridge, 77 Mass. (11 Gray) 413; Janvrin v. Poole, 181 Mass. 463, 63 N. E. 1066; Whitney v. City of Boston, 98 Mass. 312; Uphan v. City of Worcester, 113 Mass. 97; French v. City of Lowell, 117 Mass. 363; Clark v. City of Worcester, 125 Mass. 226; Webster v. Inhabitants of Melrose, 168 Mass. 5; Arbrush v. Town of Oakdale, 28 Minn. 61; Miller v. Towns of Beaver & Le Roy, 37 Minn. 203, 33 N. W. 559; Minnesota Transfer R. Co. v. District Court, 68 Minn. 242, 71 N. W. 27; Kent v. City of St. Joseph, 72 Mo. App. 42; State v. City of Kansas, 89 Mo. 34, 14 S W. 515; Lingo v. Burford, 112 Mo. 149, 20 S. W. 459, affirming 18 S. W. 1081; Kansas City v. Ward, 134 Mo. 172; Wagener v. Gage County, 3 Neb. 237. The measure of damages to be awarded the landowner through whose property a public highway is constructed is the fair market value of the land actually taken while special damages may be set off against incidental injury to the residue of the tract.

Kirkendall v. City of Omaha, 39 Neb. 1, 57 N. W. 752; City of Omaha v. Howell Lumber Co., 38 Neb. 633, 46 N. W. 919. Special damages to the remainder of a tract cannot be set off against the value of the land taken but only against incidental damages to the remainder. Woodman v. Town of Northwood, 67 N. H. 307, 36 Atl. 255; Carpenter v. Landaff, 42 N. H. 218; Whitcher v. Benton, 50 N. H. 25. Access resulting from the opening of a highway is not a special benefit, but one enjoyed by the community at large. Asheville Com'rs v. Johnston, 71 N. C. 398; Parker v. Burgett, 29 Ohio St. 513; Beekman v. Jackson County, 18 Or. 283, 22 Pac. 1074; City of Allegheny v. Black's Heirs, 99 Pa. 152; Blair v. City of Charleston, 43 W. Va. 62, 26 S. E. 341, 35 L. R. A. 852; Dickson v. City of Racine, 65 Wis. 306.

[503] City of Kansas v. Morse, 105 Mo. 510, 16 S. W. 893; Covert v. Hulick, 33 N. J. Law, 307; Lewis, Em. Dom. (2d Ed.) § 465. "The decisions may be divided into five classes, according as they maintain one or the other of the following propositions:

"First. Benefits cannot be considered at all.

"Second. Special benefits may be set off against damages to the remainder, but not against the value of the part taken.

"Third. Benefits, whether general or special, may be set off as in the last proposition.

§ 794. Discontinuance of proceedings.

It is optional with the one exercising the power of eminent domain to proceed with the proposed improvement and he may voluntarily discontinue the proceedings at any time.[504] A liability to the landowner under these circumstances is largely a question of local statutes or decisions.[505]

II. Its Control and Use.

§ 795. Generally.
796. Investment of funds.
797. The control of public highways.
798. Control discretionary.
799. Legislative control.

"Fourth. Special benefits may be set off against both damages to the remainder or the value of the part taken.

"Fifth. Both general and special benefits may be set off as in the last proposition. It will be observed that these propositions pass from one extreme to the other."

[504] Brokaw v. City of Terre Haute, 97 Ind. 451. Proceedings to widen a street may be discontinued by a city although it had taken possession of the land sought to be appropriated. City of St. Louis v. Weber, 140 Mo. 515, 41 S. W. 965; Hawkins v. Trustees of Rochester, 1 Wend. (N. Y.) 53. A city has no authority to discontinue condemnation proceedings after the award has been made and confirmed by the lapse of time in which an appeal may be taken. People v. Village of Brooklyn, 1 Wend. (N. Y.) 318; Washington Park v. Barnes, 2 T. & C. (N. Y.) 637; In re Canal St., 11 Wend. (N. Y.) 154; In re Corporation of New York, 18 Johns. (N. Y.) 506; In re Anthony St., 20 Wend. (N. Y.) 618; People v. Syracuse Common Council, 78 N. Y. 56. Proceedings by municipal authorities to condemn land for public purposes cannot be discontinued by them after the amount of compensation has been fixed as finality.

[505] In the following case a liability was imposed: Brown v. Robertson, 23 Ill. 631; Black v. City of Baltimore, 50 Md. 235; Harrington v. Berkshire County Com'rs, 39 Mass. (22 Pick.) 263; Wheeler v. City of Fitchburg, 150 Mass. 350, 23 N. E. 207; Pearsall v. Eaton County Sup'rs, 74 Mich. 558, 42 N. W. 77, 4 L. R. A. 193; Clark v. Town of Hampstead, 19 N. H. 365; Thurston v. Town of Alstead, 26 N. H. 259; In re Trustees of White Plains, 65 App. Div. 417, 72 N. Y. Supp. 1026. The discontinuance of proceedings is within the discretion of the board as to its terms and is not limited to the payment of ordinary taxes, costs and disbursements. Highland v. City of Galveston, 54 Tex. 527.

As to no resulting liability see the following cases: Carson v. City of Hartford, 48 Conn. 68; Stevens v. Borough of Danbury, 53 Conn. 9; City of New Bedford v. Bristol County Com'rs, 75 Mass. (9 Gray) 346.

§ 800. Delegation of power to control and regulate the use of public property.
801. Power as delegated to municipal corporations.
802. Delegation of power to public and quasi public corporations.
803. The extent of powers granted to delegated agencies.
804. Extent of power granted; implied powers.
805. Same subject; fundamental legislative limitations.
806. Extent of power limited by character of property.
807. The power to open, repair and improve highways.
808. Alteration of streets or highways.
809. Difference in urban and suburban uses.
810. Change of grade in a highway or street.
811. Statutory damages for change of grade.
812. Definition of grade.
813. Damages recoverable.
814. Unlawful change of grade.
815. Diversion from a public or specific use
816. Control of property acquired by gift.
817. Rights of abutting owners.
818. Legislative control as modified by the abutter's rights.
819. Abutter's special rights; lateral support.
820. Same subject continued; abutter's right to light, air and access.
821. Abutter's rights in common with the public.
822. Right of abutting owners to use of property.
823. Abutter's rights as dependent upon the passing of a fee or an easement.
824. Use of highway by abutter.
825. Use of materials by abutter or a public corporation.
826. Abutter's rights when highway is devoted to new or unusual use.
827. New use or unanticipated servitude.
828. Obstructions in a highway.
829. Authorized obstructions.
830. Abutter's right to additional compensation.
831. The same subject continued.
832. Permanent obstructions; structures and their adjuncts.
833. Wires and poles.
834. Conditions imposed for use of highway

§ 795. Generally.

A private person, natural or artifical, is limited in the control and use of its property by the nature of the title or, stated differently, the manner in which it is acquired. The same principles of law apply to the control and use of property by a public corporation and a further limitation is found based upon the purpose for which property is secured. The extent and the manner

of the control and use of property held by a public corporation is therefore dependent upon the character of its title, the manner of acquirement and the purpose for which it is acquired.[506] It necessarily follows, therefore, and because of the nature of a public corporation, that, as compared with private persons or corporations, its management and disposition of property is more restricted and its capacity comparatively limited. This principle obtains because of the fundamental differences found existing between a private person or corporation and a public corporation, in the exercise of their powers or legal capacities, based on the purpose for which created and the manner in which revenues are secured. A public corporation is created solely as a governmental necessity and the basis of a legal acquirement of property is its use for a governmental or public purpose and control and that use is radically limited by this consideration.[507] But within the operation of these rules, the property of a public corporation may be protected and controlled by it and no private person has the power to interfere with it or destroy or impair its usefulness for the purpose for which originally acquired and held.[508] The power

[506] Gooderhan v. City of Toronto, 25 Can. Sup. Ct. 246; Spaulding v. Wesson, 115 Cal. 441, 47 Pac. 249. A highway must be a public one in order that the municipality may have jurisdiction to improve it.

Town of Oldtown v. Dooley, 81 Ill. 255. A spring in a public road is not a part of the highway and its use is, therefore, not an incident to the proper use of the same. State v. Judge of Civil Dist. Ct., 51 La. Ann. 168, 26 So. 374; Dodd v. consolidated Traction Co., 57 N. J. Law, 482; Simon v. Northup, 27 Or. 487, 30 L. R. A. 171.

[507] Smith v. City of Leavenworth, 15 Kan. 81.

[508] Hancock v. Lousiville & N. R. Co., 145 U. S. 409. Where a public corporation is entitled to vote stock in a railroad company secured through the granting of aid. Pittsburgh, C., C. & St. L. R. Co. v. Iddings, 28 Ind. App. 504, 62 N. E. 112; Trustees of Augusta v. Perkins, 42 (3 B. Mon.) 437. Public authorities may maintain an action of ejectment to recover possession of streets for the use of the public.

Walker v. Trustees of Columbus, 43 Ky. (4 B. Mon.) 259; Inhabitants of Cumberland County v. Central Wharf Steam Tow-Boat Co., 90 Me. 95, 37 Atl. 867; Inhabitants of First Parish in Brunswick v. Dunning, 7 Mass. 445; Ward v. Detroit, M. & M. R. Co., 62 Mich. 46, 28 N. W. 775, 785; State v. Goetz, 24 Minn. 114; City of Fergus Falls v. Boen, 78 Minn. 186, 80 N. W. 961. Public sewers are the property of the city and may be controlled and regulated by them without interference from private persons.

Howard County v. Chicago & A. R. Co. 130 Mo. 652, 32 S. W. 651.

of control and regulation is vested in the public authorities only as representatives of the public and their action is warranted only for the vindication of a public right or the protection and regulation of the public use.[509] As a legal principle, the inherent differences between a public corporation and a private person or corporation cannot be changed by legislation and the legal right in this respect of a public corporation to acquire, dispose of or use its property, cannot be increased or diminished by legislative action. Legislative attempts to vest a public corporation with the capacities and powers of a private person or corporation are necessarily futile as a legal proposition. The fundamental character of a governmental agent cannot be changed through mere legislative desire that it should be changed as an economical or party convenience.

§ 796. Investment of funds.

Many public corporations through a wise administration of their finances accumulate a surplus for the use of particular departments. The investment of these moneys is usually made a matter of statutory provision; the character of the investment is designated [510] and particular officials named who are charged with the duty in accordance with the plain provisions of the law.[511] These statutory directions are considered mandatory and public funds must be invested in the manner and at the time designated.[512] A failure in this respect will unquestionably create a personal liability on the part of the public official [513] violating or ignoring the law.

A company having a prescriptive title to the ownership of a bridge may sue for an injury thereto. Cue v. Breeland, 78 Miss. 864, 29 So. 850; Glasby v. Morris, 18 N. J. Eq. (3 C. E. Green) 72; Jersey City v. Central R. Co., 40 N. J. Eq. (13 Stew.) 417; People v. Works, 7 Wend. (N. Y.) 486; Town of Ft. Covington v. United States & C. R. Co., 8 App. Div. 223, 40 N. Y. Supp. 313; Id., 156 N. Y. 702, 51 N. E. 1094. A town has such a property interest in a highway bridge as will sustain an action for its damage or destruction.

[509] Methodist Episcopal Church v. City of Hoboken, 33 N. J. Law, 13.

[510] See §§ 414 and 483, ante.

[511] State v. Bartley, 40 Neb. 298, 58 N. W. 966; Boydston v. Rockwall County, 86 Tex. 234, 24 S. W. 272.

[512] Village of Glenville v. Englehart, 19 Ohio Circ. R. 285. It is not permissible for a village treasurer to receive as his own public interest on public moneys. See. also, §§ 414 and 483 ante.

[513] See §§ 414 and 483, ante.

§ 797. The control of public highways.

The greater number of questions relating to the use and control of public property arise in connection with the public highways. This is true both because of the fact that the holdings of these properties are relatively large and that private persons, both natural and artificial, are interested to a greater extent in their use. The control of the public highways by a public corporation is, to repeat a principle stated in a preceding section, to a large extent, limited by the manner in which, and the purposes for which, they are acquired.[514] A public corporation can acquire a public highway irrespective of the manner of its acquisition only because of the public necessity arising for the existence of a means of passing and repassing by the residents of the community.[515] The control, therefore, of a public highway, is limited by the purposes for which it can be acquired and only such control and use is legally possible as will come within the bearing of this purpose.[516] Where the land of an individual has been legally acquired for a highway, the public corporation controlling it has the right to appropriate the property so taken to all legitimate uses and servitudes that custom will permit and the public good, as thus measured, requires.[517] The lawful exercise of these powers does not create any liability.[518] The authority to make and establish

[514] Town of Rice v. Chicago B. & N. R. Co., 30 Ill. App. 481; Grove v. City of Ft. Wayne, 45 Ind. 429.

[515] Smith v. City of Leavenworth, 15 Kan. 81; People v. Kerr, 37 Barb. (N. Y.) 357; City of New York v. Kerr, 38 Barb. (N. Y.) 369. See §§ 422 et seq., ante.

[516] Chicago v. McGinn, 51 Ill. 266; City of Chicago v. Collins, 175 Ill. 445, 51 N. E. 907, 49 L. R. A. 408. The use of streets is a right, not a privilege or an occupation; there is therefore no implied power to authorize the imposition of a license fee for the use of streets by owners of private conveyances. Dubach v. Hannibal & St. J. R. Co. 89 Mo. 483, 1 S. W. 86.

[517] City of Dubuque v. Maloney, 9 Iowa, 450; Com. v. Worcester, 20 Mass. (3 Pick.) 462; Hatch v. Hawkes, 126 Mass. 177. Under Mass. St. 1869, c. 237, § 1, authorizing the acquisition of "gravel and clay pits," and the taking therefrom of the earth and gravel necessary to be used in the construction, repair, or improvement of streets and highways, any material suitable for the purpose mentioned capable of being dug out of the ground, acquired and removed by ordinary excavation, can be used. Plant v. Long Island R. Co., 10 Barb. (N. Y.) 26; Washington v. City of Nashville, 31 Tenn. (1 Swan) 177.

[518] City of Montgomery v. Townsend, 80 Ala. 489, 4 So. 780; Simmons v. Camden, 26 Ark. 276; De Baker v. Southern Cal. R. Co. 106 Cal. 257, 39 Pac. 610; Durand v.

ordinances and regulations concerning sidewalks and streets granted to a municipal corporation includes the power of determining the respective widths of the street and the sidewalk and how the space appropriated both shall be apportioned between the two.[519]

§ 798. Control discretionary.

In a large sense, the power to control public property is a discretionary one, assuming that the control properly comes within the principles already laid down. The differences between imperative and discretionary powers have already been explained.[520] Where the legal capacity is given to a public corporation in this regard, it is discretionary with local officials representing it to exercise or refrain from exercising the power and their action is not subject to criticism or judicial review.[521] The doctrine applies to the acquiring and opening,[522] including grading and regrading,[523] of streets with their subsequent improvement and

Borough of Ansonia, 57 Conn. 70, 17 Atl. 283; Clark v. City of Wilmington, 5 Har. (Del.) 243; Roberts v. City of Chicago, 26 Ill. 249; Murphy v. City of Chicago, 29 Ill. 279; Sanitary Dist. of Chicago v. McGuirl, 86 Ill. App. 392; City of Anderson v. Bain, 20 Ind. 254, 22 N. E. 323; Cole v. City of Muscatine, 14 Iowa, 296; City of St. Louis v. Gurno, 12 Mo. 414; Lambar v. City of St. Louis, 15 Mo. 610; White v. Yazoo City, 27 Miss. 357; Radcliff's Ex'rs v. City of Brooklyn, 4 N. Y. (4 Comst.) 195. No damages can be recovered for loss of lateral support in opening streets under N. Y. laws, 1833 and 1838. Kavanagh v. City of Brooklyn, 38 Barb. (N. Y.) 232; Watson v. City of Kingston, 114 N. Y. 88, 21 N. E. 102; O'Connor v. City of Pittsburgh, 18 Pa. 187; Humes v. City of Knoxville, 20 Tenn. (1 Humph.) 403; Home Bldg. & Conveyance Co. v. City of Roanoke, 91 Va. 52, 20 S. E. 895, 27 L. R. A. 551. But see Wendell v. City of Troy, 39 Barb. (N. Y. 329. See, also, Demarest, El. R. Law.

[519] Taintor v. Town of Morristown, 33 N. J. Law, 57.

[520] §§ 108 et seq., ante.

[521] Burckhardt v. City of Atlanta, 103 Ga. 302; Michigan Tel. Co. v. City of St. Joseph, 121 Mich. 502, 80 N. W. 383, 47 L. R. A. 87; McClellan v. Town of Weston, 49 W. Va. 669, 39 S. E. 670, 55 L. R. A. 898.

[522] Grant v. City of Newark, 28 N. J. Law (4 Dutch.) 491. But this discretion, however, is subject to the public needs. Cherry v. Town of Keyport, 52 N. J. Law, 544, 20 Atl. 970; Anderson v. Turbeville, 46 Tenn. (6 Cold.) 150. The same principle also sustains the discretionary abandonment of a street where the burden of repair is excessive. Raht v. Southern R. Co. (Tenn. Ch. App.) 50 S. W. 72. See, also, §§ 429 et seq., ante.

[523] Goszler v. Corporation of Georgetown, 6 Wheat. (U. S.) 593;

repair.[524] It also applies to the right of public corporations to alter highways either by a change of direction,[525] a change in the character of the roadway[526] or an increase or decrease in its length or width.[527] The principle also applies to the particular form of improvement such as the macadamizing or paving of a street.[528]

The control is discretionary not only in respect to the acquirement of the property and its improvement or alteration, but also with respect to the time of action.[529] The above principles apply in all cases unless the power of control in any respect is made imperative either in extent or time of exercise in the grant of the power by the legislature.

§ 799. Legislative control.

The supreme control of the legislature representing the state or sovereign over the property of all public corporations has already been considered.[530] This control is limited by constitutional provisions, especially those protecting private rights and by the inherent nature and character of public corporations.[531] The control of

Fellowes v. City of New Haven, 44 Conn. 240; McHale v. Easton & B. Transit Co., 169 Pa. 416, 32 Atl. 461.

[524] Tuggle v. City of Atlanta, 57 Ga. 114; Blundon v. Crosier, 93 Md. 355, 49 Atl. 1; Raht v. Southern R. Co. (Tenn. Ch. App.) 50 S. W. 72. See, also, subject fully considered under §§ 341 et seq., ante.

[525] See § 808, post.

[526] See § 808, post.

[527] Brock v. Dore, 166 Mass. 161, 44 N. E. 142; City of San Francisco v. Kiernan, 98 Cal. 614, 33 Pac. 720; Brown v. San Francisco County Sup'rs, 124 Cal. 274, 57 Pac. 82; Louisiana Ice Mfg. Co. v. City of New Orleans, 43 La. Ann. 217, 9 So. 21; Scott v. Marlin, 25 Tex. Civ. App. 353, 60 S. W. 969.

[528] Keith v. Wilson, 145 Ind. 149, 44 N. E. 13; Burlington & M. R. R. Co. v. Spearman, 12 Iowa, 112; Dewey v. City of Des Moines, 100 Iowa, 416, 70 N. W. 605. The necessity for paving a street is to be determined partially by the use made of the street by the public generally. Schmitt v. City of New Orleans, 48 La. Ann. 1440, 21 So. 24. See, also, §§ 341, 342, ante.

[529] Allen v. La Force, 95 Mo. App. 324, 68 S. W. 1057.

[530] See Chapter III, ante.

[531] Wilson v. Eureka City, 173 U. S. 32; Murdock v. City of Cincinnati, 39 Fed. 891; Hoover v. McChesney, 81 Fed. 472; Stephenson v. Brunson, 83 Ala. 455, 3 So. 768; Pope v. Macon, 23 Ark. 644; McDonald v. Conniff, 99 Cal. 386, 34 Pac. 71; Vernon School Dist. v. Los Angeles Board of Education, 125 Cal. 593, 58 Pac. 175; Evans v. City of Denver, 26 Colo. 193, 57 Pac. 696; Appeal of Norwalk St. R. Co., 69 Conn. 576, 37 Atl. 1080, 38 Atl. 708, 39 L. R. A. 794; People v.

public property, therefore, ultimately and originally rests in the legislative branch of the government as representing the public at large. The manner and extent of this control and use is usually exercised by subordinate public corporations to whom has been delegated the power by the legislature. Such a grant may be withdrawn, diminished or enlarged at the pleasure of the legislative body, limited, to repeat, only by the character of the title to property and the purpose for which it has been acquired.[532] The unlimited power of the legislature in respect to the control and use of public property permits an arbitrary change of agency for

Martin, 178 Ill. 611, 53 N. E. 309; State v. Kolsem, 130 Ind. 434, 29 N. E. 595, 14 L. R. A. 566; Taggart v. Claypool, 145 Ind. 590, 32 L. R. A. 586; Fleming v. Hull, 73 Iowa, 598, 35 N. W. 673; State v. Brown, 35 Kan. 167; McArthur v. Nelson, 81 Ky. 67; Bennett v. Davis, 90 Me. 102; Ulman v. City of Baltimore, 72 Md. 587, 20 Atl. 141, 21 A. 709, 11 L. R. A. 224; People v. Ingham County Sup'rs, 20 Mich. 95. The legislature, however, if it sees fit may delegate this power either absolutely or under such restrictions, terms or conditions as may seem proper.

City of St. Louis v. Hill, 116 Mo. 527, 21 L. R. A. 226; Chauvin v. Valiton, 8 Mont. 451, 20 Pac. 658, 3 L. R. A. 194; In re Sewer Assessment, 54 N. J. Law, 156, 23 Atl. 517; Robert v. Kings County Sup'rs, 158 N. Y. 673, 52 N. E. 1126; Gilman v. Tucker, 128 N. Y. 190, 13 L. R. A. 304; State v. Divine, 98 N. C. 778, 4 S. E. 477; Edmonds v. Herbrandson, 2 N. D. 270, 14 L. R. A. 725; State v. Commissioners, 54 Oh. St. 333, 43 N. E. 587; Oregon City v. Moore, 3 Or. 215, 46 Pac. 1017; City of Philadelphia v. Linnard, 97 Pa. 242; In re Chestnut street, 118 Pa. 593; In re Wyoming St, 137 Pa. 494; In re Pittsburgh's Petition, 138 Pa. 401, 21 Atl. 757; Sanders v. Venning, 38 S. C. 502, 17 S. E. 134; State v. Holden, 14 Utah, 71, 46 Pac. 756, 37 L. R. A. 103; State v. Stewart, 74 Wis. 620, 43 N. W. 947, 6 L. R. A. 394. But see People v. Jessup, 160 N. Y. 249, 54 N. E. 682, reversing 28 App. Div. 524, 51 N. Y. Supp. 228, which holds that an old grant to the town of South Hampton by the crown on Nov. 1, 1676, is superior to any title or claim of the state relative to the same matter.

[532] Stoutenburgh v. Hennick, 129 U. S. 141; Backus v. Fort St. Union Depot Co., 169 U. S. 557; Williams v. Eggleston, 170 U. S. 304; Sinton v. Ashbury, 41 Cal. 525; Turner v. City of Forsyth, 78 Ga. 683, 3 S. E. 649; Indianapolis & C. R. Co. v. State, 37 Ind. 489; Ingraham v. Chicago, D. & M. R. R. Co., 34 Iowa, 249; Ford v. Town of North Des Moines, 80 Iowa, 626; State v. City of New Orleans, 42 L. Ann. 92, 7 So. 674; Warner v. Hoagland, 51 N. J. Law, 62; State v. Yopp, 97 N. C. 477; State v. City of Cincinnati, 52 Ohio St. 419, 40 N. E. 508, 27 L. R. A. 737; Madry v. Cox, 73 Tex. 538, 11 S. W. 541; Haigh v. Bell, 41 W. Va. 19, 23 S. E. 666, 31 L. R. A. 131; Roby v. Sheppard, 42 W. Va. 286, 26 S. E. 278.

these purposes by the legislature, but it is limited somewhat by the rule already stated that, where a community has acquired property for its local and public purposes through local taxation, it cannot be deprived of its special rights, although the property thus acquired may be made subject to the use of the public generally.[533]

§ 800. Delegation of power to control and regulate the use of public property.

While the ultimate power to control and regulate the use of all public property is vested ultimately in the sovereign, it is usually delegated to subordinate public corporations; they being local governmental subdivisions and better capable of determining the extent and manner of control. Public property is usually acquired through taxation for the purpose of supplying certain governmental and public necessities. The conditions which must exist in order to best accomplish this result can be best determined by local agencies.[534] There will be found ordinarily, therefore, statutory provisions vesting in local governmental agents, the general

[533] Girard v. City of Philadelphia, 74 U. S. (7 Wall.) 1; City of Chicago v. Illinois Steel Co., 66 Ill. App. 561; State v. Denny, 118 Ind. 382, 4 L. R. A. 79; State v. Barker, 116 Iowa, 96, 89 N. W. 204, 57 L. R. A. 244; Duffy v. City of New Orleans, 49 La. Ann. 114, 21 So. 179; Bradshaw v. Lankford, 73 Md. 428, 11 L. R. A. 582; Commonwealth v. Plaisted, 148 Mass. 375, 19 N. E. 224, 2 L. R. A. 142; Prince v. Crocker, 166 Mass. 347, 44 N. E. 446, 32 L. R. A. 610; People v. City of Detroit, 28 Mich. 228; State v. Schweickardt (Mo.) 19 S. W. 47; Town of Lisbon v. Clark, 18 N. H. 234; State v. Griffin, 69 N. H. 1, 39, Atl. 260, 41 L. R. A. 177; State v. Hayes, 61 N. H. 264; People v. Albertson, 55 N. Y. 50; City of Philadelphia v. Fox, 64 Pa. 169; Elliott, Roads & St. (2d ed.) §§ 438 et seq. See, also, §§ 82 et seq., ante. But see City of Mobile v. Watson, 116 U. S. 289.

[534] Thomason v. Ruggles, 69 Cal. 465, 11 Pac. 20; Banaz v. Smith, 133 Cal. 102, 65 Pac. 309. An act authorizing the improvement of city streets and the collection of local assessments therefor by the contractor doing the work is not unconstitutional as delegating to an individual the power to levy taxes or assessments or perform any municipal functions.

Weed v. City of Savannah, 87 Ga. 513, 13 S. E. 522; Elmira Highway Com'rs v. Osceola Highway Com'rs, 74 Ill. App. 185; People v. Whipple, 187 Ill. 547, 58 N. E. 468, reversing 87 Ill. App. 145; State v. Mainey, 65 Ind. 404; Keiper v. Hawk, 7 Kan. App. 271, 53 Pac. 837. A township trustee has a general control of all the business affairs of his township including

power to control public property which they may have been given the right to acquire. These grants of power are usually held to be continuing in their nature and not exhausted upon their being once exercised,[535] neither does the failure to exercise a granted power of this character result in its loss, for, as stated in a preceding section, the power to control public property as vested in subordinate public corporations is, in a large measure, discretionary; in fact, it can be said to be the rule that it is discretionary unless otherwise expressly limited or its character defined. The usual rule prohibiting the delegation of a delegated power applies in respect to granted discretionary powers.[536]

The general grant of a power also as a rule includes a grant of the right to use such agencies or exercise such lesser powers as will be found necessary to carry into execution the larger powers granted.[537]

§ 801. Power as delegated to municipal corporations.

The power of the sovereign to control and regulate the use of

those pertaining to a public highway.

Smyrk v. Sharp, 82 Md. 97, 33 Atl. 411; County of Douglas v. Taylor, 50 Neb. 535, 70 N. W. 27; Bisbee v. Mansfield, 6 Johns. (N. Y.) 84; Columbia & P. S. R. Co. v. City of Seattle, 6 Wash. 332, 34 Pac. 725; Seattle and M. R. Co. v. State, 7 Wash. 150, 34 Pac. 551; 22 L. R. A. 217; State v. Forrest, 12 Wash. 483, 41 Pac. 194. A city has the right to extend a street over tide lands, subject only to the right to use the waters for navigable purposes. State v. Childs, 109 Wis. 233, 85 N. W. 374.

[535] Grove v. City of Ft. Wayne, 45 Ind. 429; Town of Denver v. Meyers, 63 Neb. 107, 88 N. W. 191; State v. Clarke, 25 N. J. Law (1 Dutch.) 54.

[536] See § 112, ante. Reid v. Clay, 134 Cal. 207, 66 Pac. 262; Egbert v. Lake Shore & M. S. R. Co., 6 Ind. App. 350, 33 N. E. 659; City of Baltimore v. Stewart, 92 Md. 535, 48 Atl. 165. The authority given a city engineer to use vitrified brick instead of or in lieu of asphalt in the gutters of a street ordered to be paved with asphalt, is not invalid as delegating to him the power belonging to the city council to determine what material shall be used.

Peninsular Sav. Bank v. Ward, 118 Mich. 87, 76 N. W. 161, 79 N. W. 911; Thomson v. City of Boonville, 61 Mo. 282; Koeppen v. City of Sedalia, 89 Mo. App. 648; Morris v. City of Bayonne, 25 N. J. Eq. (10 C. E. Green) 345. But permission may be given to property owners to grade a street and this will not be considered a delegation of the power nor a denial of the city's power to afterwards regulate the matter. Parker v. City of New Brunswick, 32 N. J. Law, 548; Merritt v. Village of Portchester, 29 Hun. (N. Y.) 619.

[537] Grove v. City of Ft. Wayne, 45 Ind. 429.

public property subject to constitutional provisions is undisputed and the legislature as representing the law-making branch is, therefore, vested with this ultimate right which it can exercise irrespective of the boundaries of subordinate public corporations. These, it has been held, are simply governmental agents and subject to the supreme and transcendent control of the legislature which has the power to increase, diminish or change their powers, rights and boundaries at pleasure subject only to fundamental law.[538] In the preceding section it has been stated that ordinarily the power of control and use of public property is delegated to local and subordinate governmental agencies for the reasons there stated. Municipal corporations proper exist as one of these agencies and to them is granted in the largest measure the sovereign power of control.[539] These corporations, because of their character and the conditions which lead to their creation, are, necessarily, given large powers in respect to the control of public highways within their limits. The uses to which urban ways are, of necessity, put, require a grant of the character suggested.[540]

[538] Meriwether v. Garrett, 102 U. S. 472; Kahn v. Sutro, 114 Cal. 316, 33 L. R. A. 620; State v. Kolsem, 130 Ind. 434, 29 N. E. 595, 14 L. R. A. 566; Easterly v. Incorporated Town of Irwin, 99 Iowa, 694, 68 N. W. 919; Duffy v. City of New Orleans, 49 La. Ann. 114, 21 So. 179; State v. Haworth, 122 Ind. 462, 7 L. R. A. 240; Roche v. Jones, 87 Va. 484, 12 S. E. 965. See §§ 82 et seq., ante.

[539] City of St. Louis v. Western Union Tel. Co., 149 U. S. 465, Id., 148 U. S. 92; Sinton v. Ashbury, 41 Cal. 525; Louisville Bagging Mfg. Co. v. Central Pass. R. Co., 95 Ky. 50; Hodges v. Western Union Tel. Co., 72 Miss. 910, 5 Am. Electrical Cas. 56, 29 L. R. A. 770; Chicago, B. & Q. R. Co. v. State, 47 Neb. 549, 66 N. W. 624, 41 L. R. A. 481; Cape May D. & S. P. R. Co. v. City of Cape May, 59 N. J. Law, 396, 6 Am. Electrical Cas. 51; Eureka City v. Wilson, 15 Utah, 53, 48 Pac. 41; State v. Jersey City, 57 N. J. Law, 293, 5 Am. Elec. Cas. 146.

[540] Missouri v. Murphy, 170 U. S. 78; Grand Rapids Elec. Light & Power Co. v. Grand Rapids Edison Elec. Light & Fuel Gas Co., 33 Fed. 659; Electric Imp. Co. v. City and County of San Francisco, 45 Fed. 593, 13 L. R. A. 131; Buckner v. Hart, 52 Fed. 835; Louisville Trust Co. v. City of Cincinnati (C. C. A.) 76 Fed 296. Municipal corporations can control duration of franchises granted street railway companies for use of its streets.

Magee v. Overshiner, 150 Ind. 127, 49 N. E. 951, 40 L. R. A. 370; Drew v. Town of Geneva, 150 Ind. 662, 42 L. R. A. 814; City of Louisville v. Bannon, 99 Ky. 74, 35 S. W. 120; Pierce v. Drew, 136 Mass. 75; Citizens' Elec. Light & Power Co. v. Sands, 95 Mich. 551, 20 L. R. A. 411; State v. Flad, 23 Mo. App. 185; Hershfield v. Rocky Mountain Bell Tel. Co., 12 Mont. 102; Bor-

§ 802. Delegation of power to public and quasi public corporations.

The creation of public subordinate agencies of government involves the principle that, of necessity, they differ in character, extent of powers granted and functions for which organized. Public quasi corporations are to be found as a class of agencies to which the legislative power of control and regulation of property has been delegated.[541] Counties,[542] townships,[543] road and school districts, are familiar illustrations. These possess the power of regulation and control in a less degree than municipal corporations proper because the public needs that lead to their establishment are different and less complex in character. The power to control and regulate public property, therefore, by public officials of the organizations named is, as compared with the authorities of cities and towns, less both in degree and extent. Their corporate officials in acting are limited by the restricted powers of the prineipal.

§ 803. The extent of powers granted to delegated agencies.

The fact that the legislature has deemed it advisable to delegate the exercise of certain sovereign powers to subordinate agencies should not lead to the conclusion that, through the grant, an exclusive power of control and regulation is given. The state retains, at all times, in respect to powers granted its subordinate

ough of Brigantine v. Holland Trust Co. (N. J. Eq.) 35 Atl. 344; Hudson Tel. Co. v. Jersey City, 49 N. J. Law, 303; Domestic Telegraph & Tel. Co. v. City of Newark, 49 N. J. Law, 344; Electric Const. Co. v. Heffernan, 58 Hun, 605, 12 N. Y. Supp. 336; Village of Hempstead v. Ball Electric Light Co., 9 App. Div. 48, 41 N. Y. Supp. 124; Tuttle v. Brush Elec. Illuminating Co., 50 N. Y. Super. Ct. (18 J. & S.) 464; City of Allentown v. W. U. Tel. Co., 148 Pa. 117; Schenck v. Olyphant Borough, 181 Pa. 191, 37 Atl. 258; Seitzinger v. Borough of Tamaqua, 187 Pa. 539, 41 Atl. 454; Commonwealth v. Warwick, 185 Pa. 623, 40 Atl. 93; Columbia Elec. St. R., Light & Power Co. v. Sloan, 48 S. C. 21, 25 S. E. 898; Ogden City R. Co. v. Ogden City, 7 Utah, 207, 26 Pac. 288; Ellinwood v. City of Reedsburg, 91 Wis. 131, 64 N. W. 885.

[541] See § 8, ante.

[542] State v. Voorhies, 50 La. Ann. 671, 23 So. 871; Lewis v. Chosen Freeholders of Cumberland, 56 N. J. Law, 416; Green v. Inhabitants of Trenton, 54 N. J. Law, 92; City of Bayonne v. Lord, 61 N. J. Law, 136, 38 Atl. 752.

[543] Bradley v. Southern New England Tel. Co., 66 Conn. 559, 34 Atl. 499, 32 L. R. A. 280; Pierce v. Drew, 136 Mass. 75; Suburban Light & Power Co. v. Aldermen of

agencies and where the rights of third parties have not intervened, its full power to deal with the questions embraced in the grants named; it can legislate under the conditions given with respect to the regulation and control of public property including the use of highways as freely as before the subordinate corporation was entrusted with a portion of these powers.[544] The delegation of a governmental power to a subordinate agent is revokable at pleasure and does not partake of the nature of a contract.[545] The particular application of the principle lies in the fact that the legislature may give directly to individuals or corporations the right to use the streets of a municipal corporation without their first securing the grant of the right from the municipal corporation.[546] Steam and street railways, telephone and telegraph companies, or those organized for the purpose of supplying light, may derive their legal right to use for their purposes, the public highways directly from the legislature and not from the authorities of a subordinate public corporation within whose limits they may be included.[547] The legislature exercises, however, its supreme control subject to the constitutional provision, which so universally obtains, that private property cannot be taken for a public use without the payment of just compensation.[548]

§ 804. Extent of power granted; implied powers.

It has been already stated that a public corporation can exercise only those powers directly granted, implied because necessary to

Boston, 153 Mass. 200, 10 L. R. A. 497; Pennsylvania R. Co. v. Montgomery County Pass. R. Co. 167 Pa. 62, 27, L. R. A. 766; Western Union Tel. Co. v. Bullard, 65 Vt. 634; Rugg v. Commercial Union Tel. Co., 66 Vt. 208.

[544] Barnes v. Dist. of Columbia, 91 U. S. 540; Transportation Co. v. City of Chicago, 99 U. S. 635; Grand Rapids Elec. Light & Power Co. v. Grand Rapids, Edison Elec. Light & Fuel Gas Co., 33 Fed. 659; Abbott v. City of Duluth, 104 Fed. 833; Savannah & T. R. Co. v. City of Savannah, 45 Ga. 602; Chesapeake & P. Tel. Co. v. Baltimore & O. Tel. Co., 66 Md. 399; State v. Murphy, 130 Mo. 10, 5 Am. Electrical Cas. 78, 31 L. R. A. 798; Lahr v. Metropolitan El. R. Co., 104 N. Y. 268, 10 N. E. 528; American Rapid Tel. Co. v. Hess, 125 N. Y. 641, 26 N. E. 919, 13 L. R. A. 454; O'Connor v. City of Pittsburgh, 18 Pa. 189;; James River & Kanawha Co. v. Anderson, 12 Leigh (Va.) 286.

[545] Thomas v. City of Richmond, 79 U. S. (12 Wall.) 356; Indianapolis, D. & W. R. Co. v. Center Tp., 143 Ind. 63, 40 N. E. 134; See §§ 82 et seq., ante.

[546] See §§ 840, 854, post.

[547] See §§ 840, 854, post.

[548] See §§ 743 et seq., ante.

corporate life or implied because absolutely necessary to carry into effect some power expressly granted.[549] In the grant of powers to subordinate corporations in respect to the control and the use of public property, the grantee of the power, by the weight of authority, is given, impliedly, use of such agencies or means as will enable it to carry into effect the powers granted. A municipal or quasi public corporation is organized for the purpose of performing some special and local governmental duty or power. It is proper, therefore, that it should be permitted to carry out the purpose of its creation. This principle applies to specific grants of power. The corporation can lawfully avail itself of usual and reasonable agencies in order that a specially granted power may be carried into effect.[550]

§ 805. Same subject; fundamental legislative limitations.

The power of the legislature to act in a given instance is restricted by its character as the law-making branch of the government and also by constitutional provisions existing in either or both Federal and state constitutions. As the law-making body, it is legally incapable of performing functions judicial or executive in their character.[551] If enactments may be also illegal because violating some constitutional provision. It is clear that if the legislature, because of these reasons, cannot act upon a particular subject-matter, that it cannot, by any enactment, grant

[549] See §§ 108 et seq., ante.

[550] Minturn v. Larue, 23 How. (U. S.) 435; Grand Rapids Elec. Light & Power Co. v. Grand Rapids Edison Electric Light & Fuel Gas Co., 33 Fed. 659; Levis v. City of Newton, 75 Fed. 884; Old Colony Trust Co. v. City of Atlanta, 83 Fed. 39; Florida Cent. & P. R. Co. v. Ocala St. & S. R. Co., 39 Fla. 306, 22 So. 692; McManus v. Hornaday, 99 Iowa, 507, 68 N. W. 812; State v. Murphy, 134 Mo. 548, 6 Am. Electrical Cas., 83. City of St. Louis v. Bell Tel. Co., 96 Mo. 623, 2 L. R. A. 278; State v. Murphy, 130 Mo. 10, 31 L. R. A. 798; White v. McKeesport, 101 Pa. 394; Germania Sav. Bank v. Town of Darlington, 50 S. C. 337, 27 S. E. 846; Short-Conrad Co. v. School Dist., 94 Wis. 535, 69 N. W. 337.

[551] Ex parte Siebold, 100 U. S. 371; Smith v. Strother, 68 Cal. 194; State v. Barbour, 53 Conn. 76; Appeal of Norwalk St. R. Co., 69 Conn. 576, 37 Atl. 1080, 38 Atl. 708, 39 L. R. A. 794; Ex parte Griffiths, 118 Ind. 83, 3 L. R. A. 398; McLean County Precinct v. Deposit Bank of Owensboro, 81 Ky. 254; Case of Supervisors of Election, 114 Mass. 247; State v. Young, 29 Minn. 474; Shephard v. City of Wheeling, 30 W. Va. 479, 4 S. E. 635. See §§ 496 et seq., ante.

to a subordinate agency the right to exercise a power touching the same question.[552]

(a) Contract obligation. By the Federal constitution, a state is prohibited from passing any law impairing the obligation of a contract, and a state legislature, therefore, cannot grant to a subordinate public corporation or quasi corporation the right to act in such manner as will violate this provision. Attempted regulations, therefore, of public property, which impair the obligation of a contract, if one exists, will be void.

(b) Special and uniform legislation. In many states will be found constitutional prohibitions upon the passage of legislation which is special in its character or which operates with a lack of uniformity. It is true in this respect that subordinate corporations or even the state itself cannot authorize the use of public property or attempt to control it in the manner through legislative enactments that will bring its action within the prohibitive principle of these clauses.[553]

(c) Due process and the equal protection of the law. The constitutional restrictions relative to the passage of legislation which denies the equal protection of the law or which prohibits the taking of life, property or liberty without due process of law, are familiar to all. In a grant of power to a subordinate public agency relative to the use and control of public property, the state is lim-

[552] Chicago, B. & Q. R. Co. v. City of Chicago, 166 U. S. 226; State v. Holden, 14 Utah, 71, 46 Pac. 756, 37 L. R. A. 103.

[553] Robert J. Boyd P. & C. Co. v. Ward, 85 Fed. 27; Mattox v. Knox, 96 Ga. 403, 23 S. E. 307; People v. Martin, 178 Ill. 611, 53 N. E. 309; In re Hegne-Hendrum Ditch Co., 80 Minn. 58, 82 N. W. 1094; Hannibal v. Missouri & K. Tel. Co., 31 Mo. App. 23; State v. Griffin, 69 N. H. 1, 39 Atl. 260, 41 L. R. A. 177; Matter of Henneberger, 155 N. Y. 420, 50 N. E. 61, 42 L. R. A. 132; State v. Commissioners, 54 Ohio St. 333, 43 N. E. 587; In re Pittsburgh's Petition, 138 Pa. 401; Sanders v. Venning, 38 S. C. 502, 17 S. E. 134. Law relative to cattle running at large. But see Travelers' Insurance Co. v. Oswego Tp., 55 Fed. 361; In re Madera Irr. Dist., 92 Cal. 296, 28 Pac. 272, 675, 14 L. R. A. 755; Vernon School Dist. v. Los Angeles Board of Education, 125 Cal. 593, 58 Pac. 175; Gilson v. Rush County Com'rs, 128 Ind. 65, 27 N. E. 235, 11 L. R. A. 835; Lancaster County v. Trimble, 33 Neb. 121, 49 N. W. 938; In re Sewer Assessment, 54 N. J. Law, 156, 23 Atl. 517; Road Commission v. Haring, 55 N. J. Law, 327, 26 Atl. 915; Ladd v. Gambell, 35 Or. 393, 59 Pac. 113; In re Wyoming St., 137 Pa. 494; City of Erie v. Griswold, 184 Pa. 435, 39 Atl. 231.

ited unquestionably by these provisions, and all acts by the state or its governmental agencies violating these principles are of no force or effect.[554]

§ 806. Extent of power limited by character of property.

The extent of the legislative power in dealing with public property in the first instance or through subordinate public corporations is limited also by the purpose for which it is secured and the use for which it is held. The property acquired under proper authority by any public corporation in this capacity is held by it as a trustee for the public for the particular uses and purposes of its acquisition.[555] It is impossible, therefore, for a public corporation to dispossess itself, transfer to or permit the use of public property by private persons or for private purposes and the legality of acts of public authorities can be always tested by this well-known principle as well as those mentioned in the preceding section.[556]

[554] Ex parte Virginia, 100 U. S. 339; Palmer v. McMahon, 133 U. S. 660; Scott v. McNeal, 154 U. S. 34; City R. Co. v. Citizens' St. R. Co., 166 U. S. 557; Law v. Johnston, 118 Ind. 261; Richman v. Muscatine County Sup'rs, 77 Iowa, 513; Nevin v. Roach, 86 Ky. 492; State v. Weyerhauser, 68 Minn. 353, 71 N. W. 265; Mutual Life Ins. Co. v. Pinner, 43 N. J. Eq. (16 Stew.) 52; Ensign v. Barse, 107 N. Y. 329, 14 N. E. 400. But see Wilson v. Eureka City, 173 U. S. 32. An ordinance prohibiting the moving of any building upon streets without the original permission of the mayor, not invalid.

Callen v. Junction City, 43 Kan. 627, 23 Pac. 652, 7 L. R. A. 736. Legislation providing for the extension of municipal boundaries without notice is not in violation of the constitutional provisions requiring due process of law. Fourth Street Union Depot Co. v. State Railroad Crossing Board, 81 Mich. 248, 45 N. W. 937.

[555] See authorities cited under §§ 718, et seq. and 796.

[556] Florida Cent. & P. R. Co. v. Ocala, St. & S. R. Co., 39 Fla. 306, 22 So. 692; State ex rel. St. Louis Service Co., (Mo.) 6 Am. Elec. Cas. 73; Jaynes v. Omaha St. R. Co., 53 Neb. 631, 74, N. W. 67, 39 L. R. A. 751; Metropolitan Telephone and Tel Co. v. Colwell Lead Co., 67 How, Pr. (N. Y.) 365; Fobes v. Rome, W. & O. R. Co., 121 N. Y. 505, 8 L. R. A. 453; Kane v. New York El. R. Co., 125 N. Y. 164, 26 N. E. 278, 11 L. R. A. 640; American Rapid Tel. Co. v. Hess, 125 N. Y. 641, 26, N. E. 919, 13 L. R. A. 454; East Tennessee Tel. Co. v. Knoxville St. R. Co. (Tenn.) 3 Am. Electrical Cas. 406; San Antonio St. R. Co. v. Renken, 15 Tex. Civ. App. 229, 38 S. W. 829.

§ 807. The power to open, repair and improve highways.

It is customary to grant to all subordinate public corporations the general power to open or construct highways within their limits [557] although in the absence of such a grant some authorities claim that the power would still exist, being one implied because essential to the existence of the corporation.[558] The grant of the power to open or construct streets carries with it the implied power to improve them through the construction of gutters or sidewalks and laying them out upon a suitable grade.[559] As al-

[557] City of Hannibal v. Campbell, 86 Fed. 297. A city authorized to open streets eighty feet in width is not required to improve and maintain them for travel throughout their entire width; its duty has been performed by improving and maintaining a sufficient portion for the reasonable accommodation of the public.

Cohen v. City of Alameda, 124 Cal. 504, 57 Pac. 377. Statutes 1889, p. 70, authorizing the payment of the cost of street extension by special assessments on benefited land is constitutional.

Murphy v. City of Waycross, 90 Ga. 36; City of Chicago v. Law, 143 Ill. 569, 33 N. E. 855; Taylor v. McFadden, 84 Iowa, 262; Greiner v. Town of Sigourney (Iowa) 89 N. W. 1103. One not the owner of land cannot restrain a village from opening a street through it. In re Dassler, 35 Kan. 678, 12 Pac. 130; City of Argentine v. State, 46 Kan. 430; Bigelow v. City Council of of Worcester, 169 Mass. 390, 48 N. E. 1; Kulwicki v. Munro, 95 Mich. 28; Yanish v. City of St. Paul, 50 Minn. 518; Keough v. City of St. Paul, 66 Minn. 114; City of Springfield v. Weaver, 137 Mo. 650; Saxton Nat. Bank v. Bennett, 138 Mo. 494; State v. Wright, 54 N. J. Law, 130, 23 Atl. 116; Jersey City v. National Docks R. Co., 55 N. J. Law, 194; Wilson v. Inhabitants of Trenton, 55 N. J. Law, 220; In re Deering, 85 N. Y. 1. The power is limited to streets legally laid out.

Young v. Town of Henderson, 76 N. C. 420; Parsons v. City of Columbus, 50 Ohio St. 460, 34 N. E. 677. The Taylor Law, so called, of May 11th, 1886, held valid. Hamilton County Com'rs v. State, 50 Ohio St. 653, 35 N. E. 887. The grant of such a power may be unconstitutional because special legislation. Huddleston v. City of Eugene, 34 Or. 343, 55 Pac. 868, 43 L. R. A. 444; Commonwealth v. Kline, 162 Pa. 499, 29 Atl. 799; Smith v. Grayson County, 18 Tex. Civ. App. 153, 44 S. W. 921; City of Waco v. Chamberlain, (Tex. Civ. App.) 45 S. W. 191; City of Austin v. Nalle, 85 Tex. 520; McCrowell v. City of Bristol, 89 Va. 652, 20 L. A. R. 653. See, also, §§ 423 et seq., ante.

[558] Serviss v. Detroit Public Works, 115 Mich. 63, 72 N. W. 1117. A city may, under charter provisions, control the making of plats for additions to it. State v. District Court of Ramsey County, 80 Minn. 293, 83 N. W. 183.

[559] Burlington & M. R. R. Co. v. Spearman, 12 Iowa, 112; Taber v. Grafmiller, 109 Ind. 206; Adams

ready stated, the extent of these improvements, their character and the time of making them, is usually discretionary, and, in the absence of an abuse of the power, will not be reviewed or controlled by the courts.[560] The power to open a street or highway also carries with it the general power to keep it in repair.[561] The exercise of the power may, by statute, be made dependent upon the action of certain designated property owners, and statutory provisions of this character necessarily control the time and the manner of the construction, improvement or repair.[562] The power

v. City of Shelbyville, 154 Ind. 467, 57 N. E. 114, 49 L. R. A. 797. The authority must be strictly pursued. See, also, Chap. VI, subd. II, on Local Assessments.

[560] Havens v. Town of Wethersfield, 67 Conn. 533, 35 Atl. 503; City of Brunswick v. King, 91 Ga. 522, 17 S. E. 940; Culver v. City of Chicago, 171 Ill. 399, 49 N. E. 573; Chicago & N. P. R. R. Co. v. City of Pa. 499, 29, Atl. 799; Smith v. Chicago, 172 Ill. 66, 49 N. E. 1006; Peyton v. Village of Morgan Park, 172 Ill. 102, 49 N. E. 1003; Topliff v. City of Chicago, 196 Ill. 215, 63 N. E. 692; Neff v. Covington Stone & Sand Co., 21 Ky. L. R. 1454, 55 S. W. 697; Blundon v. Crosier, 93 Md. 1355, 49 Atl. 1; Seattle Transfer Co.v. City of Seattle,27 Wash. 520, 68 Pac. 90. See, also, §§ 341, 342 and 798, ante.

[561] Santa Cruz Rock Pavement Co. v. Broderick, 113 Cal. 628, 45 Pac. 863. The term "repair" does not include the right to improve in a manner different from that previously done. Flickinger v. Fay, 119 Cal. 590, 51 Pac. 855; Center Tp. Grant County v. Davis, 24 Ind. App. 603, 57 N. E. 283; Weir v. Owensboro & N. R. R. Co., 14 Ky. L. R. 875, 21 S. W. 643; In re East Syracuse, 20 Abb. N. C. (N. Y.) 131. A highway controlled by a village though within its limits may be improved within the discretion of the public authorities. Hines v. City of Lockport, 50 N. Y. 236; Somerset v. Stoystown Road, 74 Pa. 61.

[562] City St. Imp. Co. v. Babcock (Cal.) 68 Pac. 584; City of Atlanta v. Smith, 99 Ga. 462, 37 S. E. 696; Taylor v. City of Bloomington, 186 Ill. 497, 58 N. E. 216; Trah v. Village of Grant Park, 192 Ill. 351, 61 N. E. 442; Sunderland v. Martin, 113 Ind. 411, 15 N. E. 689. But landowners may be stopped by their action from setting up the illegality of an improvement.

Town of Covington v. Nelson, 35 Ind. 532; Pruden v. Jackson County Com'rs, 156 Ind. 325, 58 N. E. 437; Lowe v. White County Com'rs, 156 Ind. 163, 59 N. E. 466; Shearer v. Bay County Sup'rs, 128 Mich. 552, 87 N. W. 789; Fohl v. Chicago & N. W. R. Co., 84 Minn. 314, 87 N. W. 919; Shoenberg v. Field, 95 Mo. App. 241, 68 S. W. 945; La Monte v. Chosen Freeholders of Somerset County (N. J. Law) 35 Atl. 1; Springer v. Inhabitants of Logan, 58 N. J. Law, 588; Shapter v. Carroll, 18 App. Div. 390, 46 N. Y. Supp. 202; May v. Bermel, 20 App. Div. 53, 46 N. Y. Supp, 622; Conde v. City of Schenectady, 29 App. Div. 604, 51

to open, improve or repair may be also limited by statutory or constitutional provisions relative to the expenditure of public funds, the incurring of indebtedness,[563] the necessity for the passage of a resolution of intention, other legal measures prescribed as preliminary to the making of an improvement,[564] or provisions basing the extent of the improvement upon the benefits received by abutting property owners.[565] The power to repair is also restricted by the principle that the term "to repair" does not include the making of an original improvement, but only a reconstruction, renewal or restoration of an original improvement. The term "repair" is defined by Webster as follows: "To restore to a sound or good state after decay, injury, dilapidation, or partial destruction; to renew; to restore; to mend."[566]

The power to pave a street. The paving or macadamizing of a street or the construction of a bridge is usually expensive and

N. Y. Supp. 854; In re City of New York, 167 N. Y. 624, 60 N. E. 1108, affirming 57 App. Div. 166, 68 N. Y. Supp. 196; Hixson v. Burson, 54 Ohio St. 470, 43 N. E. 1000. An unconstitutional statute is not made lawful by its proper exercise. In re Public Alley in Borough of West Chester, 160 Pa. 89, 28 Atl. 506. See, also, § 360, ante.

[563] Smith v. City of St. Joseph, 122 Mo. 643, 27 S. W. 344. Rev. St. 1889, § 1303, forbidding an appropriation in excess of revenue does not exempt a city from its liability for damages for a change of street grade though an appropriation has been made. See, also, as holding the same, the case of City of Springfield v. Baker, 56 Mo. App. 637. See, also, §§ 175 et seq., ante.

[564] Piedmont Pav. Co. v. Allman, 136 Cal. 88, 68 Pac. 493; Altman v. City of Dubuque, 111 Iowa, 105, 82 N. W. 461; Farr v. Inhabitants of Ware, 173 Mass. 403, 53 N. E. 898; Golding v. Inhabitants of North Attleborough, 172 Mass. 223; Kiley v. Bond, 114 Mich. 447; Dunston v. Smith, 49 N. J. Law, 150, 6 Atl. 663; Village of Tonawanda v. Price, 171 N. Y. 415, 64 N. E. 191; Reynolds v. Schweinefus, 27 Ohio St. 311; Brophy v. Landman, 28 Ohio St. 542; City of Cincinnati v. Davis, 58 Ohio St. 225, 50 N. E. 918; Freidrich v. City of Milwaukee, 114 Wis. 304, 90 N. W. 174. See, also, §§ 361 et seq., ante.

[565] McKee v. Town of Pendleton, 154 Ind. 652, 57 N. E. 532; McManus v. Hornaday, 99 Iowa, 507; Borough of Connellsville v. Hoag, 156 Pa. 326, 27 Atl. 25; In re Wick St., 184 Pa. 93, 39 Atl. 3. See, also, §§ 347 et seq., ante.

[566] Mackin v. Wilson, 20 Ky. L. R. 218, 45 S. W. 663; Levi v. Coyne, 22 Ky. L. R. 493, 57 S. W. 790; Ritterskamp v. Stifel, 59 Mo. App. 510; Barber Asphalt Pav. Co. v. Hezel, 155 Mo. 391, 56 S. W. 449, 48 L. R. A. 285; Hurley v. Inhabitants of Trenton, 66 N. J. Law, 538, 49 Atl. 581. But see Regenstein v. City of Atlanta, 98 Ga. 167, 25 S. E. 428.

is not regarded as an ordinary improvement or repair,[567] and it is necessary for a municipal corporation in order to improve its streets in this manner, to have the right expressly given.[568] The grant of the power to pave, unless there are limiting conditions, usually carries with it the implied power to repave or repair the pavement when this becomes necessary through the destruction or wearing out of the original improvement.[569]

§ 808. Alteration of streets or highways.

It may become necessary through changed conditions, or for the purpose of better serving the public necessities, to alter or relocate, in the manner provided by law, a highway or street through a change in the character of the roadway,[570] a change in its direction,[571] or by an increase or decrease in its width or length.[572] The general statutory power to open highways carries with it, as a rule, the right to make such alterations as are suggested above and the official authorities of cities, villages, road districts or counties, are usually regarded as the exclusive judges of the propriety and the necessity of these changes or alterations and, in accordance with the rule already stated, courts of equity will not interfere with the exercise of this discretion unless there manifestly appears injustice or a gross abuse of the power.[573] The rule

[567] Palmer v. Burnham, 20 Cal. 364; Diggins v. Hartshorne, 108 Cal. 154, 41 Pac. 283; Phelps v. City of Detroit, 120 Mich. 447, 79 N. W. 640; People v. City of Buffalo, 52 App. Div. 157, 65 N. Y. Supp. 163; City of Chester v. Bullock, 187 Pa. 544, 41 Atl. 452. But see Mullarky v. Town of Cedar Falls, 19 Iowa, 21.

[568] Greenleaf v. Pasquotank County Com'rs, 123 N. C. 30, 31 S. E. 264; Town of Grand Isle v. Kinney, 70 Vt. 38, 41 Atl. 130.

[569] Burckhardt v. City of Atlanta, 103, Ga. 302, 30 S. E. 32; Regenstein v. City of Atlanta, 98 Ga. 167, 25 S. E. 428.

[570] Dana v. City of Boston, 170 Mass. 593, 49 N. E. 1013. The power to repair will not include the power to make a change in the structural formation of the way. Inhabitants of Lancaster v. Worcester County Com'rs, 113 Mass. 100. The power to alter a way cannot be extended by implication to authorize the construction of a bridge.

[571] M'Ilvoy v. Speed, 7 Ky. (4 Bibb.) 85; State Lunatic Hospital v. Inhabitants of Worcester, 42 Mass. (1 Metc.) 437; Inhabitants of Gloucester v. Essex County Com'rs, 44 Mass. (3 Metc.) 375. But under authority to alter a way, an entire new line cannot be located from one terminus to another.

Hayward v. Inhabitants North Bridgewater, 71 Mass. (5 Gray) 65; Brigham v. Worcester County, 147 Mass. 446, 18 N. E. 220;

Thurston v. City of Lynn, 116 Mass. 544; Lincoln v. Commonwealth, 164 Mass. 1, 41 N. E. 112; Weber v. Ryers, 82 Mich. 177, 46 N. W. 233; Cyr v. Dufour, 68 Me. 492. Upon the alteration of a highway, the newly erected portion is substituted for the old.

Chasmer v. Blew, 55 N. J. Law, 67, 25 Atl. 710. Jurisdiction to vacate a portion of a highway does not exist under statutes providing the mode of alteration of the existing highway. Smock v. Vanderveer, 41 N. J. Law, 303; Town of Wheatfield v. Shasley, 23 Misc. 100, 51 N. Y. Supp. 835. Facts considered and held not a relocation of the highway. Kenedy v. Erwin, 44 N. C. (Busb.) 387. Highways should not be altered except when the interests of the public require it.

State v. Raborn, 60 S. C. 78, 38 S. E. 260; Williams v. Mitchell, 49 Wis. 284. An order altering a highway is prima facie evidence of the regularity of all the proceedings prior thereto. State v. Hayden, 32 Wis. 663. The power of alteration is limited to the statutory jurisdiction of the body making it.

Harrison v. Milwaukee County Sup'rs, 51 Wis. 645. The power to alter a highway does not authorize a change of its grade. State v. Burgeson, 108 Wis. 174, 84 N. W. 241. An order for the alteration of highways may be so indefinite as to render it void.

[572] In re Alston, 1 Pen. (Del.) 359, 40 Atl. 938. Under Rev. Code, c. 60, § 4, providing for a change of course of a public road does not authorize the widening of the existing road. Brantly v. Huff, 62 Ga. 532; City of Deering v. County Com'rs, 87 Me. 151, 32 Atl. 797; State v. Canterbury, 40 N. H. 307; Holmes v. Jersey City, 12 N. J. Eq. (1 Beasl.) 299; State v. Hale, 25 N. J. Law (1 Dutch.) 324; Fowler v. Larabee, 59 N. J. Law, 259; People v. Lohnas, 54 Hun, 604, 8 N. Y. Supp. 104; Matter of Broadway Widening, 63 Barb. (N. Y.) 572. A statutory provision relative to the filing of report of commissioners in respect to the widening of a street held directory merely not jurisdictional. Blackman v. Riley, 138 N. Y. 318, 34 N. E. 214; Heiple v. Clackamas County, 20 Or. 147, 25 Pac. 291.

Stone v. Langworthy, 20 R. I. 602. Permission cannot be given by a member of a highway. committee to widen a highway. But see Green v. Loudenslager, 54 N. J. Law, 478, 24 Atl. 367; St. Vincent Female Orphan Asylum v. City of Troy, 76 N. Y. 108; Philadelphia County Com'rs v. Spring Garden Com'rs, 6 Serg & R. (Pa.) 522. See, also, cases collected in 32 Am. & Eng. Corp. Cas., pp. 88–149.

[573] Mitchell v. Coosa County Com'rs Ct., 116 Ala. 650, 22 So. 993. A void order changing a public road may be set aside mero motu. Ponder v. Shannon, 54 Ga. 187; Dunham v. Village of Hyde Park, 75 Ill. 371; Brush v. City of Carbondale, 78 Ill. 74. See, also, § 798, ante.

The usual rule of immunity from collateral attack will apply to the action suggested in the text. Quoting and citing Knowles v. City of Muscatine, 20 Iowa, 248; Sullivan v. Robins, 109 Iowa, 235, 80 N. W. 340; Drew v. Cotton, 68 N. H. 22; Stone v. Langworthy, 20 R. I. 602; In re Alston, 1 Pen. (Del.) 359.

also applies in this connection, which applies to all control of public property, that action by municipal or public authorities, even where a granted power exists, may be made dependent upon the consent or original action by designated property owners,[574] and is limited by the title and conditions, if any, under which the property is acquired. The exercise of the powers included within this paragraph is confined to legal and public highways[575] irrespective of the manner in which created.

Relocation of a road. A change in the character of the roadway, in its direction, or an increase in its length is regarded as action which will necessitate the inauguration of the proceedings prescribed by statute for the laying out or establishment of a new road.[576] Upon the alteration of an existing highway, the newly located portion is substituted for the old and becomes then

[574] City & County of San Francisco v. Kiernan, 98 Cal. 614, 33 P. 720; Bowers v. Snyder, 88 Ind. 302; Inhabitants of Newcastle v. Lincoln County Com'rs, 87 Me. 227, 32 Atl. 885. The proceedings must be sufficient to warrant a proposed alteration.

Inhabitants of Whately v. Franklin County Com'rs, 42 Mass. (1 Metc.) 336; Cutter v. City of Cambridge, 88 Mass. (6 Allen) 20; Hobart v. Plymouth County, 100 Mass. 159; Jeffries v. Inhabitants of Swampscott, 105 Mass. 535. Statutory provisions must be strictly followed. Hagemeyer v. Wright County Com'rs, 71 Minn. 42, 73 N. W. 628; State v. Young, 27 Mo. 259. But the public authorities have the right to make an alteration in a road. Self v. Gowin, 80 Mo. App. 398; Howeth v. Jersey City, 30 N. J. Law, 93; Hand v. Fellows, 148 Pa. 456, 23 Atl. 1126; Neis v. Franzen, 18 Wis. 537; Hark v. Gladwell, 49 Wis. 172. See, also, §§ 360 et seq., ante.

[575] Babcock v. Welch, 71 Cal. 400, 12 Pac. 337; Town of Kent v. Pratt, 73 Conn. 573, 48 Atl. 418; Blair v. Boesch, 59 Iowa, 554; Weber v. Ryers, 82 Mich. 177; Quinn v. City of Paterson, 27 N. J. Law (3 Dutch.) 35; Hancock v. Borough of Wyoming, 148 Pa. 635, 24 Atl. 88. It is immaterial whether the highway be one created by dedication or prescription. Almy v. Church, 18 R. I. 182, 26 Atl. 58; Morriss v. Cassady, 78 Tex. 515, 15 S. W. 102.

[576] Mitchell v. Court, 116 Ala. 650; Gross v. McNutt, 4 Idaho, 286, 38 Pac. 935; Brown v. Roberts, 23 Ill. App. 461, affirmed 123 Ill. 631, 15 N. E. 30. One not owning land upon that part of a highway relocated and who is a tax payer is not a person interested in the alteration to whom a statutory right of appeal is given. Adams v. Ulmer, 91 Me. 47; Dana v. City of Boston, 170 Mass. 593; Turlow v. Ross, 144 Mo. 234, 45 S. W. 1125; Robson v. Byler, 14 Tex. Civ. App. 374; State v. Wheeler, 97 Wis. 96; Town of Wheatfield v. Shasley, 23 Misc. (N. Y.) 100.

the legal way upon which public moneys may be legally expended and in the alteration of which a public liability will be assumed.[577]

§ 809. Difference in urban and suburban uses.

The right of the public authorities to control the use of a highway largely depends upon its character as an urban or suburban way.[578] The uses to which the two kinds of roads are put are materially different and to the public authorities having control of streets proper as they are found within the limits of municipal corporations is usually given, either expressly or by necessary implication, a much larger degree of power and discretion in making improvements, changes or repairs.[579]

§ 810. Change of grade in a highway or street.

The power to open a highway, whether a street proper or otherwise, usually carries with it the implied right to establish in a lawful manner [580] a certain grade with reference to abutting property

[577] Cyr v. Dufour, 68 Me. 492; Getchell v. Inhabitants of Oakland, 89 Me. 426; DeLapp v. Beckwith, 114 Mich. 394; Cook v. Hecht, 64 Mo. App. 273; Engleman v. Longhorst, 120 N. Y. 332, 24 N. E. 476; State v. Britt, 118 N. C. 1255; Silverthorne v. Parsons, 60 Ohio St. 331, 54 N. E. 259. A highway may be erected through affirmative action of all the parties interested though not complying with statutory provisions.

[578] Cater v. N. W. Telep. & Exch. Co., 60 Minn. 539, 28 L. R. A. 310; Huddleston v. City of Eugene, 34 Or. 343, 55 Pac. 868, 43 L. R. A. 444; Elliott, Roads & St. (2d Ed.) §§ 398, 408. Lewis, Em. Dom. (2d Ed.) §§ 126 et seq.

[579] Kincaid v. Indianapolis Nat. Gas Co., 124 Ind. 577, 8 L. R. A. 602; Haight v. City of Keokuk, 4 Iowa, 199; Van Brunt v. Town of Flatbush, 128 N. Y. 50, 27 N. E. 973; State v. Davis, 55 Ohio St. 15; Oregon City v. Moore, 30 Or. 215; Dillon, Mun. Corp. (4th Ed.) § 676. See, also, cases cited in preceding note and the subject further considered in §§ 818, 825, 828, post.

[580] Chicago & N. P. R. Co. v. City of Chicago, 174 Ill. 439, 51 N. E. 596. Where the law requires the establishment of a grade by the adoption of an ordinance in the prescribed manner, the passage of a mere resolution is not sufficient to establish the grade of the streets designated by it. Gould v. Schermer, 101 Iowa, 582; American Savings & Loan Association v. Burghardt, 19 Mont. 323; Themanson v. City of Kearney, 35 Neb. 881, 53 N. W. 1009; Ware v. Borough of Rutherford, 55 N. J. Law, 450, 26 Atl. 933; Hosmer v. City of Gloversville, 27 Misc. 669, 59 N. Y. Supp. 559; Archer v. City of Mt. Vernon, 63 App. Div. 286, 71 N. Y. Supp. 571; Wilder v. City of Cincinnati, 26 Ohio St. 284; Sweet v.

and construct it upon the gradients determined upon.[581] As already stated, the power to open a highway also carries with it the power to make, ordinarily, the usual or necessary repairs and improvements. It may be found necessary, for the greater convenience of the public after a highway has once been established and graded, to change its roadway by altering the gradients and thus changing its line of grade with reference to adjoining property. The grant of the right to grade a highway, express or implied, carries with it the power, without the consent of property owners, to change the grade.[582] Stated differently, the power to

Conley, 20 R. I. 381, 39 Atl. 326; Webster v. White, 8 S. D. 479; Page v. Belvin, 88 Va. 985, 14 S. E. 843.

[581] Smith v. Corporation of Washington, 20 How. (U. S.) 135; Goszler v. Corporation of Georgetown, 6 Wheat. (U. S.) 593; Himmelmann v. Hoadly, 44 Cal. 213; Palmer v. Burnham, 120 Cal. 364, 52 Pac. 664; Flinn v. Mowry, 131 Cal. 481, 63 Pac. 724; German Savings and Loan Society v. Ramish (Cal.) 69 P. 89; Fellowes v. City of New Haven, 44 Conn. 240; Whaples v. City of Waukegan, 95 Ill. App. 29; Burr v. Town of New Castle, 49 Ind. 322; Barfield v. Gleason, 23 Ky. L. R. 128, 63 S. W. 964; Keough v. City of St. Paul, 66 Minn. 114, 68 N. W. 843; Taylor v. City of St. Louis, 14 Mo. 20; Townsend v. Jersey City, 26 N. J. Law (2 Dutch.) 444. The power to grade streets though the street is occupied with a plank road constructed under authority of a legislative grant to a private corporation. Ball v. City of Tacoma, 9 Wash. 592. But see City of Napa v. Easterby, 61 Cal. 509, as construing special charter provisions.

[582] Williams v. City of Portland, 19 Can. Sup. Ct. 159; City of Little Rock v. Katzenstein, 52 Ark. 107; Thorn v. West Chicago Park Com'rs, 130 Ill. 594; Egbert v. Lake Shore & M. S. R. Co., 6 Ind. App. 350. The inherent right in municipal authorities to change the grade of a street cannot be delegated for the private advantage of a railroad company. Macy v. City of Indianapolis, 17 Ind. 267; City of Lafayette v. Bush, 19 Ind. 326; Matingly v. City of Plymouth, 100 Ind. 545; Creal v. City of Keokuk, 4 G. Green (Iowa) 47; Dudley v. Tilton, 14 La. Ann. 283. The right to re-grade a public way is ultimately vested in the public authorities. Karst v. St. Paul, S. & T. F. R. Co., 22 Minn. 118; Saxton Nat. Bank v. Bennett, 138 Mo. 494, 40 S. W. 97; Estes v. Owen, 90 Mo. 113, 2 S. W. 133; State v. Jersey City, 52 N. J. Law, 490, 19 Atl. 1096; Inhabitants of Trenton v. McQuade, 52 N. J. Eq. 669, 29 Atl. 354; Fish v. City of Rochester, 6 Paige (N. Y.) 268; Waddell v. City of New York, 8 Barb. (N. Y.) 95; Farrington v. City of Mt. Vernon, 166 N. Y. 233, 59 N. E. 826; Columbus Gas, Light & Coke Co. v. City of Columbus, 50 Ohio St. 65, 33 N. E. 292, 19 L. R. A. 510. The power to grade streets is a continuing one and conferred upon municipal author-

establish the grade of a highway is ordinarily a continuing one and is not exhausted by its once exercise. This principle applies, it must be understood, only in determining the rights of abutting property owners where a change in grade has been made which results in an interference with or a damage to their property. The legislature unquestionably has the right to authorize public corporations acting through their proper officials to change the grade of a highway as often as may be found necessary to meet changed conditions or for the greater convenience of the public.[583] The material question is where the grade of the street has once been established and fixed, and abutting property owners have constructed improvements upon the street or highway, with reference to the established grade, whether they are not entitled to compensation for the damage or injuries they may suffer by reason of the change in grade.[584] The authorities in this country upon this question are not at variance and almost uniformly maintain the doctrine that under such circumstances the adjoining property owner is not entitled to consequential damages,[585] though

ities for the public benefit; it is not exhaused by its once exercise, nor can it in the absence of statutory authority be ceded or bargained away. Wistar v. Philadelphia, 80 Pa. 505. But see Murphy v. City of Boston, 120 Mass. 419.

[583] City of Lafayette v. Fowler, 34 Ind. 140; Wolfe v. Pearson, 114 N. C. 621, 19 S. E. 264. See, also, cases cited under preceding note.

[584] City of Delphi v. Evans, 36 Ind. 90; Chase v. Sioux City, 86 Iowa, 603, 53 N. W. 333; Blanden v. City of Ft. Dodge, 102 Iowa, 441, 71 N. W. 411. A request for the regrading of a street will not constitute an estoppel so as to preclude a property owner from claiming damages because of a change of grade.

City of Newark v. Sayre, 41 N. J. Law, 158; People v. Gilon, 76 Hun, 346, 27 N. Y. Supp. 704; Clark v. City of Philadelphia, 171 Pa. 30, 33 Atl. 124. The mere establishment of a grade on paper prior to the one which was consummated by physical construction cannot be considered. See, also, authorities cited generally under this section.

[585] Smith v. Corporation of Washington, 20 How. (U. S.) 135; City of Denver v. Vernia, 8 Colo. 399; Healey v. City of New Haven, 47 Conn. 305. A promise of the municipal authorities to a landowner of compensation for consequential damages caused by change of grade when authorizied by law is not binding. Selden v. City of Jacksonville, 28 Fla. 558, 10 So. 457, 14 L. R. A. 370; Markham v. City of Atlanta, 23 Ga. 402; City of Rome v. Omberg, 28 Ga. 46; Macy v. City of Indianapolis, 17 Ind. 267; Cheever v. Shedd, 13 Blatchf. 258, Fed. Cas. No. 2,634; Baker v. Town of Shoals, 6 Ind. App. 319, 33 N. E. 664; Cole v. City of Muscatine, 14 Iowa, 296; Russell v. City of Burlington, 30

Iowa, 262; Meyer v. City of Burlington, 52 Iowa, 560; Farmer v. City of Cedar Rapids, 116 Iowa, 322, 89 N. W. 1105; Methodist Episcopal Church v. City of Wyandotte, 31 Kan. 721. Callender v. Marsh, 18 Mass. (1 Pick.) 418. "The streets on which the plaintiff's house stands had become public property by the act of laying them out conformably to law, and the value of the land taken must have been either paid for, or given to the public, at the time, or the street could not have been legally established. Being legally established, although the right or title in the soil remained in him from whom the use was taken, yet the public acquired the right, not only to pass over the surface in the state it was in when first made a street, but the right also to repair and amend the street, and, for this purpose, to dig down and remove the soil sufficiently to make the passage safe and convenient. Those who purchase house lots bordering upon streets are supposed to calculate the chance of such elevations and reductions as the increasing population of a city may require, in order to render the passage to and from the several parts of it safe and convenient, and as their purchase is always voluntary, they may indemify themselves in the price of the lot which they buy, or take the chance of future improvements, as they shall see fit. The standing laws of the land giving to surveyors the power to make these improvements, everyone who purchases a lot upon the summit or on the decline of a hill, is presumed to foresee the changes which public necessity or convenience may require, and may avoid or provide against a loss."

City of Pontiac v. Carter, 32 Mich. 164; City of Detroit v. Beckman, 34 Mich. 125; Lee v. City of Minneapolis, 22 Minn. 13; Henderson v. City of Minneapolis, 32 Minn. 319; Willis v. City of Winona, 59 Minn. 27, 60 N. W. 814, 26 L. R. A. 142. A city is not liable for damages caused by the construction of a wagon bridge in the absence of a statute or city charter imposing such liability. Tate v. Missouri, K. & T. R. Co. 64 Mo. 149; Benden v. Nashua, 17 N. H. 477.

Radcliff's Ex'rs v. City of Brooklyn, 4 N. Y. (4 Comst.) 195. "The common council of the city of Brooklyn has ample authority to lay out, open, grade, level and pave streets within the city. When lands are taken for a street, the owner is to be paid his damages, to be assessed by commissioners. But there is no provision for paying consequential damages, or such as may result to persons whose lands are not taken. (Stat. 1833, p. 499, §§ 1, 2, 16; id. 1838, p. 119, §§ 1, 2.) Such is my construction of the statutes touching the question. Furman Street lying west of the testator's premises, had been laid prior to the digging of which the plaintiffs complain; but it had not then been opened or used as a highway. The digging was done in the site of the street for the purpose of grading and levelling the same for public use. There was no excavation or any other act done by the defendants in or upon the testator's land. But in consequence of digging away the bank in the site of the street, which

was a natural support of the testator's land, a portion of his premises fell into the street, and he suffered damage. There is no charge that the defendants acted maliciously; nor do the pleadings impute to them any want of skill or care in doing the work. The defendants are a public corporation; and the act in question was done for the benefit of the public, and under ample authority, if the legislature had power to grant the authority, without providing for the payment of such consequential damage I find no precedent for testator. Our constitution provides that private property shall not be taken for public use without just compensation. But I am not aware that this, or any similar provision in the constitutions of other states, has ever been held applicable to a case like this. Although the testator's property has suffered damages I find no precedent for saying that it has been 'taken for public use,' within the meaning of the constitution. * * * The case before us seems to fall within the principle that a man may enjoy his land in the way such property is usually enjoyed, without being answerable for the indirect or consequential damages which may be sustained by an adjoining land owner. But if that be a doubtful position, there is a class of cases directly on the point in judgment, which hold that persons acting under an authority conferred by the legislature to grade, level and improve streets and highways, if they exercise proper care and skill, are not answerable for the consequential damages which may be sustained by those who own lands bounded by the street or highway. And this is so whether the damage results either from cutting down or raising the street; and although the grade of the street had been before established, and the adjoining land owners had erected buildings with reference to such grade. As this doctrine has often been asserted, and has never been denied in any well considered judgment, I shall do little more than refer to some of the cases where it may be found. * * * The opening of a street in a city is not necessarily an injury to the adjoining landowners. On the contrary, it is in almost every instance a benefit to them. The damage which they sometimes sustain, because the level of the street does not correspond with the level of their land, is usually more than compensated by the increased value which the property acquires from having a new front on a street. In some instances the land owner will suffer a heavy loss; and this case, may, perhaps, be one of the number; but it is damnum absque injuria, and the owner must bear it. He often gets the benefit for nothing, when the value of his land is increased by opening or improving a street or highway; and he must bear the burden in the less common case of a depreciation in value in consequence of the work. It may be added, that when men buy and build in cities and villages, they usually take into consideration all those things which are likely to affect the value of their property, and particularly what will probably be done by way of opening and grading streets and avenues. Whether in cases of this kind the legislature ought as a

Ohio,[586] Kentucky[587] and Tennessee[588] hold otherwise. Under these circumstances, the question of the existence of a contract also has been raised, and where a change in the grade is made, the constitutional prohibition against the impairment of a contract obligation invoked. The authorities hold on this proposition

matter of equity, to provide for the payment of such damages as are merely consequential, we are not called upon to decide. It is enough for us to say, that a law which makes no such provision is not, for that reason, unconstitutional and void."

Smith v. Village of White Plains, 67 Hun, 81, 22 N. Y. Supp. 450; Matter of Ehrsam, 37 App. Div. 272, 55 N. Y. Supp. 942; In re Ridge St., 29 Pa. 391; Home Bldg. & Conveyance Co. v. City of Roanoke, 91 Va. 52, 20 S. E. 895, 27 L. R. A. 551; Alexander v. City of Milwaukee, 16 Wis. 247; Watkins v. City of Milwaukee, 55 Wis. 335, 69 N. W. 818. The limits of this work preclude a fuller citation and discussion of the authorities, but the reader is referred to Lewis, Em. Dom. (2d Ed.) §§ 92, et seq., where the subject is very fully and thoroughly considered.

[586] Rhodes v. City of Cleveland, 10 Ohio St. 159; McCombs v. Town Council of Akron, 15 Ohio, 474; Id., 18 Ohio, 229; Jackson v. Jackson, 16 Ohio St. 163; City of Cincinnati v. Penny, 21 Ohio St. 499; City of Youngstown v. Moore, 30 Ohio St. 133; City of Akron v. Chamberlain Co., 34 Ohio St. 328. "While we recognize the general rule to be, that no liability on the part of a municipality for injury to abutting property, by reason of the improvement of a street, exists where such improvement is properly made, yet this rule is subject, as we have seen, to the exception that where abutting property is improved with reference to an existing street, so graded or improved under the authority of the public agents having the control thereof, as to indicate, fairly and reasonably, permanency in the character of the street improvement, a liability is cast upon the city or village for injuries resulting from subsequent changes. And it would seem to follow, as a logical sequence, that, if before a permanent grade is thus established, the owner of an abutting lot improves the same with reference to a reasonable grade to be established in the future, and his anticipations are realized in the subsequent establishment of the grade, he should thereafter, in respect to such improvement, be entitled to enjoy the same right in the grade of the street which was thus fairly and reasonably anticipated, as if he had improved his lot after the grade had been so established." City of Cincinnati v. Whetstone, 47 Ohio St. 196, 24 N. E. 409; Smith v. Wayne County Com'rs, 50 Ohio St. 628, 35 N. E. 796.

[587] City of Louisville v. Louisville Rolling Mill Co., 66 Ky. (3 Bush.) 416. But see Keasey v. City of Louisville, 34 Ky. (4 Dana) 154.

[588] Hamilton County v. Rape, 101 Tenn. 222, 47 S. W. 416. But see Humes v. City of Knoxville, 20 Tenn. (1 Humph.) 403.

that the establishment of a grade by the proper authorities in a legal manner under a granted power from the legislature is not in effect the making of a contract between the corporation and the abutting property owner that the grade shall remain the same and that if a change is made, the party to the contract suffering a damage is not entitled to compensation for its breach.[589] They maintain that since the opening and establishment of highways is a governmental and legislative act, no contract relation can be established through the fixing of a grade and the opening of a street upon that line and that the public corporation is at liberty to change that grade as often as may be found necessary to meet a change of physical condition or to better serve the public and that if such a change is made, since no contract relation exists, the constitutional provision does not apply and the abutting property owner is not entitled to recover damages although he may have been seriously injured. As said by the supreme court of the United States,[590] "One object of the ordinance probably was, to give as much validity to the graduation made by the commissioners, as if it had been made under the direct superintendence of the corporate body. But it cannot be disguised, that a promise is held forth to all who should build on the graduated streets, that the graduation should be unalterable. The court, however, feels great difficulty in saying, that this ordinance can operate as a perpetual restraint on the corporation. When a government enters into a contract, there is no doubt of its power to bind itself to any extent not prohibited by its constitution. A corporation can make such contracts only as are allowed by the acts of incorporation. The power of this body to make a contract which should so operate as to bind its legislative capacities forever thereafter, and disable it from enacting a by-law, which the legislature enables it to enact, may well be questioned. We rather think that the corporation cannot abridge its own legislative power."

Statutory compensation. The fact that a change of grade may seriously damage adjoining property has been the occasion for the passage of legislation in many states creating a liability for consequential damages,[591] The rights of property owners under

[589] Goszler v. Corporation of Georgetown, 6 Wheat. (U. S.) 593.

[590] Goszler v. Corporation of Georgetown, 6 Wheat. (U. S.) 593.

[591] Smith v. Corporation of Washington, 20 How. (U. S.) 135; Springer v. City of Chicago, 37 Ill. App. 206, affirmed 135 Ill. 552, 26 N. E. 514, 12 L. R. A. 609; City of Chicago v. Spoor, 190 Ill. 340, 60 N. E.

such conditions are measured naturally by the language creating the liability and providing the remedies for its determination and enforcement.[592] These laws are strictly construed in common with all laws forming the basis of a right not before existing,[593] and

540, reversing 91 Ill. App. 472. Damages not recoverable under certain conditions for the construction of a street viaduct. An irregular or defective exercise of an authorized power is no defense to a claim for damages. City of Baltimore v. Rice, 73 Md. 307; Whitaker v. Borough of Phoenixville, 141 Pa. 327; Huckestein v. City of Allegheny, 165 Pa. 367, 30 Atl. 982. A city is not liable for a change of grade under a street not a public and legal one. Lewis v. Borough of Darby, 166 Pa. 613. No estoppel to claim damages by signing the petition for change of grade.

[592] Harper v. State, 113 Ala. 91; German Sav. and Loan Soc. v. Ramish, 138 Cal. 120, 69 Pac. 89, 70 Pac. 1067; City of Terre Haute v. Blake, 9 Ind. App. 403; Keehn v. McGillicuddy, 15 Ind. App. 580, 44 N. E. 554. A grade cannot be legally changed without assessing and tendering the damages occasioned to those entitled.

Noyes v. Town of Mason City, 53 Iowa, 418; City of Louisville v. McGill, 21 Ky. L. R. 718, 52 S. W. 1053; Interstate Consolidated Rapid Transit R. Co. v. Early, 46 Kan. 197, 26 Pac. 422; City of Baltimore v. Smith & Schwartz Brick Co., 80 Md. 458, 31 Atl. 423. Evidence of cost of filling to new grade relevant.

Garrity v. City of Boston, 161 Mass. 530, 37 N. E. 672. To merely restore a street to a proper grade is not such a change of grade as will result in a claim for damages by an abutting property owner. Genois v. City of St. Paul, 35 Minn. 330; City of Vicksburg v. Herman, 72 Miss. 211, 16 So. 434; Markowitz v. Kansas City, 125 Mo. 485, 28 S. W. 642; Smith v. City of St. Joseph, 122 Mo. 643; Bartlett v. Bristol, 66 N. H. 420, 24 Atl. 906. The remedy prescribed by statute is exclusive.

Heiser v. City of New York, 29 Hun (N. Y.) 446; Id., 104 N. Y. 68, 9 N. E. 866; Matter of Ehrsam, 37 App. Div. 272, 55 N. Y. Supp. 942. A tenant of realty cannot recover damages suffered by the change of grade in a part of a bridge. Phipps v. Village of North Pelham, 61 App. Div. 442, 70 N. Y. Supp. 630. Under Laws 1897, c. 414, § 159, one damaged by the change of the street grade must present a verified claim within sixty days after such change is effected.

Lester v. City of New York, 79 Hun (N. Y.) 479; Tate v. City of Greensborough, 114 N. C. 392, 24 L. R. A. 671; Wabash R. Co. v. City of Defiance, 52 Ohio St. 262, 40 N. E. 89. One failing to file a claim for damages in accordance with Revised Statutes, §§ 2304 and 2315, waives it. City of Philadelphia v. Wright, 100 Pa. 235; In re Fisher's Petition, 178 Pa. 325, 35 Atl. 922; Gilligan v. City of Providence, 11 R. I. 258; Owens v. City of Milwaukee, 47 Wis. 461; Benton v. City of Milwaukee, 50 Wis. 368.

[593] German Sav. & Loan Soc. v. Ramish, 138 Cal. 120, 69 Pac. 89, 70 Pac. 1067; Willard v. Borough of

in their local wording and interpretation must be found the extent of the liability and the manner and time, how and when its provisions can be made available to an adjoining property owner who has suffered damages because of a change of grade.[594]

Killingworth, 8 Conn. 247; City of Lafayette v. Cox, 5 Ind. 38; Henderson v. City of Covington, 77 Ky. (14 Bush) 312; City of Worcester v. Keith, 87 Mass. (5 Allen) 17; City of Port Huron v. McCall, 46 Mich. 565; Leonard v. City of Canton, 35 Miss. 189.

[594] Chicago, B. & Q. R. R. Co. v. City of Chicago, 166 U. S. 226; Platt v. Town of Milford, 66 Conn. 320, 34 Atl. 82; Gilpin v. City of Ansonia, 68 Conn. 72, 35 Atl. 777. The city's delay in appraising damages caused by changing grade will not warrant the commencement of a separate action by the land owner for such purpose.

City of Jeffersonville v. Myers, 2 Ind. App. 532, 28 N. E. 999; City of Topeka v. Sells, 48 Kan. 520, 29 Pac. 604; Barfield v. Gleason, 23 Ky. L. R. 128, 63 S. W. 964; Sullivan v. City of Fall River, 144 Mass. 579, 12 N. E. 553; Hill v. City of St. Louis, 59 Mo. 412; Householder v. Kansas City, 83 Mo. 488. Under Mo. Const. art. 2, § 21, a city is liable in a common-law action for injury to a lot caused by change of a street grade. Second Cong. Church Soc. v. City of Omaha, 35 Neb. 103, 52 N. W. 829; Hinckley v. City of Franklin, 69 N. H. 614, 45 Atl. 643; Ward v. City of New Brunswick, 49 N. J. Law, 552, 10 Atl. 109. One whose damages caused by the change of street grade have not been paid as provided by statute, may compel payment or bring suit, under § 70, N. J. Road act or the provisions of the act of March 10, Laws 1880, p. 133.

State v. City of Bayonne, 54 N. J. Law, 293, 23 Atl. 648; Reock v. City of Newark, 33 N. J. Law, 129; In re Caffrey, 52 App. Div. 264, 65 N. Y. Supp. 470, and cases cited; Hatch v. City of New York, 82 N. Y. 436. Local assessments due upon property cannot be retained by the city from an award of damages to the owner for a change of the grade in a street.

People v. Fitch, 147 N. Y. 355, 41 N. E. 695; In re Grab, 157 N. Y. 69, 51 N. E. 398; Fuller v. City of Mt. Vernon, 171 N. Y. 247, 63 N. E. 964, affirming 64 App. Div. 621, 72 N. Y. Supp. 1103; Ernst v. Kunkle, 5 Ohio St. 520. Where one is injured by the grading of a street, an action will not lie until a claim for damages is filed with the city clerk and sixty days thereafter elapses without the city taking any steps to assess the damages.

Beltzhoover v. Goolings, 101 Pa. 293; Borough of Millvale v. Poxon, 123 Pa. 497, 16 Atl. 781; Eisenhart v. City of Philadelphia, 154 Pa. 393, 26 Atl. 367. A claim for damages for change of grade must be presented within six years after the physical work was done. Brady v. City of Wilkes-Barre, 161 Pa. 246, 28 Atl. 1085; Rodgers v. City of Philadelphia, 181 Pa. 243, 37 Atl. 339; Anness v. City of Providence, 13 R. I. 17. The remedy given by statute is lost unless a claim for damages caused by the change of

§ 811. Statutory damages for change of grade.

In the last paragraph of the preceding section it was stated that many states have adopted either constitutional provisions or enacted statutes giving adjoining property owners the right to compensation through the lawful change of grade of a street where damages have been suffered by property of the character noted. There is an absolute lack of uniformity in these provisions and the subject can be best considered by reference to the cases which are cited in the subjoined note and in which they are arranged alphabetically according to states.[595] No general prin-

grade is made within forty days. City of Chattanooga v. Neely, 97 Tenn. 527, 37 S. W. 281; Seavey v. City of Seattle, 17 Wash. 361; Church v. City of Milwaukee, 31 Wis. 512; Smith v. City of Eau Claire, 83 Wis. 455, 53 N. W. 744; Drummond v. City of Eau Claire, 85 Wis. 566, 55 N. W. 1028; Pittelkow v. City of Milwaukee, 94 Wis. 651.

[595] *Alabama:* City of Montgomery v. Townsend, 80 Ala. 489, 4 So. 780; City Council of Montgomery v. Maddox, 89 Ala. 181.

California: Matter of Beale Street, 39 Cal. 495; McVerry v. Boyd, 89 Cal. 304; Eachus v. Los Angeles Consol. Elec. R. Co., 103 Cal. 614; Bancroft v. City of San Diego, 120 Cal. 432.

Connecticut: Healey v. City of New Haven, 49 Conn. 394; Peck v. Bristol, 74 Conn. 483, 51 Atl. 521; Shelton Co. v. Borough of Birmingham, 61 Conn. 518, 24 Atl. 978; Holley v. Town & Borough of Torrington, 63 Conn. 426, 28 Atl. 613; Cook v. Town of Ansonia, 66 Conn. 413, 34 Atl. 183; Gilpin v. City of Ansonia, 68 Conn. 72, 35 Atl. 777; McGar v. Borough of Bristol, 71 Conn. 652, 42 Atl. 1000. Conn. Gen. St. § 2703, authorizes a recovery for damages sustained by change of grade in a highway.

Florida: Selden v. City of Jacksonville, 28 Fla. 558, 10 So. 457, 14 L. R. A. 370.

Georgia: Markham v. City of Atlanta, 23 Ga. 402; Estes v. City of Macon, 103 Ga. 780.

Illinois: City of Bloomington v. Pollock, 141 Ill. 346, 31 N. E. 146, Id., 38 Ill. App. 133. The owner of property at the time the actual change of grade takes place is entitled to claim damages. Marshall v. City of Chicago, 37 Ill. App. 351; Whaples v. City of Waukegan, 95 Ill. App. 29; Brockhausen v. Rochland, 137 Ill. 547; City of Bloomington v. Pollock, 141 Ill. 346.

Indiana: Stein v. City of Lafayette, 6 Ind. App. 414, 33 N. E. 91; City of Terre Haute v. Blake, Ind. App. 403; Busenbark v. City of Crawfordsville, 9 Ind. App. 578; City of Lafayette v. Nagle, 113 Ind 425, 15 N. E. 1; City of Columbus v. Hydraulic Woolen Mills Co., 33 Ind. 435; City of Huntington v. Griffith, 142 Ind. 280, 41 N. E. 8; City of Terre Haute v. Evansville & T. H. R. Co., 149 Ind. 174, 46 N. E. 77, 37 L. R. A. 189; Hirth v. City of Indianapolis, 18 Ind. App. 673, 48 N. E. 876. Rev. St. 1894, § 3830, relative

to changing grades of streets repeals that part of Rev. St. 1894, § 3508 (Horner's St. 1897, § 3073) which provides that before the established grade of a street can be changed, the damages caused by the change shall be assessed and tendered to the parties injured. City of Lafayette v. Wortman, 77 Ind. 404; City of Wabash v. Alber, 88 Ind. 428. The statutory provision that the grade of a street shall not be changed until the damages occasioned by the change shall have been tendered does not apply to towns or villages. City of Kokomo v. Mahan, 100 Ind. 242. The statute providing for compensation upon a change of grade in a street applies to a sidewalk as well as the roadway of a street. City of Valparaiso v. Adams, 123 Ind. 250; Holden v. City of Crawfordsville, 143 Ind. 558, 41 N. E. 370.

Iowa: Ressegieu v. Sioux City, 94 Iowa, 543, 63 N. W. 184, 28 L. R. A. 389; Phillips v. City of Council Bluffs, 63 Iowa, 576. Construing Iowa Code, § 469. Preston v. City of Cedar Rapids, 95 Iowa 71, 63 N. W. 577. A property owner petitioning for a change of grade is estopped from claiming damages resulting from improvements made upon the changed grade. Stewart v. City of Council Bluffs, 84 Iowa, 61; Chase v. City of Sioux City, 86 Iowa, 603; Buser v. City of Cedar Rapids, 115 Iowa, 683, 87 N. W. 404; Blanden v. City of Ft. Dodge, 102 Iowa, 441; Morton v. City of Burlington, 106 Iowa, 50.

Kansas: Kemper v. Campbell, 45 Kan. 529; City of Topeka v. Sells, 48 Kan. 520.

Kentucky: City of Henderson v. Winstead, 22 Ky. L. R. 828, 58 S. W. 777.

Massachusetts: Brown v. City of Lowell, 49 Mass. (8 Metc.) 172; White v. Blanchard Bros. Granite Co., 178 Mass. 363, 59 N. E. 1025; Snow v. Inhabitants of Provincetown, 109 Mass. 123; Geraghty v. City of Boston, 120 Mass. 416, construing General St. c. 43, § 22. Dana v. City of Boston, 176 Mass. 97, 57 N. E. 325.

Michigan: Sligh v. City of Grand Rapids, 84 Mich. 497, 47 N. W. 1093; Harper v. City of Detroit, 110 Mich. 427.

Minnesota: Karst v. St. Paul, S. & T. F. R. Co., 22 Minn. 118; Wilkin v. City of St. Paul, 33 Minn. 181. The construction of a portion of a bridge twenty feet above the established grade and closing for travel the street underneath, is such an alteration of an established grade as to entitle the lot owner to damages. Moritz v. City of St. Paul, 52 Minn. 409, 54 N. W. 370. The words "owner" or "owners" as used in the charter of the city of St. Paul relative to damages for change of street grade are used to designate the parties interested and are to be considered in a comprehensive sense. Menges v. City of St. Paul, 57 Minn. 9; Abel v. City of Minneapolis, 68 Minn. 89, 70 N. W. 851; State v. Blake, 86 Minn. 37, 90 N. W. 5.

Missouri: Schumacher v. City of St. Louis, 3 Mo. App. 297; Sheehy v. Kansas City Cable R. Co., 94 Mo. 574, 7 S. W. 579. Under Const. Mo. § 21, art. 2, a city cannot make an alteration in the grade of its street thereby injuring private property without making compensation. Vaile v. City of Independence, 116 Mo. 333, 22 S. W. 695. No liability where property owners change the grade. Hickman v. Kansas City,

120 Mo. 110, 25 S. W. 325, 23 L. R. A. 658; Imler v. City of Springfield, 30 Mo. App. 669; Jarboe v. City of Carrollton, 73 Mo. App. 347; Walker v. City of Sedalia, 74 Mo. App. 70. Const. § 20, art. 2, relative to damages to abutting property by reason of a change of grade of a street is self executing. Stickford v. City of St. Louis, 75 Mo. 309. Damages may be sustained where a change of grade does not extend the whole width of the street. Cross v. City of Kansas, 90 Mo. 13, 1 S. W. 749; Glascow v. City of St. Louis, 107 Mo. 198; Vaile v. City of Independence, 116 Mo. 333; Davis v. Missouri Pac. R. Co., 119 Mo. 180; Clinkenbeard v. City of St Joseph, 122 Mo. 641; City of St. Louis v. Lang, 131 Mo. 412, 33 S. W. 54.

Mississippi: City of Vicksburg v. Herman, 72 Miss. 211, 16 So. 434.

Nebraska: Harmon v. City of Omaha, 17 Neb. 548; Svanson v. City of Omaha, 38 Neb. 550; McGavock v. City of Omaha, 40 Neb. 64; Nebraska City v. Northcutt, 45 Neb. 456; Hammond v. City of Harvard, 31 Neb. 635, 48 N. W. 462; City of Omaha v. Williams, 52 Neb. 40.

New Hampshire: Hodgman v. City of Concord, 69 N. H. 349, 41 Atl. 287. The owner of the premises at the time of the actual change of grade is entitled to the damages sustained. Hinckley v. City of Franklin, 69 N. H. 614, 45 Atl. 643. One is entitled to damages for a change of grade in a sidewalk though the roadway beyond is not altered.

New Jersey: Stewart v. City of Hoboken, 57 N. J. Law, 330, 31 Atl. 278; Clark v. City of Elizabeth, 61 N. J. Law, 565, 40 Atl. 616; Rogge v. City of Elizabeth, 64 N. J. Law, 491, 46 Atl. 164; construing act of May 7th, 1889, Public Laws, p. 378, relative to the change of grade of streets in the cities of New Jersey. Inhabitants of Trenton v. McQuade, 52 N. J. Eq. 669; Collins v. Langan, 58 N. J. Law, 6; Clark v. City of Elizabeth, 61 N. J. Law, 565.

New York: Bartlett v. Village of Tarrytown, 52 Hun, 380, 5 N. Y. Supp. 240. Construing N. Y. Laws 1883, c. 113, relative to change of street grade in any incorporated village. In re Church of Our Lady of Mercy, 57 Hun, 590, 10 N. Y. Supp. 683. Laws N. Y. 1883, c. 113, inconsistent with existing charters repeals them so far as applicable. Whitmore v. Village of Tarrytown, 62 Hun, 619, 16 N. Y. Supp. 740; Heiser v. City of New York, 104 N. Y. 68; In re Smiddy, 65 Hun, 620, 19 N. Y. Supp. 949. Construing and applying Laws 1888, c. 311, and Laws 1889, c. 201, and holding that they do not repeal Laws 1883, c. 113, making incorporated villages liable for damages to real property occasioned by a change of grade or highways. People v. Lord, 29 App. Div. 455, 52 N. Y. Supp. 2. Under Laws 1893, c. 537, § 2, as amended by Laws 1894, c. 567, an owner of land fronting on a street, the grade of which has been legally changed, must file with the comptroller a claim describing the property for purposes of identification and making a demand for the damages which he has sustained. In re Grab, 31 App. Div. 610, 52 N. Y. Supp. 395. Laws 1897, c. 414, § 159, apply where there are no special charter provisions relative to ascertaining

damages sustained by a property owner through the regrading of a street. In re Church of Our Lady of Mercy, 57 Hun (N. Y.) 590; In re Greer, 39 App. Div. 22, 56 N. Y. Supp. 938. Laws 1897, c. 414, § 159, provide for the payment of damages caused by the change of the graded street whether from the natural grade or one established by the village authorities. People v. Green, 64 N. Y. 606; People v. Gilon, 121 N. Y. 551; In re Grade Crossing Com'rs, 154 N Y. 561, 49 N. E. 131. Construing and applying the charter provisions of the city of Buffalo relative to the alteration of street grades and the payment of damages to the abutting owners sustaining injuries.

North Carolina: Wolfe v. Pearson, 114 N. C. 621.

Ohio: Hickox v. City of Cleveland, 8 Ohio St. 543; City of Cincinnati v. Whetstone, 47 Ohio St. 196, 24 N. E. 409. The owner is entitled to recover damages the day of the injury and where an award is made later than this, he is entitled to interest on the amount of compensation awarded from and after the actual change of the established grade. City of Youngstown v. Moore, 30 Ohio St. 133; City of Cincinnati v. Whetstone, 47 Ohio St. 196.

Pennsylvania: Folkenson v. Borough of Easton, 116 Pa. 523, 8 Atl. 869. Prior to the Pa. Const. 1874, no recovery could be had for injuries sustained by a property owner by reason of a change of grade of a street. Borough of Freemansburg v. Rodgers (Pa.) 8 Atl. 872. The owner of property at the time of the actual physical change of grade is entitled to the damages caused thereby. Power v. Borough of Ridgway, 149 Pa. 317, 24 Atl. 307. A bridge being a part of a public highway if rebuilt upon a different grade will occasion a liability to property injured by the change in its grade. Seaman v. Borough of Washington, 172 Pa. 467, 33 Atl. 756; In re Plan 166, 143 Pa. 414, 22 Atl. 669, construing and applying act of Feb. 2, 1854, P. L. 37, § 27, known as the consolidation act of the city of Philadelphia. Jones v. Borough of Bangor, 144 Pa. 638, 23 Atl. 252. One dedicating land for the purpose of a public highway is not estopped to afterwards claim damages under the statute caused by a change of grade. Beaver v. City of Harrisburg, 156 Pa. 547, 27 Atl. 4; Mellor v. City of Philadelphia, 160 Pa. 614, 28 Atl. 991. A property owner under Const. art. 16, § 8, may recover damages caused by changing the grade of a side street though his property does not abut upon it. Rudderow v. City of Philadelphia, 166 Pa. 241, 31 Atl. 53. Clark v. City of Philadelphia, 171 Pa. 30. A waiver of a claim for damages caused by the opening of a street will not operate as a waiver either by estoppel or intention of damages for the change of garde. In re Chatham Street, 191 Pa. 604, 43 Atl. 365. Pa. Const. art. 16, § 8, relative to the making of compensation for injuries sustained by the construction or change of highways is not limited to injuries to abutting property alone, but applies to all injuries which are substantial. Lewis v. Borough of Homestead, 194 Pa. 199, 45 Atl. 123. An abutting owner is entitled to damages though not on the part

ciple can be stated which will be applicable and will determine the extent of the compensation recoverable even under the same conditions and circumstances.

of a street where the grade is changed.

Rhode Island: Gardiner v. Town of Johnston. 16 R. I. 94; Almy v. Coggeshall, 19 R. I. 549.

South Carolina: Paris Mountain Water Co. v. City Council of Greenville, 53 S. C. 82, 30 S. E. 699. The terms "alter" as used in the city charter of Greenville, relative to the power of the city council over streets, includes any change in their structural formation either by raising or lowering its surface or changing its location. Damages for a change of grade may, therefore be recovered. Garraux v. City Council of Greenville, 53 S. C. 575, 31 S. E. 597.

South Dakota: Whittaker v. City of Deadwood, 12 S. D. 608, 82 N. W. 202.

Tennessee: City of Knoxville v. Harth, 105 Tenn. 436, 58 S. W. 650; City of Nashville v. Nichol, 62 Tenn. (3 Baxt.) 338.

Texas: City of Dallas v. Kahn, 9 Tex. Civ. App. 19; Denison & P. Suburban R. Co. v. James, 20 Tex. Civ. App. 358, 49 S. W. 660; City of Texarcana v. Talbot, 7 Tex. 26 Civ. App. 202, 26 S. W. 451. The consent of the owner to a change of grade may estop him from claiming damages.

Virginia: But see Kehrer v. City of Richmond, 81 Va. 745.

Washington: In re City of Seattle, 26 Wash. 602, 67 Pac. 250. The road damages caused by the change of grade of a street is personal to the owner at the time.

West Virginia: Yeager v Town of Fairmount, 43 W. Va. 259, 27 S. E. 234; Blair v. City of Charleston, 43 W. Va. 62, 35 L. R. A. 852.

Wisconsin: Goodall v. City of Milwaukee, 5 Wis. 32; Pearce v. City of Milwaukee, 18 Wis. 428; Addey v. City of Janesville, 70 Wis. 401, 35 N. W. 931; Herzer v. City of Milwaukee, 39 Wis. 360; Dore v. City of Milwaukee, 42 Wis. 108; Smith v. City of Eau Claire, 78 Wis. 457, 47 N. W. 830, construing Laws 1889, c. 184, entitled "An act to revise, consolidate and amend" the Eau Claire city charter and holding that the latter legislation repeals an old city charter. Anderton v. City of Milwaukee, 82 Wis. 279, 52 N. W. 95, 15 L. R. A. 830, construing Laws 1891, c. 254, relative to a change of grade of a street in the city of Milwaukee as affected by Wis. Const. art. 1, § 9, and Const. U. S. Amend. 14, § 1. Walish v City of Milwaukee, 95 Wis. 16, 69 N. W. 818. Laws 1874, c. 184, do not entitle a land owner to compensation in case of an alteration of an established grade if the street has not been actually graded to this grade. State v. City of Superior, 108 Wis. 16, 83 N. W. 1100. Wis. Laws 1891, c. 124, § 113, creates a liability for damages caused by change of a grade of a street in the city of Superior. Jorgenson v. City of Superior, 111 Wis. 561, 87 N. W. 565. A liability for a change of grade is created by Laws 1891, c. 124, § 113. Liebermann v. City of Milwaukee, 89 Wis. 336, 61 N. W. 1112; Colclough v. City of Milwaukee, 92 Wis. 182;

§ 812. Definition of grade.

The compensation that can be recovered is based upon a change of the lawful grade and this proposition naturally leads to the definition of a grade. In this respect the cases are not uniform; some hold that to constitute a lawful grade, the change of which will lead to a recovery of the compensation permitted by statute, the gradient of the street must have been established by official action according to the rules prescribed by local charters or general statutes.[596] Other cases maintain that official action establishing a grade may not be necessary so long as the street has been maintained and improved upon either a natural grade or one on which the street has been improved or repaired.[597]

A change of grade. A change, therefore, will depend upon the manner in which the grade may have been established; if official action is necessary to establish a grade, action of the same character is necessary to make a change of grade that can be the basis of a recovery of damages.[598] If statutory or charter provisions

Walish v City of Milwaukee, 95 Wis. 16.

See, also, cases generally collected in 35 Am. & Eng. Corp. Cases. Lewis, Eminent Domain, (2d. Ed.) §§ 206b, et seq.

[596] Dorland v. Bergson, 78 Cal. 637, 21 Pac. 537; Gardiner v. Town of Johnston, 16 R. I. 94, 12 Atl. 888.

[597] McGar v. Borough of Bristol, 71 Conn. 652, 42 Atl. 1000. The term "grade" as used in Gen. St. § 2703, relative to a change of grade does not signify a level precisely or officially established upon the surface of the highway as it in fact exists. Allen v. City of Davenport, 107 Iowa, 90; Davis v. Missouri Pac. R. Co., 119 Mo. 180; Hickman v. Kansas City, 120 Mo. 110, 23 L. R. A. 658; Smith v. City of St. Louis, 122 Mo. 643; Bartlett v. Village of Tarrytown, 55 Hun, 492, 8 N. Y. Supp. 739; Niver v. Village of Bath-on-the-Hudson, 27 Misc. 605, 58 N. Y. Supp. 270; Borough of New Brighton v. United Presbyterian Church, 96 Pa. 331.

[598] Moore v. City of Atlanta, 70 Ga. 611; Keehn v. McGillicuddy, 15 Ind. App. 580; City of Valparaiso v. Adams, 123 Ind. 250, 24 N. E. 107; Kepple v. City of Keokuk, 61 Iowa, 653; Farmer v. City of Cedar Rapids, 116 Iowa, 322, 89 N. W. 1105; Bogard v. O'Brien, 14 Ky. L. R. 648, 20 S. W. 1097; Albro v. City of Fall River, 175 Mass. 590, 56 N. E. 894; Lane v. City of Boston, 125 Mass. 519; Viscardi v. Inhabitants of Great Barrington, 174 Mass. 406, 54 N. E. 859; Rakowsky v. City of Duluth, 44 Minn. 188, 46 N. W. 338; Gehling v. City of St. Joseph, 49 Mo. App. 430; Maudlin v. City of Trenton, 67 Mo. App. 452; Stuebner v. City of St. Joseph, 81 Mo. App. 273; Hall v. City of Trenton, 86 Mo. App. 326; Kroffe v. City of Springfield, 86 Mo. App. 530; McGavock v. City of Omaha, 40 Neb. 64, 58 N. W. 543; Kearney

do not require this action, a determination by the proper officials for a change in the physical grade of the street, whether natural or otherwise, and the consequent affecting of its gradient to conform to the new line established is sufficient.[599]

§ 813. Damages recoverable.

Statutory or charter provisions may be the basis of the right to compensation on the part of the abutting owner for a change of grade. As already stated, the owner's right when based upon this will be limited in its extent and the manner of recovery where it

v. Andrews, 10 N. J. Eq. (2 Stockt.) 70; Vanderbeck v. Ridgewood Tp., 50 N. J. Law, 514, 14 Atl. 598; State v. City of Rutherfort, 52 N. J. Law, 499, 19 Atl. 972; State v. City of Bayonne, 54 N. J. Law, 293, 23 Atl. 648; Brineley v. Inhabitants of Perth Amboy, 29 N. J. Law, 259; Collins v. Langan, 58 N. J. Law, 6, 32 Atl. 258.

Vanatta v. Town of Morristown, 34 N. J. Law, 445. Reasonable notice must be given of the passage of a city ordinance directing the change of grade so that persons affected may have an opportunity to be heard. Heiser v. City of New York, 104 N. Y. 68. A statutory provision providing a mode of compensation to persons injured by public improvements is exclusive. Folmsbee v. City of Amsterdam, 142 N. Y. 118, 36 N. E. 821; Lewis v. Borough of Homestead, 194 Pa. 199, 45 Atl. 123; Aldrich v. City of Providence, 12 R. I. 241; Sargent v. City of Tacoma, 10 Wash. 212, 38 Pac. 1048. A change of grade, however accomplished, will result in a liability to the abutting property owner for damages. Meinzer v. City of Racine, 74 Wis. 166, 42 N. W. 230.

[599] City of Huntington v. Griffith, 142 Ind. 280, 41 N. E. 8, 589; Luse v. City of Des Moines, 22 Iowa, 590. An averment that the defendant "fixed and established a grade as it was lawfully authorized to do," is sufficient. Ressegieu v. Sioux City, 94 Iowa, 543, 63 N. W. 184, 28 L. R. A. 389; Millard v. Webster City, 113 Iowa, 220, 84 N. W. 1044; Davis v. Missouri Pac. R. Co. 119 Mo. 180, 24 S. W. 777; Smith v. City of St. Joseph, 122 Mo. 643, 27 S. W. 344; Imler v. City of Springfield, 30 Mo. App. 669; Cole v. City of St. Louis, 132 Mo. 633, 34 S. W. 469; Taylor v. City of Jackson, 83 Mo. App. 641; City of Harvard v. Crouch, 47 Neb. 133, 66 N. W. 276; In re Greer, 39 App. Div. 22, 56 N. Y. Supp. 938; Whitmore v. Village of Tarrytown, 137 N. Y. 409, 33 N. E. 489. Evidence considered and held not a change or alteration of the street grade within the meaning of the statute. Borough of New Brighton v. Piersol, 107 Pa. 280; O'Brien v. City of Philadelphia, 150 Pa. 589, 24 Atl. 1047; Hobson v. City of Philadelphia, 150 Pa. 595, 24 Atl. 1048; City of Chattanooga v. Geiler, 81 Tenn. (13 Lea) 611; City of Ft. Worth v. Howard, 3 Tex. Civ. App. 537, 22 S. W. 1059; Blair v. City

is prescribed.[600] Generally speaking, the principles applicable to the recovery of damages as discussed and stated in those sections relating to the taking of property under the power of eminent domain will control and these will constitute the measure of damages.[601] The rule is also true that an abutting property owner cannot recover for a general depreciation of property which may have been suffered by the change of grade and must rely upon the special damages that his property has sustained.[602] An interference with access to his property [603] resulting in a loss of business or in-

of Charlestown, 43 W. Va. 62, 26 S. E. 341, 35 L. R. A. 852.

[600] See §§ 810, 811, ante.

[601] Healey v. City of New Haven, 49 Conn. 394; New Haven Steam Saw Mill Co. v. City of New Haven, 72 Conn. 276, 44 Atl. 229, 609. Interest from the time that damages are liquidated is a proper element of damage. Sanitary Dist. of Chicago v. McGuirl, 86 Ill. App. 392; Natick Gaslight Co. v. Inhiabitants of Natick, 175 Mass. 246, 56 N. E. 292. A gas company is not entitled to any damages resulting from the laying out of its pipes, made necessary by the change in the grade of a street. Moritz v. City of St. Paul, 52 Minn. 409, 54 N. W. 370; Hampton v. Kansas City, 74 Mo. App. 129. Damages should be estimated from the time of the injury and interest may be added from that time. In re Caffrey, 52 App. Div. 264, 65 N. Y. Supp. 470. See §§ 743 et seq., ante.

[602] Reardon v. City and County of San Francisco, 66 Cal. 492; Eachus v. Los Angeles Consol. Elec. R. Co., 103 Cal. 614. There can be a recovery only for an actual physical change of grade. Pause v. City of Atlanta, 98 Ga. 92, 26 S. E. 489; City of Lafayette v. Nagle, 113 Ind. 425, 15 N. E. 1; City of Topeka v. Martineau, 42 Kan. 387, 22 Pac. 419, 5 L. R. A. 775; City of Leavenworth v. Duffy, 10 Kan. App. 124, 62 Pac. 433; Town of West Covington v. Schultz, 16 Ky. L. R. 831, 30 S. W. 410; City of Louisville v. Coleburne, 22 Ky. L. R. 64, 56 S. W. 681; Offutt v. Montgomery County Com'rs, 94 Md. 115, 50 Atl. 419; Davenport v. Inhabitants of Dedham, 178 Mass. 382, 59 N. E. 1029. No damages can be recovered where the only injury is occasioned by the fact that the change in the grade of a street renders it less convenient for use than it was before. Davenport v. Inhabitants of Hyde Park, 178 Mass. 385, 59 N. E. 1030; Dana v. City of Boston, 176 Mass. 97, 57 N. E. 325; Keil v. City of St. Paul, 47 Minn. 288, 50 N. W. 83; In re Grade Crossing Com'rs, of Buffalo, 166 N. Y. 69, 59 N. E. 706, Id., 17 App. Div. 54, 44 N. Y. Supp. 844; Smith v. Wayne County Com'rs, 50 Ohio St. 628, 35 N. E. 796.

[603] Hohmann v. City of Chicago, 140 Ill. 226, 29 N. E. 671. The desertion of customers from a saloon is not an element of damage for which one can recover damages caused by the construction of a viaduct. Tinker v. City of Rockford, (Ill.) 28 N. E. 573; City of Chicago v. Atlgeld, 33 Ill. App. 23. The plaintiff in an action to recover for damages caused by a change of

convenience, an increased liability to the action of surface water,[604] and other special injuries of a similar character, will form the basis of proceedings under the statute by him.[605]

grade must show that he was the owner thereof at the time the injury was done.

Marshall v. City of Chicago, 77 Ill. App. 351; City of Chicago v. Jackson, 88 Ill. App. 130; City of Joliet v. Bower, 155 Ill. 414, 40 N. E. 619, reversing 49 Ill. App. 464. A city changing the grade of a street is liable to the owners of all property damaged by the change whether abutting or otherwise. McCash v. City of Burlington, 72 Iowa, 26, 33 N. W. 346; Morton v. City of Burlington, 106 Iowa, 50, 75 N. W. 662; Denise v. City of Omaha, 49 Neb. 750, 69 N. W. 119; City of Omaha v. Flood, 57 Neb. 124, 77 N. W. 379. But see Hubbard v. Inhabitants of Webster, 118 Mass. 509; Jordan v. City of Benwood, 42 W. Va. 312, 26 S. E. 266, 36 L. R. A. 519.

[604] City of Montgomery v. Maddox, 89 Ala. 181, 7 So. 433; Town of Avondale v. McFarland, 101 Ala. 381, 13 So. 504, overruling City of Montgomery v. Townsend, 80 Ala. 489; Conniff v. City and County of San Francisco, 67 Cal. 45; Sison v. Town of Stonington, 73 Conn. 348, 47 Atl. 662; City of Springfield v. Griffith, 46 Ill. App. 246; City of Mt. Sterling v. Jephson, 21 Ky. L. R. 1028, 53 S. W. 1046; Woodbury v. Inhabitants of Beverly, 153 Mass. 245, 26 N. E. 851; Carll v. Village of Northport, 11 App. Div. 120, 42 N. Y. Supp. 576; Inman v. Tripp, 11 R. I. 520; McCray v. Town of Fairmont, 46 W. Va. 442, 33 S. E. 245; Addy v. City of Janesville, 70 Wis. 401, 35 N. W. 931; But see Magarity v. City of Wilmington, 5 Houst. (Del.) 530; Stewart v. Clinton, 79 Mo. 603; Yeager v. Town of Fairmont, 43 W. Va. 259, 27 S. E. 234. There is no liability unless the surface water is collected in a body by reason of the change of grade and thrown upon the abutting lot.

[605] Lehigh Valley Coal Co. v. City of Chicago, 25 Fed. 415; City of Chicago v. Baker, 86 Fed. 753, 30 C. C. A. 364; Shelton Co. v. Borough of Birmingham, 61 Conn. 518, 24 Atl. 978. The destruction of a cellar entrance from the sidewalk by a change of grade of a street is not an element of damage.

Shelton Co. v. Borough of Birmingham, 62 Conn. 456. The value of a sidewalk previously constructed and which is destroyed by a change of grade can be properly included in the damages. Holley v. Town and Borough of Torrington, 63 Conn. 426, 28 Atl. 613. The destruction of a sidewalk and shade trees is properly considered in determining the damages caused by a change of grade.

Cook v. City of Ansonia, 66 Conn. 413, 34 Atl. 183. The value of trees and sidewalk destroyed and cost of grading rendered necessary by a change of street grade are proper elements of damage. McGar v. Borough of Bristol, 71 Conn. 652; New Haven Steam Saw Mill Co. v. City of New Haven, 72 Conn. 288, 44 Atl. 233; City Council of Augusta v. Schrameck, 96 Ga. 426, 23 S. E. 400. The cost of

filling in a lot and raising a building necessitated by a raise in the grade of the street is a proper element of damage.

City of Joliet v. Adler, 71 Ill. App. 456. The rental value of property is not an element upon which to base damages for a change of street grade, but evidence of the appearance of the property as affected by the change of grade is relevant. City of Chicago v. Jackson, 88 Ill. App. 130. The expense of making a new sewer connection is allowable.

Conklin v. City of Keokuk, 73 Iowa, 343, 35 N. W. 444; Richardson v. Webster City, 111 Iowa, 427, 82 N. W. 920. The destruction of shade trees, the cost of a retaining wall and increased difficulty of access, can be included. City of Ludlow v. Froste, 20 Ky. L. R. 216, 45 S. W. 661. The owner can recover for the destruction of fences and trees. City of Louisville v. Hegan, 20 Ky. L. R. 1532, 49 S. W. 532; City of Henderson v. Winstead, 22 Ky. L. R. 828, 58 S. W. 777; City of Louisville v. Harbin, 22 Ky. L. R. 1865, 61 S. W. 1011; Chase v. City of Portland, 86 Me. 367, 29 Atl. 1104; Chase v. City of Worcester, 108 Mass. 60; Hartshorn v. Worcester County, 113 Mass. 111.

Buell v. Worcester County, 119 Mass. 372. The expenses a prudent man would incur in putting property in as good a condition as it was before with reference to grade, is a proper element of damages caused by a change of grade in a street.

Bemis v. City of Springfield, 122 Mass. 110; City of Grand Rapids v. Luce, 92 Mich. 92; Walker v. City of Sedalia, 74 Mo. App. 70. The destruction of shade trees is properly considered as an element of damages. Watson v. City of Columbia, 77 Mo. App. 267. The expenses of a former change of grade not allowed.

Stanwood v. City of Omaha, 38 Neb. 552, 57 N. W. 287; City of Omaha v. Williams, 52 Neb. 40, 71 N. W. 970. One who purchases property on the street where the grade is established must improve his property with reference to such grade.

People v. Lord, 31 App. Div. 221, 52 N. Y. Supp. 568. A widow with two minor children cannot be awarded the damages based upon the entire fee. Sauer v. City of New York, 44 App. Div. 305, 60 N. Y. Supp. 648. Evidence relative to the profits of a business prior to the construction of a viaduct and losses sustained thereafter is incompetent, being too speculative.

Seaman v. Borough of Washington, 172 Pa. 467, 33 Atl. 756; Groff v. City of Philadelphia, 150 Pa. 594, 24 Atl. 1048. A city is not liable for damages to a house rented on a lot after the change in grade was authorized. Lawrence v. City of Philadelphia, 154 Pa. 20, 25 Atl. 1079. Damages can only be recovered for injuries to lots abutting on the street the grade of which is changed. See, also, Mellor v. City of Phildelphia, 160 Pa. 614.

In re Tucker & Frankford Streets, 166 Pa. 366, 31 Atl. 117. The increased cost of delivering freight to a railroad caused by a change in the grade of a street occupied by tracks is not a proper element of damage. Ridge Ave. Pass. R. Co. v. City of Philadelphia,

Special benefits must be considered. In considering the damages sustained, any special benefits which his property may have received through the change of grade must be considered and deducted from the special damages that he may have suffered.[606] An increase in common to the entire neighborhood cannot be consid-

181 Pa. 592, 37 Atl. 910. A street railway company can claim no damages for impediment to travel caused by a change of grade made in the street upon which tracks are located. Cherry v. City of Rock Hill, 48 S. C. 553, 26 S. E. 798. The fact that an owner may be obliged to take a more circuituous route between his residence and place of business can not be included as an element of damage. French v. City of Milwaukee, 49 Wis. 584; Tyson v. City of Milwaukee, 50 Wis. 78. The cost of grading adjoining premises to conform to a change of street grade is a legitimate item of damages. Meinzer v. City of Racine, 74 Wis. 166. The cost of filling in premises to correspond with the changed grade is properly considered.

[606] Flicken v. City of Atlanta, 114 Ga. 970, 41 S. E. 58; City of Elgin v. McCallum, 23 Ill. App. 186; Springer v. City of Chicago, 135 Ill. 552, 26 N. E. 514, 12 L. R. A. 609; City of Savanna v. Loop, 47 Ill. App. 214; Hopkins v. City of Ottawa, 59 Ill. App. 288; City of Elgin v. Eaton, 83 Ill. 535; Springer v. City of Chicago, 135 Ill. 552, 12 L. R. A. 609; McCash v. City of Burlington, 72 Iowa, 26, 33 N. W. 346; Morton v. City of Burlington, 106 Iowa, 50; Parker v. City of Atchison, 46 Kan. 14; Chase v. City of Portland, 86 Me. 367, 29 Atl. 1104; Donovan v. City of Springfield, 125 Mass. 371; Cross v. Plymouth County, 125 Mass. 557; Woodbury v. Inhabitants of Beverly, 153 Mass. 245; Wolters v. City of St. Louis, 132 Mo. 1, 33 S. W. 441; Kent v. City of St. Joseph, 72 Mo. App. 42; Rives v. City of Columbia, 80 Mo. App. 173; Clay v. Board, 85 Mo. App. 237; Hammond v. City of Harvard, 31 Neb. 635; Barr v. City of Omaha, 42 Neb. 341, 60 N. W. 591.

Smith v. City of Omaha, 49 Neb. 883, 69 N. W. 402. An award of damages under Omaha city charter, § 116, upon a change of grade must show affirmatively that possible benefits to the public were considered and that the award represents the damages sustained, less such benefits, if any. City of Omaha v. Hansen, 36 Neb. 135, 54 N. W. 83. Increase of travel is not a special benefit. Svanson v. City of Omaha, 38 Neb. 550, 57 N. W. 289; Kirkendall v. City of Omaha, 39 Neb. 1, 57 N. W. 752; Stewart v. City of Hoboken, 57 N. J. Law, 330, 31 Atl. 278.

Lotze v. City of Cincinnati, 61 Ohio St. 272, 55 N. E. 828. Improved light and ventilation afforded buildings and increased facilities for carrying on business for which used are incidental and special local benefits to be considered in estimating the damages to abutting property caused by the change of grade of a street. Chambers v. Borough of South Chester, 140 Pa. 510; Philadelphia Ball Club v. City of Philadelphia, 182 Pa. 362, 38 Atl. 357; City of Dallas

ered.[607] The only just and practicable rule which can be adopted for a measure of damages to adjoining lot owners is the difference in the market value of the property before the improvement is made and unaffected by it and its value afterwards as affected by it.[608]

§ 814. Unlawful change of grade

The rules stated above only apply, however, to a lawful change of grade and if public officials without authority take action in regrading a street that results in an injury to property owners,

v. Kahn, 9 Tex. Civ. App. 19, 29 S. W. 98; City of Dallas v. Cooper, (Tex. Civ. App.) 34 S. W. 321; Blair v. City of Charleston, 43 W. Va. 62, 26 S. E. 341, 35 L. R. A. 852; Smith v. City of Eau Claire, 78 Wis. 457.

[607] Fairchild v. City of St. Paul, 46 Minn. 540; Cole v. City of St. Louis, 132 Mo. 633, 34 S. W. 469; City of Omaha v. Cochran, 30 Neb. 637; Lowe v. City of Omaha, 33 Neb. 587, 50 N. W. 760; Kirkendall v. City of Omaha, 39 Neb. 1, 57 N. W. 752; Vacation of Howard St., 142 Pa. 601; Rudderow v. City of Philadelphia, 166 Pa. 241; Drummond v. City of Eau Claire, 85 Wis. 566, 55 N. W. 1028. But see Aswell v. City of Scranton, 175 Pa. 173, 34 Atl. 656.

[608] City of Montgomery v. Townsend, 80 Ala. 489, 4 So. 780; Platt v. Town of Milford, 66 Conn. 320, 34 Atl. 82; Roughton v. City of Atlanta, 113 Ga. 948, 39 S. E. 316; City of Jacksonville v. Loar, 65 Ill. App. 218; Butler v. City of East St. Louis, 74 Ill. App. 649; Ross v City of Chicago, 91 Ill. App. 416; City of Joliet v. Schroeder, 92 Ill. App. 68; Stewart v. City of Council Bluffs, 84 Iowa, 61, 50 N. W. 219; Hempstead v. City of Des Moines, 52 Iowa, 303; Preston v. City of Cedar Rapids, 95 Iowa, 71, 63 N. W. 577; Parker v. City of Atchison, 46 Kan. 14, 26 Pac. 435; City of Covington v. Taffee 24 Ky. L. R. 373, 68 S. W. 629; Chase v City of Portland, 86 Me. 367, 29 Atl. 1104; Garrity v. City of Boston, 161 Mass. 530; Davis v. Missouri Pac. R. Co., 119 Mo. 180, 24 S. W. 777. Damages cannot be recovered for injuries to improvements put on abutting property after the new grade to which the change is made has been established and made a matter of record.

Smith v. Kansas City, 128 Mo. 23, 30 S. W. 314; Dale v. City of St. Joseph, 59 Mo. App. 566; Keith v. Bingham, 100 Mo. 300, 13 S. W. 683. A claim for damages by reason of a change of grade is personal with the owner of the property at the time of the injury and does not run with the land. Clinkingbeard v. City of St. Joseph, 122 Mo. 641; Markowitz v. Kansas City, 125 Mo. 485; Smith v. Kansas City, 128 Mo. 23; City of Vicksburg v. Herman, 72 Miss. 211; City of Omaha v. Flood, 57 Neb. 124; City of Harvard v. Crouch, 47 Neb. 133, 66 N. W. 276; In re Grade Crossing of Com'rs of Buffalo, 169 N. Y. 605, 62 N. E. 1096; Chambers v. Borough of South Chester, 140 Pa. 510,

irrespective of statutory provisions, they can recover the damages sustained by them. The element of lawful authority necessarily excludes either action without authority or that not taken in the manner and at the time provided by law.[609]

Actual damages caused by a change of grade. Neither does the principle stated in the preceding sections apply to any but consequential damages. If, through the grading or regrading of a highway, the property of adjoining owners is actually encroached upon, taken or damages, they must be compensated[610]

21 Atl. 409; Dawson v. City of Pittsburgh, 159 Pa. 317, 28 Atl. 171; Mead v. City of Pittsburgh, 194 Pa. 392, 45 Atl. 59; City of Ft. Worth v. Howard, 3 Tex. Civ. App. 537, 22 S. W. 1059; City of Dallas v. Leake (Tex. Civ. App.) 34 S. W. 338.

[609] Roberts v. City of Chicago, 26 Ill. 249; City of Burlington v. Gilbert, 31 Iowa, 356; Stuebner v. City of St. Joseph, 81 Mo. App. 273; Dore v. City of Milwaukee, 42 Wis. 108.

[610] City of New Westminster v. Brighouse, 20 Can. Sup. Ct. 520. Abutting property is entitled to a lateral support. City of Montgomery v. Townsend, 84 Ala. 478, 4 So. 180; Larrabee v. Town of Cloverdale, 131 Cal. 96, 63 Pac. 143; City of Macon v. Hill, 58 Ga. 595; City of Shawneetown v. Mason, 82 Ill. 337; City of Bloomington v. Pollock, 141 Ill. 346; City of North Vernon v. Voegler, 89 Ind. 77; Hendershott v. City of Ottumwa, 46 Iowa, 658; Given v. City of Des Moines, 70 Iowa, 637.

Brown v. Webster City, 115 Iowa, 511, 88 N. W. 1070. Evidence of the damage caused by the grading to trees on plaintiff's premises is admissible. City of Louisville v. Louisville Rolling Mill Co., 66 Ky. (3 Bush) 416; City of Louisville v. Hegan, 20 Ky. L. R. 1532, 49 S. W. 532; Dyer v. City of St. Paul, 27 Minn. 457, 8 N. W. 272; State v. Ramsey County Dist. Court, 33 Minn. 295; Nichols v. City of Duluth, 40 Minn. 389; Munger v. City of St. Paul, 57 Minn. 9, 58 N. W. 601; Werth v. City of Springfield, 78 Mo. 107; Gibson v. Owens, 115 Mo. 258; Carll v. Village of Northport, 11 App. Div. 120, 42 N. Y. Supp. 576; Comesky v. Postal Tel. Cable Co., 41 App. Div. 245, 58 N. Y. Supp. 467; Slingerland v. International Contracting Co., 43 App. Div. 215, 60 N. Y. Supp. 12; Mott v. Lewis, 52 App. Div. 558, 65 N. Y. Supp. 31; Uline v. New York Cent. & H. R. Co., 101 N. Y. 98; Ottenot v. New York, L. & W. R. Co., 119 N. Y. 603; Pappenheim v. Metropolitan El. R. Co., 128 N. Y. 436, 13 L. R. A 401; Stowers v. Gilbert, 156 N. Y. 600; City of San Antonio v. Mullaly, 11 Tex. Civ. App. 596; Cooper v. City of Dallas, 83 Tex. 239; Stearns v. City of Richmond, 88 Va. 992, 14 S. E. 847; Page v. Belvin, 88 Va. 985; City of Seattle v. Buzby, 2 Wash. T. 25; Parke v. City of Seattle, 5 Wash. 1, 31 Pac. 310, 32 Pac. 82, 20 L. R. A. 68. An abutting lot is entitled to lateral support when the grade of the street is made so negligently as to

for the injuries suffered since this constitutes a taking of property or may be made the basis of an action sounding in tort.

§ 815. Diversion from a public or specific use.

The principle that the state acting for itself or through its delegated agencies maintains an unlimited control over public property is not without its limitations. The principal one is that based upon the purpose for which the property is acquired. All governmental organizations are public in their character and the property which they acquire in that capacity can be secured only because of this fact and because it is acquired for a public purpose and use. The public property of a public corporation cannot be dealt with in the same manner as private. It cannot be controlled or transferred in such a manner as to effect a diversion of its use as a public one.[611] The use and control must remain public and this cannot be lost,[612] bargained or legislated away.[613] This is true whether the property is owned in fee or an easement only has been acquired; it is held in trust for the public and in respect to public highways for the purposes of general travel. Public

cause the soil of such a lot to slide into the street, the injury is direct, not merely consequential. Smith v. City of Seattle, 20 Wash. 613, 56 Pac. 389.

[611] Hardin v. Sangamon County, 71 Ill. App. 103. Any portion of a public building, cannot be used for the regular transaction of the private business of an individual even though the public officials did not object. Cook County v. City of Chicago, 167 Ill. 109; Ingram v. Chicago, D. & M. R. Co. 38 Iowa, 669; Louisiana Const. & Imp. Co. v. Illinois Cent. R. Co., 49 La. Ann. 527, 21 So. 891, 37 L. R. A. 661; Village of Buffalo v. Harling, 50 Minn. 551. 52 N. W. 931; City of St. Paul v. Chicago & St. P. R. Co., 63 Minn. 330, 63 N. W. 267, 65 N. W. 649, 68 N. W. 458, 34 L. R. A. 184; State v. Schweickardt, 109 Mo. 496, 19 S. W. 47. The establishment of rules regulating the use of a park and the granting of the right to serve refreshments will not be regarded as a diversion of the legitimate uses of the park. Simon v. Northup, 27 Or. 487, 40 Pac. 560, 30 L. R. A. 171; City of San Antonio v. Stumberg, 70 Tex. 366, 7 S. W. 754; Alleghany County v. Parrish, 93 Va. 615, 25 S. E. 882. See also, § 733, ante. But see Pacific Coast S. S. Co. v. Kimball, 114 Cal. 414, 46 Pac. 275.

[612] Neitzey v. Baltimore & P. R. Co., 5 Mackey (D. C.) 34; Bailey v. Culver, 84 Mo. 531; Dummer v. Selectmen of Jersey City, 20 N. J. Law (Spencer) 86.

[613] City of Shreveport v. Walpole, 22 La. Ann. 526; Le Clercq v. Town of Gallipolis, 7 Ohio (pt. 1). 217; Reighard v. Flinn, 189 Pa. 355, 42 Atl. 23, 43 L. R. A. 502; Franklin County v. Gills, 96 Va.

authorities have no authority to devote property to other uses than the one for which it is secured or has been dedicated.[614] Public highways cannot be sold,[615] neither can the highways, streets or public squares be levied upon to satisfy the debts of a particular public corporation.[616] Attempts, therefore, on the part of the public corporations to deprive the public of their rightful use of public property are illegal. This rule, however, does not prevent the sovereign from transferring the supervision and control of public property from one governmental agent to another,[617] if it does not thereby devote it to a use substantially different from that for which it was originally acquired and intended.

330, 31 S. E. 507; Gilman v. City of Milawukee, 55 Wis. 328.

[614] State v. City of Mobile, 5 Port. (Ala.) 279; Lutterloh v. City of Cedar Keys, 15 Fla. 306; Beveridge v. West Chicago Park Com'rs, 7 Ill. App. 460; Craig v. People, 47 Ill. 487; Carter v. City of Chicago, 57 Ill. 283; City of Chicago v. Wright, 69 Ill. 318; Stevens v. Walker, 15 La. Ann. 577; City of St. Paul v. Chicago, M., St. P. R. Co., 63 Minn. 330, 68 N. W. 458, 34 L. R. A. 184; Glasgow v. City of St. Louis, 87 Mo. 678; Winchester v. Capron, 63 N. H. 605. A town has no right to erect and maintain a watch house or tramp house on land taken for a public highway.

Attorney General v. Heishon, 18 N. J. Eq. (3 C. E. Green) 410; Methodist Episcopal Church v. City of Hoboken, 33 N. J. Law, 13; Meyers v. Hudson County Elec. Co., 63 N. J. Law, 573, 44 Atl. 713, reversing 60 N. J. Law, 350, 37 Atl. 618, construing acts of 1884 (P. L. p. 331), 1893 (P. L. p. 412) and 1896 (P. L. p. 322), relative to the consent of landowners to the erection of poles on highways.

Tompkins v. Hodgson, 4 T. & C. (N. Y.) 435. The trustees of a village may authorize the erection of a soldiers' monument in one of the public streets. Parsons v. Van Wyck, 56 App. Div. 329, 67 N. Y. Supp. 1054; State v. Cincinnati Gas Light & Coke Co., 18 Ohio St. 262; Gleason v. City of Cleveland, 49 Ohio St. 431, 31 N. E. 802. A square having been donated to the public generally may be used as the site of the soldiers' and sailors' monument authorized by act of the legislature.

Bender v. Streabich, 17 Pa. Co. Ct. R. 609. Public school buildings are held in trust for school purposes only and cannot be used for church, Sunday school, lyceum or other purposes foreign to public instruction. See, also, § 733, ante.

[615] City of Macon v. Franklin, 12 Ga. 239; Alves' Ex'rs. v. Henderson, 55 Ky. (16 B. Mon.) 131.

[616] Peake v. City of New Orleans (C. C. A.) 60 Fed. 127, affirming City of New Orleans v. Gurley, 56 Fed. 376; Ransom v. Boal, 29 Iowa, 68.

[617] Thomas v. City of Richmond, 79 U. S. (12 Wall.) 356; Coffin v. City of Indianapolis, 59 Fed. 221; White v. Sullivan County Com'rs, 129 Ind. 396; State v. Kolsem, 130 Ind. 434, 29 N. E. 595, 14 L. R. A. 566; Indianapolis, D. & W. R.

§ 816. Control of property acquired by gift.

A public corporation may acquire by gift or grant, property, the transfer of ownership of which is conditional upon its use for a specific purpose. Familiar instances of this condition are to be found in donations of land for use as public parks or commons [618] or for the construction of some specially designated public building.[619] The use of this property is public in its character and the rule, therefore, stated in the preceding section with reference to a diversion of that use applies and the further principle obtains that a public corporation or even the sovereign cannot, without the consent of the donor, put the property to a use other than that included within the original condition.[620] Land donated for the

Co. v. Center Tp., 143 Ind. 63, 40 N. E. 134; State v. Haworth, 122 Ind. 462, 7 L. R. A. 240; Kansas City v. Duncan, 135 Mo. 571, 37 S. W. 513; Simon v. Northup, 27 Or. 487, 40 Pac. 560, 30 L. R. A. 171; The legislature may transfer the supervision and control of the public highways of a city for it does not thereby divert them to a use substantially different from that for which they were originally created. Roche v. Jones, 87 Va. 484, 12 S. E. 965.

[618] Davenport v. Buffington, 97 Fed. 234, 46 L. R. A. 377, 38 C. C. A. 453; Id., 1 Ind. T. 424, 45 S. W. 128, with note on the right of a tax payer to enjoin a misuse of public property. McCullough v. Board of Education of San Francisco, 51 Cal. 418; McIntyre v. El Paso County Com'rs, 15 Colo. App. 78; City of Alton v. Illinois Transp. Co., 12 Ill. 54; City of Jacksonville v. Jacksonville R. Co., 67 Ill. 541; Village of Princeville v. Auten, 77 Ill. 327; Sachs v. Village of Towanda, 79 Ill. App. 439; Kreigh v. City of Chicago, 86 Ill. 410; Warren v. Lyons City, 22 Iowa, 351; Rutherford v. Taylor, 38 Mo. 315; Price v. Thompson, 48 Mo. 361; Le Clercq v. Trustees of Gallipolis, 7 Ohio (pt. 1) 227; Church v. City of Portland, 18 Or. 74; City of Llano v. Llano County, 5 Tex. Civ. App. 132; Harris County v. Taylor, 58 Tex. 690; Abbott v. Mills, 3 Vt. 521. See, also, § 733, ante. But see Town of Lebanon v. Warren County Com'rs, 9 Ohio St. 80.

[619] Church v. City of Portland, 18 Or. 73, 22 Pac. 528, 6 L. R. A. 259; Mahon v. Luzerne County, 197 Pa. 1, 46 Atl. 894.

[620] Crampton v. Zabriskie, 101 U. S. 601; Davenport v. Buffington, 97 Fed. 234, 38 C. C. A. 453, 46 L. R. A. 377; Packard v. Jefferson County Com'rs, 2 Colo. 350; Whitsett v. Union Depot & R. Co., 10 Colo. 243; McIntyre v. El Paso County Com'rs, 15 Colo. App. 78. A city cannot authorize the construction of a county court house in one of its parks; Union Pac. R. Co. v. Foley, 19 Colo. 280; City of Denver v. Girard, 21 Colo. 450; Sachs v. Village of Towanda, 79 Ill. App. 439; Rowzee v. Pierce, 75 Miss. 846, 23 So. 307, 40 L. R. A. 402; Cummings v. City of St. Louis, 90 Mo. 261; Board of Regents, Normal

construction of a public court house upon it cannot be used for other purposes, though they may be public;[621] neither can property donated for use as parks, public grounds or boulevards, be appropriated for any use not inconsistent with the donor's conditional grant.[622] Such conveyances or grants are construed strictly in favor of the grantor and the language in each particular instance must determine the relative rights of the parties.[623]

§ 817. Rights of abutting owners.

The law in respect to some of the rights of abutting owners is unsettled. This condition on reason should not exist if the elementary principles relating to the creation, use and maintenance of highways be clearly understood and kept in mind at all times. A highway, as already defined, is a public way used for the purpose of public travel, for passing and repassing and as a mode of accesss to abutting property.[624] Public highways are secured through dedication, prescription or the exercise of the power of

School Dist. No. 3, v. Painter, 102 Mo. 464, 10 L. R. A. 493; Newell v. Town of Hancock, 67 N. H. 244.

Seward v. City of Orange, 59 N. J. Law, 331, 35 Atl. 799. A municipality has no power to lay out a highway over land acquired for use as a public park or common. Carter v. City of Portland, 4 Or. 339. See note 2 Am. & Eng. Corp. Cas. p. 7. See, also, §§ 733 et seq., ante, where all of the questions considered in sections 815 and 816 are discussed and many cases cited with apt quotations from them.

[621] State v. Hart, 144 Ind. 107, 33 L. R. A. 118; Allegheny County v. Parrish, 93 Va. 615, 25 S. E. 882.

[622] Rowzee v. Pierce, 75 Miss. 846, 23 So. 307, 40 L. R. A. 402; Methodist Episcopal Church v. City of Hoboken, 19 N. J. Eq. (4 C. E. Green) 355; Id., 33 N. J. Law, 13; McReynolds v. Broussard, 18 Tex. Civ. App. 409, 45 S. W. 760. See § 733, ante.

[623] Pettitt v. City of Macon, 95 Ga. 645, 23 S. E. 198; Cook County v. City of Chicago, 167 Ill. 109, 47 N. E. 210, construing act of Jan. 15, 1831, relative to the erection of public buildings in Chicago on public squares and the sale of such squares. Hunt v. Beeson, 18 Ind. 380; City of Ft. Wayne v. Lake Shore & M. S. R. Co., 132 Ind. 558, 32 N. E. 215, 18 L. R. A. 367; Whitlock v. State, 30 Neb. 815, 47 N. W. 284. A square granted to the city of Omaha "shall be used by said city for the purpose of a high school, college, or other institution of learning, and for no other purpose whatever," cannot be used for a primary department of the public schools. Newell v. Town of Hancock, 67 N. H. 244, 33 Atl. 253; Tifft v. City of Buffalo, 65 Barb. (N. Y.) 460; Williams v. First Presbyterian Soc., 1 Ohio St. 478.

[624] See §§ 422 et seq., ante.

eminent domain and the fee of the land may be acquired or an easement only. The sole basis of the right of acquisition of land from private owners is its proposed public use for the well recognized purposes to which a public highway may be put.[625] The former owner of the property retains certain rights in the land thus acquired by a public corporation, and these are limited by the character of the title secured being less where a fee passes and more where an easement only is acquired.[626] Whatever the character of the title may be of the public highway as secured, there are, therefore, two parties interested; the public corporation holding the nominal title in trust for the public for its use and benefit as a public highway and its legitimate purposes, and the original owner of the property whose interests are twofold being first based upon the fact of servient ownership [627] and second on the further condition that, as an abutting property owner without regard to other circumstances, he is entitled not only to share in the general rights of the public but in addition he has a special and personal interest in access to his property, the improvements which he may have paid for and the further easements of light and air as coming from the highway.[628] All these interests of the

[625] See §§ 717 et seq.

[626] Huffman v. State, 21 Ind. App. 449, 52 N. E. 713; Murray v. Norfolk County, 149 Mass. 328, 21 N. E. 757. Trees standing in a highway which become an obstruction may be removed without making compensation to the owner. Page v. Belvin, 88 Va. 985, 14 S. E. 843.

[627] Town of Suffield v. Hathaway, 44 Conn. 521; Rockford Gaslight & Coke Co. v. Ernst, 68 Ill. App. 300. An abutter may recover of third persons for injuries to trees in the street in front of his premises who as against the city has no control over nor property in them. Esty v. Baker, 48 Me. 495; Adams v. Rivers, 11 Barb. (N. Y.) 390.

[628] Smith v. McDowell, 148 Ill. 51, 35 N. E. 141, 22 L. R. A. 393. But an abutter cannot because of that mere fact, be permitted to use the street in a manner inconsistent with its due use by the public. Brakken v. Minneapolis & St. L. R. Co., 29 Minn. 41; Longworth v. Sedevic, 165 Mo. 221, 65 S. W. 260; Naschold v. City of Westport, 71 Mo. App. 508. A sidewalk in front of an abutter's property cannot be abolished nor the street unreasonably narrowed so as to destroy his rights.

Lahr v. Metropolitan El. R. Co., 104 N. Y. 268. "An abutting owner necessarily enjoys certain advantages from the existence of an open street adjoining his property, which belong to him by reason of its location, and are not enjoyed by the general public, such as the right of free access to his premises, and the free admission and circulation of light and air to, and

abutting owner are property rights.[629] The acquisition and the use of the public highways is fundamentally limited by the purposes for which they are acquired and such limitations cannot be destroyed or eliminated or the elementary character of a public highway changed either by the legislature or bodies acting lawfully under its authority. A few special rights of abutting property owners will be considered directly in the immediately following sections and still others discussed indirectly in those sections relating to the extent of control by public corporations over public highways.[630]

§ 818. Legislative control as modified by the abutter's rights.

In a preceding section, the principle has been stated that all highways are subject to legislative control which may be exercised either by the state legislature or some public body to whom the authority is delegated.[631] This control, complete and full as it is, includes, however, only that action which may be taken considering the character of the property over which the control is exercised and further limited by the special and peculiar rights of abutting property owners. Stated concisely in another way, the land acquired with accompanying burden of abutting property is secured for a special public use, namely, that of a public highway and all legislative action is limited by this character and this condition.[632]

through his property. These rights are not only valuable to him for sanitary purposes, but are indispensable to the proper and beneficial enjoyment of his property, and are legitimate subjects of estimate by the public authorities, in raising the fund necessary to defray the cost of constructing the street. He is, therefore, compelled to pay for them at their full value, and if in the next instant they may by legislative authority be taken away and diverted to inconsistent uses, a system has been inaugurated which resembles more nearly legalized robbery than any other form of acquiring property." Wolfe v. Pearson, 114 N. C. 621, 19 S. E. 264; Perkins v. Ross (Tenn. Ch. App.) 42 S. W. 58. See, also, §§ 817 and 818, post.

[629] Sorensen v. Town of Greeley, 10 Colo. 369; Brakken v. Minneapolis & St. L. R. Co., 29 Minn. 41; Story v. New York El. R. Co., 90 N. Y. 122; Lahr v. Metropolitan El. R. Co., 104 N. Y. 269; Reed v. State, 108 N. Y. 407; Dillenbach v. City of Xenia, 41 Ohio St. 207. Dillon, Mun. Corp. (4th Ed.) § 656a.

[630] See §§ 797 et seq., ante.

[631] See §§ 797 and 799, ante.

[632] Transportation Co. v. City of Chicago, 99 U. S. 635; Dillon, Mun. Corp. (4th Ed.) § 712.

Extent of control a varying one. All streets are highways but not all highways are streets. Highways can be for the purpose of determining the exact extent of control and the liability of public corporations within whose jurisdiction they are situated divided into urban and suburban. The legitimate uses to which urban ways are and may be put vary in their degree and character from those which may be imposed upon suburban ways.[633] The general power exists to repair, maintain, improve, use and control highways—this general power is restricted by the character of the way. The use of streets for the purpose of laying water or gas mains or pipes is clearly a proper one which cannot be said of a rural highway, and other apt illustrations familiar to all might be given here.[634] Some of the proper uses of streets and rural ways

[633] Montgomery v. Santa Ana Westminister R. Co., 104 Cal. 186, 37 Pac. 786, 25 L. R. A. 654. "There is a wide distinction between a highway in the country and a street in a city or village, as to the mode and extent of the enjoyment, and as a sequence in the extent of the servitude in the land upon which they are located. The country highway is needed only for the purpose of passing and repassing, and as a general rule, to which there are few needed exceptions, the right of the public and of the authorities in charge is confined to the use of the surface, with such rights incidental thereto as are essential to such use. In the case of streets in a city there are other and further uses, such as the construction of sewers and drains, laying of gas and water pipes, erection of telegraph and telephone wires, and a variety of other improvements, beneath, upon, and above the surface, to which in modern times urban streets have been subjected. These urban servitudes are essential to the enjoyment of streets in cities and to the comfort of citizens in their more densely populated limits."

Board of Trade Tel. Co. v. Barnett, 107 Ill. 507; Lostutter v. City of Aurora, 126 Ind. 436, 12 L. R. A. 259; Cater v. North Western Tel. Exch. Co., 60 Minn. 539, 28 L. R. A. 310; Van Brunt v. Town of Flatbush, 128 N. Y. 50, 27 N. E. 973; Lockhart v. Craig St. R. Co., 139 Pa. 419, 21 Atl. 26; Zehren v. Milwaukee Elec. R. & L. Co., 99 Wis. 83, 441 L. R. A. 575; see, also, § 809, ante.

[634] Consumers' Gas Trust Co. v. Huntsinger, 12 Ind. App. 285, 40 N. E. 34; Avery v. Indiana & O. Oil, Gas & Min. Co., 120 Ind. 600, 22 N. E. 781; Kincaid v. Indianapolis Nat. Gas Co., 124 Ind. 577, 8 L. R. A. 602; Magee v. Overshiner, 150 Ind. 127, 40 L. R. A. 370; McGrew v. Stewart, 51 Kan. 185; Taylor v. Portsmouth K. & Y. St. R. Co., 91 Me. 193, 39 Atl. 560; Bloomfield & R. Natural Gas Light Co. v. Calkins, 62 N. Y. 386; Van Brunt v. Town of Flatbush, 128 N. Y. 50, 27 N. E. 973; Huddleston v. City of Eugene, 34 Or. 343, 55 Pac. 868, 43

will be considered in the following sections. The principle maintained in many cases of a difference in respect to nature and extent of public servitude and control between urban and rural highways is denied and with good reason by some of the later cases.[635]

L. R. A. 444; Johnston's Appeal (Pa.) 7 Atl. 167; Columbia Conduit Co. v. Com., 90 Pa. 307; Sterling's Appeal, 111 Pa. 35, 2 Atl. 105.

[635] Eels v. American Telephone & Tel. Co., 143 N. Y. 133, 38 N. E. 202, 25 L. R. A. 640. "While concurring in the view that the easement in a public street in a city or village may well be greater as the actual necessities of the case are greater for sewers and gas and water pipes, yet in this case, as we have to deal only with the easement in a purely country highway, it is not important to discuss how the easement became greater in the one case than in the other, or as to the time when the right to the enlarged use of the highway or street attaches, or the method or means by which the right to such enlarged use was attained Density of population creates public necessities for water, light, drainage and other conveniences which do not exist in purely rural districts and along a purely rural highway. Yet the same land might alter from a country highway to a city street, and it might be determined that there was an implied dedication of the country highway at the time the land was taken to the uses which the future village or city street might require." Mr. Pierce, in speaking of the distinction between city and country highways, says: "But as both the highway and the street are appropriated for the same general purpose, and a highway in a district sparsely inhabited at one time may, by the growth of population, become a street in a city, this distinction does not appear to rest on a sound basis." Pierce, Railroads, 232. This doctrine has now become fully established in New York by the recent case of Palmer v. Larchmont Elec. Co., 158 N. Y. 231, 52 N. E. 1092, 43 L. R. A. 672, wherein the court says: "But the owner of the fee in a country highway, taken, opened and dedicated for a public use, is entitled to no further compensation after the territory has become thickly settled and the highway has become a street of an incorporated city. This was recognized in the Eels case, and it is, therefore, apparent that, at the time the land was taken for a highway, it was impliedly dedicated to the uses which the public might in the future require."

Lewis, Em. Dom. (2 Ed.) §§ 91c. et seq. "The public can no more take, without compensation, an easement for the urban uses of highways, than it can take, without compensation, an easement for the rural uses of highways. It follows, either that the public must have a very limited control and easement in country roads after they become city streets, or else that the easement is the same in both cases, and that the same principles are to be applied to both in determining what is a legitimate use. The latter seems to us the

§ 819. Abutter's special rights; lateral support.

One of the special rights of property owners is that of lateral support; he is entitled to the use of his land in its natural condition.[636] This principle, however, by the weight of authority, excludes lateral support for artificial improvements which he may have erected or created.[637] In the improvement, maintenance or control of a highway, the term used in its general sense, a public corporation cannot, therefore, take action that will result in a destruction or impairment of the lateral support to which every abutting property owner is especially entitled.[638] Following the general rule stated above, this right of lateral support would exclude support for buildings or improvements.[639]

§ 820. Same subject continued; abutter's right to light, air and access.

An abutting property owner is entitled in common with the public to the use of the highway and in addition to what may be termed an easement in the light and air that may come to his property by means or from a highway[640] and also the access to his property from it.[641] A public highway is created not only for

correct view, and the public easement may be defined as the right to use and improve the way for highway purposes as the public needs demand.

[636] Thurston v. Hancock, 12 Mass. 220; Gilmore v. Driscoll, 122 Mass. 199; Buskirk v. Strickland, 47 Mich. 389; Nichols v. City of Duluth, 40 Minn. 389; Keating v. City of Cincinnati, 38 Ohio St. 141; Richardson v. Vermont Cent. R. Co., 25 Vt. 465; Stearns v. City of Richmond, 88 Va. 992.

[637] Elliott, Roads & S. (2d Ed.) § 205.

[638] City of Rome v. Homberg, 28 Ga. 46; Roll v. City of Augusta, 34 Ga. 326; Hovey v. Mayo, 43 Me. 322; City of Pontiac v. Carter, 32 Mich. 164; Dyer v. City of St. Paul, 27 Minn. 457; Armstrong v. City of St. Paul, 30 Minn. 299; Hoffman v. City of St. Louis, 15 Mo. 651; White v. Yazoo City, 27 Miss. 357; Dodson v. City of Cincinnati, 34 Ohio St. 276; Keating v. City of Cincinnati, 38 Ohio St. 141. But see Taylor v. City of St. Louis, 14 Mo. 20; Parke v. City of Seattle, 5 Wash. 1, 20 L. R. A. 68. See, also, § 1, ante.

[639] Transportation Co. v. City of Chicago, 99 U. S. 635; Mitchell v. City of Rome, 49 Ga. 19. But see Ladd v. City of Philadelphia, 171 Pa. 485; Stearns v. City of Richmond, 88 Va. 992.

[640] Story v. New York, El. R. Co., 90 N. Y. 122; Lahr v. Metropolitan El. R. Co., 104 N. Y. 268; Drucker v. Manhattan R Co., 160 N. Y. 157; Stanley v. New York El. R. Co., 44 N. Y. State Rep. 889.

[641] Bigelow v. Ballerino, 111 Cal. 559, 44 Pac. 307; Selden v.

the purpose of furnishing the public a means of passing and repassing, a way of travel for the community, but also as a means of egress from and ingress to the property of abutting owners. The general right of a public corporation to improve, repair, maintain or control public highways is, therefore, limited again by these special and peculiar rights of the abutting owner and action on the part of abutting authorities, affirmative or negative in its character that may cause the impairment or destruction of access to abutting property [642] or its use of the light and air as naturally available,[643] will result clearly in a corporate liability. These

City of Jacksonville, 28 Fla. 558, 10 So. 457, 14 L. R. A. 370; State v. Berdetta, 73 Ind. 185; Chesapeake & P. Tel. Co. v. MacKenzie, 74 Md. 36; Gustafson v. Hamm, 56 Minn. 334, 57 N. W. 1054, 22 L. R. A. 565; Spencer v Metropolitan St. R. Co., 120 Mo. 154, 23 S. W. 126, 22 L. R. A. 668; Dill v. School Board of Education of Camden, 47 N. J. Eq. 421, 20 Atl. 739, 10 L. R. A. 276; Story v. New York El. R. Co., 90 N. Y. 122; Bischoff v. New York El. R. Co., 138 N. Y. 257, 33 N. E. 1073; Holloway v. Southmayd, 139 N. Y. 390; Edmison v. Lowry, 3 S. D. 77, 52 N. W. 583, 17 L. R. A. 275; Frater v. Hamilton County, 90 Tenn. 661; 19 S. W. 233; Hamilton County v. Rape, 101 Tenn. 222, 47 S. W. 416; Lewis, Eminent Domain (2d Ed.) sec. 91e, p. 170, citing many cases.

[642] Hart v. Buckner, (C. C. A.) 54 Fed. 925; Jackson v. Kiel,13 Colo. 378; 6 L. R. A. 254; Pittsburg, Ft. Wayne & C. R. Co. v. Cheevers, 149 Ill. 430, 24 L. R. A. 156; Fossion v. Landrey, 123 Ind. 136, 24 N. E. 96; Dyche v. Weichselbaum, 9 Kan. App. 360, 58 Pac. 126; Eagle Tp., Highway Com'rs v. Ely, 54 Mich. 173; Gustafson v. Hamm, 56 Minn. 334, 22 L. R. A. 565; Loeber v. Butte General Elec. Company, 16 Mont. 39 Pac. 912. An electric pole may be so placed as to give an abutting owner no occasion to claim damages. Borough of Brigantine v. Holland Trust Co. (N. J. Eq.) 37 Atl. 438. The right of access includes the right to run electric wires into an abutter's buildings from poles lawfully erected in the street. Richardson & Boynton Co. v. Barstow Stove Co., 26 Abb. N. C. 150, 11 N. Y. Supp. 935. An abutting owner cannot use a sidewalk for driving and backing teams thereon. Wolfe v. Pearson, 114 N. C. 621; Mondle v. Toledo Plow Co., 6 Ohio N. P. 294; Kinnear Mfg. Co. v. Beatty, 65 Ohio St. 264, 62 N. E. 341. An abutting owner has no right to object to obstructions placed by other abutting owners upon a portion of a vacated street and which has reverted to them. Raht v. Southern R. Co. (Tenn. Ch. App.) 50 S. W. 72. But see Textor v. Baltimore & O. R. Co., 59 Md. 63. A gate at a railroad crossing necessary for public safety and authorized by law cannot be removed at the instance of an abutting owner because it obstructs the access to his premises.

[643] First Nat. Bank of Montgomery v. Tyson, 133 Ala. 459, 32 So.

rights, it has been repeatedly held, are property and vested rights incapable of damage or destruction without the payment of compensation.[644]

§ 821. Abutter's rights in common with the public.

An abutting property owner may also have a right in common with the public to the use of the highway for the legitimate purposes to which it may be enjoyed by the public.. A highway, as repeatedly defined, is a public way for the purpose of travel, of passing and repassing and the abutter clearly, as one of the public or of the community, is entitled to the rights that this condition or relationship affords him.[645] The public corporation therefore, is again limited in the extent of its control and power over public highways by this right existing, as above stated.[646]

§ 822. Right of abutting owners to use own property.

The power of a public corporation to control or regulate the improvements or use of public ways is based upon their character and on the further fact that they are held in trust for the public for legitimate uses. This power of control and regulation clearly can go no further than the physical extent of the property

144, 59 L. R. A. 399. The easement of view from every part of public streets is an available right to the abutting property owner and will be protected by the courts against illegal encroachments.

[644] See cases cited generally in this section. See this question fully considered in the N. Y. Elevated R. R. Cases, notably Story v. New York El. R. Co., 90 N. Y. 122, and Lahr v. Metropolitan El. R. Co., 104 N. Y. 268. See, also, Lewis, Em. Dom. (2d. Ed.) §§ 91e et seq., citing many cases. The principles are so well established that but few cases are given here.

[645] Hetzel v. Baltimore & O. R. Co., 169 U. S. 26, reversing 7 App. D. C. 524; Hart v. Buckner (C. C. A.) 54 Fed. 925. An abutting owner has such a right in the adjoining highway as to bring a suit to enjoin its obstruction. Storm v. Barger, 43 Ill. App. 173; Earll v. City of Chicago, 136 Ill. 277; Indiana, B. & W. R. Co. v. Eberle, 110 Ind. 542, 11 N. E. 467. An abutting owner whose title extends to the middle of a highway cannot object to an obstruction in the other half of the street. Bradley v. Pharr, 45 La. Ann. 426, 12 So. 618, 19 L. R. A. 647; People v. Moore, 50 Hun, 356, 3 N. Y. Supp. 159; Drake v. Hudson River R. Co., 7 Barb. (N. Y.) 508; Parish v. Baird, 160 N. Y. 302, 54 N. E. 724.

[646] Smith v. City of Leavenworth, 15 Kan. 81; Point Pleasant Land Co. v. Cranmer, 40 N. J. Eq. (13 Stew.) 81.

acquired and is dependent upon the purpose for which held.[647] Under this principle, public authorities have no power to regulate or control the use of private abutting property where such use does not interfere with the legitimate purposes for which the highway was created.[648] Utilitarian purposes and not ornamental determine in general the legitimate uses of a highway. The establishment of a uniform building line on residence streets some distance back of the street line proper being an attempt to control private property and based upon no legal reason is, therefore, unlawful.[649] Within the legal limits, however, of the highway, the corporation undoubtedly retains its complete power of control except as restricted by the suggestions made in this and preceding sections.

§ 823. Abutter's rights as dependent upon the passing of a fee or an easement.

In addition to the special rights of abutting property owners stated in the last few sections and which they possess independent of the title acquired by the corporation in and to its highways, there are further rights dependent upon the extent of the title acquired. The public may acquire a fee of the lands occupied and controlled for highway purposes or it may legally obtain an easement only in this property, a reversionary interest vesting in the abutting owner. Upon the character of the title thus acquired will depend the rights of an abutting property owner in two particulars; namely, the personal use of a highway and the use of the materials which may be found within it. The right of the corporation to use materials will also depend upon the character of the title acquired.

[647] Broadbelt v. Loew, 162 N. Y. 642, 57 N. E. 1105, affirming 15 App. Div. 343, 44 N. Y. Supp. 159.

[648] City of St. Louis v. Dorr, 145 Mo. 466, 41 S. W. 1094, 42 L. R. A. 686; Thompson v. Androscoggin River Co., 54 N. H. 545; Edsall v. Howell, 86 Hun, 424, 33 N. Y. Supp. 892, construing N. Y. Laws 1863, c. 93, permitting the planting of trees along a roadside within a certain distance from the outward line of the highway. City of Philadelphia v. Linnard, 97 Pa. 242.

[649] City of St. Louis v. Hill, 116 Mo. 527, 22 S. W. 861, 21 L. R. A. 226; citing Thompson v. Androscoggin River Imp. Co., 54 N. H. 545; Wynehamer v. People, 13 N. Y. (3 Kern.) 378; City of Philadelphia v. Linnard, 97 Pa. 242; In re Chestnut St., 118 Pa. 593, 12 Atl. 585.

§ 824. Use of highway by abutter.

The ownership of the fee to real property gives to the owner for all substantial and legal purposes complete control and possession of it whether that owner be a natural or an artificial person. In the case of land acquired for highway purposes, a public corporation is limited in its control and use of it by its character as a public highway, although acquired in fee.[650] Where the title acquired is an easement, the degree of control and possession is determined by the extent of the grant.[651] An abutting property owner transferring an easement only to the public authorities is entitled, by the weight of authority, to the use of such portions of the highway as may not be occupied or intended for the traveled way and its repair for such private and personal use as will not be inconsistent with, destroy or impair the use of the land as a highway,[652] though by this physical possession and use, no pre-

[650] Rummel v. New York & W. R. Co., 30 N. Y. St. Rep. 235, 9 N. Y. Supp. 404.

[651] Washington Ice Co. v. Shortall, 101 Ill. 46; Village of Brooklyn v. Smith, 104 Ill. 429; State v. Pottmeyer, 33 Ind. 402; Julien v. Woodsmall, 82 Ind. 568; Kane v. City of Baltimore, 15 Md. 240; Baker v. Frick, 45 Md. 337; Bean v. Coleman, 44 N. H. 539; Woodring v. Forks Tp., 28 Pa. 355. See, also, cases cited in the following paragraph.

[652] City Council of Montgomery v. Parker, 114 Ala. 118, 21 So. 452. An abutting property owner has no right to the exclusive use of the street next to the sidewalk adjoining his premises for his private carriages and those of his guests. Louth v. Thompson, 1 Pen. (Del.) 149, 39 Atl. 1100. An abutting owner has the right to place upon the public highway door steps, stepping stones or hitching posts and to have coal holes, cellar doors or areas for light and ventilation upon the pavement, of which every one is bound to take notice at his peril.

Hanbury v. Woodward Lumber Co., 98 Ga. 54, 26 S. E. 477; Gregsten v. City of Chicago, 145 Ill. 451, 34 N. E. 426; Field v. Darling, 149 Ill. 556, 37 N. E. 850, 24 L. R. A. 406; Smith v. McDowell, 148 Ill. 51, 35 N. E. 141, 22 L. R. A. 393; Matthiessen & Hegeler Zinc Co. v. City of LaSalle, 117 Ill. 411. Abutters have no right to make a subterranean passage under a street for the purpose of mining coal or other minerals even though no injury is done to the street. Webb v. Butler County Com'rs, 52 Kan. 375, 34 Pac. 973; Farnsworth v. City of Rockland, 83 Me. 508, 22 Atl. 394; Burr v. Stevens, 90 Me. 500, 36 Atl. 547. An abutter has no authority for his own use and convenience to widen the road by digging and throwing up the soil of an adjoining lot.

Kane v. City of Baltimore, 15 Md. 240; Allen v. City of Boston, 159 Mass. 324; Towne v. City of Newton, 167 Mass. 311, 45 N. E.

scriptive rights can be acquired.[653] In this respect, however, a distinction has been made between urban and suburban ways, the

745. An abutter cannot erect a retaining wall on that portion of the street adjoining his premises. Ellsworth v. Lord, 40 Minn. 337, 42 N. W. 389; Thom v. Dodge County, 64 Neb. 845, 90 N. W. 763. A landowner may take advantage of a public highway for the purpose of drainage where he does not inconvenience or injure the public work.

Chamberlain v. Enfield, 43 N. H. 356. The owner of the fee in the soil of a public highway may make such use of his land, subject to the easement, for the placing of lumber, as will, under all the circumstances, be reasonable and proper. State v. Inhabitants of Trenton, 54 N. J. Law, 92, 23 Atl. 281; Town of Clay v. Hart, 25 Misc. 110, 55 N. Y. Supp. 43; Ryan v. Preston, 59 App. Div. 97, 69 N. Y. Supp. 100, construing N. Y. Laws 1899, c. 152, § 6, as amended by Laws of 1900, c. 640, relative to the standing, hitching or driving of horses or other animals on side streets.

Flynn v. Taylor, 127 N. Y. 596, 28 N. E. 418, affirming 53 Hun, 167, 6 N. Y. Supp. 96, 14 L. R. A. 556; Woodring v. Forks Tp., 28 Pa. 355; Dell Rapids Mercantile Co. v. City of Dell Rapids, 11 S. D. 116, 75 N. W. 898. An abutting lot owner owning the fee has a right to construct in the adjoining street an area for his use subject, of course, to the use of the street as a public highway by the public. Holden v. Shattuck, 34 Vt. 336; Raymond v. Keseberg, 84 Wis. 302, 54 N. W. 612, 19 L. R. A. 643. An abutting owner may temporarily use a part of a street for building operations. This right is founded on reasonable necessity and the extent of the use will depend upon the circumstances in each particular case. But see Swan v. Colville, 19 R. I. 161, 32 Atl. 854.

[653] London & San Francisco Bank v. City of Oakland, 90 Fed. 691. "Under the laws of some of the states, the fact that appellant had been in the actual possession of the land for such a length of time as is shown in this case would have enabled it to recover upon the plea of adverse possession; but in California the law is well settled that no one can acquire by adverse possession, as against the public, the right to obstruct a street dedicated to public use, and thus prevent the use of it as a public highway. Hoadley v. City and County of San Francisco, 50 Cal. 265, 274; People v. Pope, 53 Cal. 437, 450; City of Visalia v. Jacob, 65 Cal. 434, 4 Pac. 433; San Leandro v. Le Breton, 72 Cal. 170, 177, 13 Pac. 405. Where this rule prevails, the authorities are all to the effect that when the land has been dedicated to, and accepted by, the public, it becomes irrevocable; and mere lapse of time, or the making of valuable improvements thereon, constitutes no defense whatever. Buntin v. City of Danville, 93 Va. 200, 208, 24 S. E. 830; Harn v. Common Council of Dadeville, 100 Ala. 199, 14 So. 9; Taraldson v. Town of Lime Springs, 92 Iowa, 187, 60 N. W. 658; City of Baltimore v. Frick, 82 Md. 77, 86, 33 Atl. 435; Elliott, Roads & S. 667, 670."

Harn v. Common Council of Dadeville, 100 Ala. 199, 14 So. 9;

principle applying that rights of the public in the latter may be lost by prescription where the use and possession has been of such

Reed v. City of Birmingham, 92 Ala. 339; Webb v. City of Demopolis, 95 Ala. 116, 13 So. 289, 21 L. R. A. 62; People v. Pope, 53 Cal. 437; City of San Francisco v. Bradbury, 92 Cal. 414, 28 Pac. 803; Ames v. City of San Diego, 101 Cal. 390, 35 Pac. 1005; City Council of Augusta v. Burum, 93 Ga. 68, 19 S. E. 820, 26 L. R. A. 340; City of Lewiston v. Booth, 3 Idaho, 692, 34 Pac. 809; City of Quincy v. Jones, 76 Ill. 231; Logan County Sup'rs v. City of Lincoln, 81 Ill. 156; Ramsay v. Clinton County, 92 Ill. 225; Hibbard, Spencer, Bartlett & Co. v. City of Chicago, 173 Ill. 91, 50 N. E. 256, 40 L. R. A. 621; City of Sullivan v. Tichenor, 179 Ill. 97, 53 N. E. 561; Brooks v. Riding, 46 Ind. 15; Indianapolis, P. & C. R. Co. v. Ross, 47 Ind. 25; Sims v. City of Frankfort, 79 Ind. 446; Green County Com'rs v. Huff, 91 Ind. 333; Wolfe v. Town of Sullivan, 133 Ind. 331, 32 N. E. 1017; Solberg v. City of Decorah, 41 Iowa, 501; City of Waterloo v. Union Mill Co., 72 Iowa, 437; Rae v. Miller, 99 Iowa, 650, 68 N. W. 899; Webb v. Butler County Com'rs, 52 Kan. 375, 34 Pac. 973; Curran v. City of Louisville, 83 Ky. 628; City of Thibodeaux v. Maggioli, 4 La. Ann. 73; City of Shreveport v. Walpole, 22 La. Ann. 526; Ulman v. Charles St. Ave. Co., 83 Md. 130, 34 Atl. 366; Henshaw v. Hunting, 67 Mass. (1 Gray) 203.

Van Brunt v. Lynch, 76 Mich. 455, 43 N. W. 444; Parker v. City of St. Paul, 47 Minn. 317, 50 N. W. 247. "The rights of the public are seldom guarded with the degree of care with which owners of private property guard their rights, and, consequently, acts or omissions which might weigh heavily against private persons cannot always be given the same force against the public."

City of Vicksburg v. Marshall, 59 Miss. 563; Witherspoon v. City of Meridian, 69 Miss. 288; Territory v. Deegan, 3 Mont. 82; Jersey City v. Morris Canal & Banking Co., 12 N. J. Eq. (1 Beasl.) 547; Smith v. State, 23 N. J. Law, (3 Zab.) 712; Clark v. Pierson, 37 N. J. Law, 216; Laing v. United N. J. R. & Canal Co., 54 N. J. Law, 576; Dygert v. Schenck, 23 Wend. (N. Y.) 446; Simis v. Brookfield, 68 N. Y. St. Rep. 738, 34 N. Y. Supp. 695; Burbank v. Fay, 65 N. Y. 57; Kellogg v. Thompson, 66 N. Y. 88; Driggs v. Phillips, 103 N. Y. 77; Wolfe v. Pearson, 114 N. C. 621, 19 S. E. 264; State v. Cincinnati Gaslight & Coke Co., 18 Ohio St. 268; Heddleston v. Hendricks, 52 Ohio St. 460, 40 N. E. 408; Barter v. Com. 3 Pen. & W. (Pa.) 253; Penny Pot Landing v. City of Philadelphia, 16 Pa. 79; City of Philadelphia v. Philadelphia & R. R. Co., 58 Pa. 253; Kopf v. Utter, 101 Pa. 27; Commonwealth v. Moorehead, 118 Pa. 344, 12 Atl. 424; Simmons v. Cornell, 1 R. I. 519; Eddy v. Granger, 19 R. I. 105, 31 Atl. 831, 28 L. R. A. 517; Crocker v. Collins, 37 S. C. 327, 15 S. E. 951; City of Memphis v. Lenore, 46 Tenn. (6 Cold.) 412; Rhodes v. Whitehead, 27 Tex. 304; Buntin v. City of Danville, 93 Va. 200, 24 S. E. 830; Ralston v. Town of Weston, 46 W. Va.

a character as to create a prescriptive right.[654] In some states it has been held that a statute of limitations applies to municipal corporations the same as to private individuals.[655] The better

544, 33 S. E. 326; Elliott, Roads & Streets, §§ 882, et seq.

Dillon, Mun. Corp. 4th Ed., § 675. "Upon consideration, it will, perhaps, appear that the following view is correct: Municipal corporations, as we have seen, have, in some respects, a double character,—one public, the other (by way of distinction) private. As respects property not held for public use, or upon public trusts, and as respects contracts, and rights of a private nature, there is no reason why such corporations should not fall within limitation statutes, and be affected by them. For example, in an action on contract or for tort, a municipal corporation may plead or have pleaded against it the statutes of limitations. But such a coporation does not own and cannot alien public streets or places, and no mere laches on its part or on that of its officers can defeat the right of the public thereto; yet, there may grow up, in consequence, private rights of more persuasive force in the particular case than those of the public. It will, perhaps, be found, that cases sometimes arise of such a character that justice requires that an equitable estoppel shall be asserted even against the public, but if so, such cases will form a law unto themselves, and do not fall within the legal operation of limitation enactments. The author cannot assent to the doctrine that, as respects public rights, municipal corporations are impliedly within ordinary limitation statutes. It is unsafe to recognize such a principle. But there is no danger in recognizing the principle of an estoppel in pais as applicable to exceptional cases, since this leaves the courts to decide the question, not by the mere lapse of time, but upon all the circumstances of the case to hold the public estopped or not, as right and justice require." But see Orr v. O'Brien, 77 Iowa, 253, 42 N. W. 183.

[654] City of Ft. Smith v. McKibbin, 41 Ark. 45; Black v. O'Hara, 54 Conn. 17; City of Burlington v. Burlington & M. R. Co., 41 Iowa, 134; Dudley v Trustees of Frankfort, 51 Ky. (12 B. Mon.) 610; Flynn v. City of Detroit, 93 Mich. 590; Webster v. City of Lincoln, 56 Neb. 502, 76 N. W. 1076; City of Cincinnati v. Evans, 5 Ohio St. 594; Lessee of Cincinnati v. First Presbyterian Church, 8 Ohio 299; Coleman v. Thurmond, 56 Tex. 514; Knight v. Heaton, 22 Vt. 480; City of Richmond v. Poe, 24 Grat. (Va.) 149. But see Rae v. Miller, 99 Iowa, 650, 68 N. W. 899; Heddleston v. Hendricks, 52 Ohio St. 460, 40 N. E. 408. See, also, Ralston v. Town of Weston, 46 W. Va. 544, 33 S. E. 326, overruling the earlier case of City of Wheeling v. Campbell, 12 W. Va. 36, one of the most frequently cited cases.

[655] City of Pella v. Scholte, 24 Iowa, 283; Clements v. Anderson, 46 Miss. 581; School Directors of St. Charles v. Georges, 50 Mo. 194; Jersey City v. Howeth, 30 N. J. Law, 521; Oxford Tp. v. Columbia, 38 Ohio St. 87; Evans v. Erie

reasons and the great weight of authority, however, support the rule that no rights in public highways can be obtained by adverse use. "These principles pervade the laws of the most enlightened nations as well as our own code and are essential to the protection of public rights, which would be gradually frittered away, if the want of complaint or prosecution gave the party a right. Individuals may reasonably be held to a limited period to enforce their right against adverse occupants, because they have interest sufficient to make them vigilant, but in public rights of property, each individual feels but a slight interest, and rather tolerates even a manifest encroachment, than seeks a dispute to set it right." The courts hold, however, that an occupation of a highway for ornamental purposes or a trivial use can constitute no claim of title by adverse possession.[656] In some instances through a long continued nonuser, or permissive use, of a public highway, private rights have arisen of such a character as to create against the public corporation an equitable estoppel or an estoppel in pais, but these instances are rare and the decision in each case has been based upon the peculiar circumstances arising and upon no general principle which would affect the universal doctrine stated above.[657]

§ 825. Use of materials by abutter or a public corporation.

The extent of the title acquired in respect to the right to use materials found within the limits of a highway is again a determining consideration. Where an easement only is acquired,

County, 66 Pa. 222; City of Galveston v. Menard, 23 Tex. 349; Knight v. Heaton, 22 Vt. 480; City of Richmond v. Poe, 24 Grat. (Va.) 149. See, also, cases cited in preceding note.

[656] Watkins v. Lynch, 71 Cal. 21; Indianapolis, P. & C. R. Co. v. Ross, 47 Ind. 25; Cheek v. City of Aurora, 92 Ind. 107; City of Waterloo v. Union Mill Co., 72 Iowa, 437; Barnes v. Lloyd, 112 Mass. 224; Marble v. Price, 54 Mich. 466; State v. Culver, 65 Mo. 607; Bliss v. Johnson, 94 N. Y. 235; Lane v. Kennedy, 13 Ohio St. 42; Carter v. Town of La Grange, 60 Tex. 636; Reilly v. City of Racine, 51 Wis 526. See, also, Bice v. Town of Walcott, 64 Minn. 459, 67 N. W. 360.

[657] Dickerson v. City of Le Roy, 72 Ill. App. 588; Cheek v. City of Aurora, 92 Ind. 107; Collett v. Vanderburgh Com'rs, 119 Ind. 27, 21 N. E. 329, 4 L. R. A. 321; Simplot v. City of Dubuque, 49 Iowa, 630; Sanderson v. Cerro Gordo County, 80 Iowa, 89, 45 N. W. 560; Baldwin v. Trimble, 85 Md. 396, 36 L. R. A. 489; De Vaux v. City of Detroit, Har. (Mich.) 98; City of Big

the public authorities have no right to any of the materials which may be found within the limits of the highway except such as are necessary to improve or maintain the highway at that immediate place,[658] although some authorities extend this right to the full length of the particular highway.[659] Where it is necessary to excavate for the purpose of grading a street, there is commonly no objection to the use of this material in filling the same street or others adjacent or depositing it elsewhere.[660] Under some conditions, however, the right exists to use materials for the construction or the repair of highways located elsewhere or indirectly connected with the one upon which the abutting property in question is located.[661] Where the corporation has acquired a fee, its right

Rapids v. Comstock, 65 Mich. 78, 31 N. W. 811; Lane v. Kennedy, 13 Ohio St. 42; Paine Lumber Co. v. City of Oshkosh, 89 Wis. 449, 61 N. W. 1108. Dillon Mun. Corp. (4th Ed.) § 675, 3 Kents Conn. 451.

[658] Woodruff v. Neal, 28 Conn. 165. The owner of land used as a highway has the exclusive right to the grass and other materials growing thereon. Rawls v. Tallahassee Hotel Co., 43 Fla. 288, 31 So. 237; Smith v. City Council of Rome, 19 Ga. 89; City of Macon v. Hill, 58 Ga. 595; Overman v. May, 35 Iowa, 89; Shawnee County Com'rs v. Beckwith, 10 Kan. 603; Bradley v. Pharr, 45 La. Ann. 426, 12 So. 618, 19 L. R. A. 647; Bent v. Emery, 173 Mass. 495, 53 N. E. 910; Murray v. Norfolk County, 149 Mass. 328, 21 N. E. 757.

Cuming v. Prang, 24 Mich. 514. Lands dedicated to the public as a highway are subject only to the use of the public as such, the fee remaining in the owner of the adjacent property acquires no title to a mine, a bed of peat or earth or gravel found thereon.

Althen v. Kelly, 32 Minn. 280; Rich v. City of Minneapolis, 40 Minn. 82, 41 N. W. 455; Viliski v. City of Minneapolis, 40 Minn. 304, 41 N. W. 1050, 3 L. R. A. 831; Baker v. Shephard, 24 N. H. (4 Fost.) 208; Ladd v. French, 53 Hun, 635, 6 N. Y. Supp. 56; Robert v. Sadler, 104 N. Y. 229, 10 N. E. 428; Gidney v. Earl, 12 Wend, (N. Y.) 98; Leonard v. City of Cincinnati, 26 Ohio St. 447. But see Town of Palatine v. Kreuger, 121 Ill. 72, 12 N. E. 75.

[659] Bundy v. Catto, 61 Ill. App. 209; Robert v. Sadler, 37 Hun (N. Y.) 377.

[660] City of Delphi v. Evans, 36 Ind. 90; Haas v. City of Evansville, 20 Ind. App. 482, 50 N. E. 46; Upham v. Marsh, 128 Mass. 546; Bissell v. Collins, 28 Mich. 277; Griswold v. Bay City, 35 Mich. 452.

[661] In Massachusetts it has been held that a public corporation has the right of removing material from one public highway to another within its jurisdiction for the purposes of repairing and improving them. See the following cases. Denniston v. Clark, 125 Mass. 216; Lawrence v. Inhabitants of Nahant, 136 Mass. 477.

in respect to the use of materials is largely increased and practically coextensive with the rights of an owner of land in fee simple.[662] The limitation exists, however, that the materials may be used only for the purpose of constructing, repairing or maintaining highways within the limits of the corporation. The sale of earth, rock, gravel or wood for general purposes of profit is discountenanced. An abutter, although owning the fee of the land upon which a highway is located cannot remove stone, earth or other material from within its limits so as to impair or destroy its present or prospective use as a highway.[663] The relative rights of the abutting owner and the public corporation in and to the materials found in the highways are dependent, to some extent, upon the character of the way, whether urban or suburban. A narrow traveled way is all that is usually required in a suburban highway, leaving, ordinarily, its larger part unimproved and subject to no necessary use by the public. A limited portion only of the legally established highway is required for the traveled way and the material to keep it in repair. On the contrary, an ordinary street in a city or village is used for the purpose of travel throughout its full width, all of which is improved and kept in repair. The abutting owner, whether urban or suburban, is not permitted to exercise any rights which would interfere with the primary purpose for which the highway is established and the public corporation is given the most ample powers to improve and repair the highway so that it will be available for this purpose. It can be readily seen therefore, that the owner of abutting property in the country may use more of the dedicated way and in a different manner than the owner of abutting property in a city or town without interfering with the proper use of the highway or the right of the public authorities to maintain, repair and improve them. The uses also to which the two classes of highways may be put vary with the needs of the public who have a right to use them for their proper purposes and these necessities are far different in a populous city or town from those experienced by residents in country districts.[664]

[662] City of La Salle v. Matthiessen & Hegeler Zinc Co., 16 Ill. App. 69.

[663] City Council of Montgomery v. Parker, 114 Ala. 118; Union Coal Co. v. City of La Salle, 136 Ill. 119, 12 L. R. A. 326; Erwin v. Central Union Tel. Co., 148 Ind. 365; City of Madison v. Mayers, 97 Wis. 399, 73 N. W. 43, 40 L. R. A. 635.

[664] See authorities cited under §§ 809 & 818, ante.

§ 826. Abutter's rights when highway is devoted to new or unusual use.

A highway when acquired from the original owner by whatever method passes to the public corporation in trust for the public for its use as a highway and the owner at that time is supposed to be compensated for all the damages or injuries which he may have sustained, by reason of the use and the acquirement of his property for highway purposes,[665] unless special ones are allowed by statute as in the case of a change of grade.[666]

The use of the highway as a means of travel includes, ordinarily, the usual mode or means of travel existing at the time of the establishment of the street or those that can be reasonably anticipated.[667]

§ 827. New use or unanticipated servitude.

A new or unusual method of travel may come into use and the question then arises of the right of the abutting property owner to recover compensation for the use of his property in this manner. This right is partly determined by the character of the title acquired by the corporation, whether an easement or a fee only, and the consequent extent of control by the public.[668] Where an easement only is acquired, the weight of authority seems to give the abutting property owner the right to claim additional compensation for the imposition of a new or an unusual burden or servitude upon property acquired from him,[669] and the fact that the highway may be held in fee would deny the right in these instances, though some authorities hold otherwise.[670] The fact that a highway may be either suburban or urban in its character is also a condition determining the relative rights of the public and the abutting property owner. The streets of a municipality may be used by new and unusual modes of travel without creating a liability where the owner of property abutting upon the

[665] See §§ 790 et seq., ante.

[666] See §§ 811, et seq., ante.

[667] See §§ 827 et seq., post.

[668] See cases cited in the following notes. See, also, Elliott, Roads & Streets, §§ 206, et seq.

[669] City of Savannah v. Wilson, 49 Ga. 476; City of Richmond v. Smith, 148 Ind. 294; Haight v. City of Keokuk, 4 Iowa, 199; Prosser v. Wapello County, 18 Iowa, 327; Lexington, H. & P. Turnpike Road Co. v. McMurtry, 42 Ky. (3 B. Mon.) 516; State v. Laverack, 34 N. J. Law, 201. See post, sections on use of streets by steam railways.

[670] See §§ 823 et seq., ante.

rural highway would not be denied the right of additional compensation.[671] These questions will be fully considered in the following sections which consider the use of highways by railways, both steam, street and elevated, telephone, telegraph and electric light companies, gas and water companies and other corporations or individuals.

§ 828. Obstructions in a highway.

The fundamental idea of a highway dedication is that land so used is set apart to the entire community for such public use and purposes as a means of passing and repassing, as the character of the highway, whether urban or suburban, seems to require. The primary use and purpose is public travel. The burden imposed upon the land so acquired and used, whether an easement only or a fee, is the right of the public authorities to construct and maintain thereon a safe and convenient roadway which shall, at all times, be open and free for public use as a means of travel.[672] As already stated, there is an essential and well recognized difference between urban and suburban servitudes; the easement of the later being much more comprehensive than the other and, therefore, many of the rules which apply to the one class of highways cannot be applied as against the other class.[673] The use of the highway for a particular purpose may or may not be considered an obstruction by applying as a test the question of whether, under the peculiar circumstances of each individual case, the proposed or actual use interferes with the legal and established character of the highway for its legitimate uses,[674] and this question will in-

[671] Taylor v. Portsmouth, K. & Y. St. R. Co., 91 Me. 193, 39 Atl. 560. The carriage of passengers or the transmission of intelligence by telephone, telegraph, or the use for the purpose of laying water or gas pipes and sewers are all public uses of a highway which the authorities may permit regardless of the individual. Cater v. North Western Tel. Exch. Co., 60 Minn. 539, 28 L. R. A. 310.

[672] See §§ 423 et seq., ante.

[673] See §§ 809, 818 and 825, ante.

[674] Louth v. Thompson, 1 Pen. (Del.) 149, 39 Atl. 1100; Jackson v. People, 9 Mich. 111. Graves v. Shattuck, 35 N. H. 257. It must be determined under the circumstances of each particular case whether an object permanently placed, temporarily set or slowly moving in a highway is a nuisance and this determination must depend upon whether the occupancy of a highway necessarily obstructs the passage over and upon it. See note, obstruction of highways, 33 Am. Eng. Corp. Cas. 469.

volve as including within the words "peculiar circumstances," a consideration of the kind of way, whether urban or suburban, the character of the title, whether an easement or a fee and any special rights of abutting property owners legally existing.

§ 829. Authorized obstructions.

The legislature or one of its properly delegated agencies may, by its action, authorize the use of a street in such a manner as will cause an obstruction and which, without such authority, would be regarded as illegal and a nuisance. The discretionary power is often given municipal bodies to authorize these encroachments or obstructions and where an abuse of discretion is not shown, their action will be sustained if coming within the general principles in respect to the creation and use of a highway.[675] The legislature or its subordinate legislative agents can regulate by law or ordinance the use of the public ways in such a manner as will best serve, on the whole, the public interests.[676]

§ 830. Abutter's right to additional compensation.

The question of whether a use of a highway may or may not be an obstruction is entirely separate and distinct from the right of an abutting owner to receive compensation for that use. The legislature with its power of control may authorize the use of highways for certain purposes which, without that authority, would be regarded as obstructions, public nuisances, and subject to removal.

[675] Dannenberg v. City of Macon, 114 Ga. 174, 39 S. E. 880; Heineck v. Grosse, 99 Ill. App. 441; Grove v. City of Ft. Wayne, 45 Ind. 429. The power of a city through its streets extends upwards indefinitely for the purpose of their preservation, safe use and enjoyment: the right of the use by the public is coextensive with this power. Garrett v. Janes, 65 Md. 260. The authorities may permit the erection of a bridge projecting into the street. Cushing v. City of Boston, 128 Mass. 330; People v. Green, 116 Mich. 505, 74 N. W. 714; People v. Collins, 17 App. Div. 448, 45 N. Y. Supp. 282, Ackerman v. True 31 Misc. 597, 66 N. Y. Supp. 140; Babbage v. Powers, 130 N. Y. 281, 29 N. E. 132, 14 L. R. A. 398; Jorgensen v. Squires, 144 N. Y. 280, 39 N. E. 373; Andrews v Bean, 97 N. C. 315, 1 S. E. 532; Barling v. West, 29 Wis. 307. But see Appleton v. Inhabitants of Nantucket, 121 Mass. 161; Beecher v. Newark St. & Water Com'rs, 65 N. J. Law, 307, 47 Atl. 466, affirming 64 N. J. Law, 475, 46 Atl. 166.

[676] Taylor v. Portsmouth, K. & Y. St. R. Co., 91 Me. 193, 39 Atl. 569.

The legislature, however, cannot deprive an abutting owner of his right to compensation by the legislative imposition upon a highway of an additional burden or servitude and one which was not contemplated at the time of the dedication of the highway and for which the owner at that time received no compensation.[677] This question arises most frequently in connection with the use of highways by steam railways, telegraph, telephone, and electric light companies. The decisions are at variance in respect to what may be regarded as an additional servitude and attention will be called to them as the consideration of the subject progresses.

§ 831. The same subject continued.

Applying the general principle stated above, various uses of a public highway will now be considered under the word "obstructions." These may be classed as permanent, temporary and recurring in their character. The first class includes the use of public highways by permanent structures with their adjuncts; posts and wires, fences, railways, both steam, street and elevated, and other miscellaneous uses of a similar character.[678] The second class includes the use of a highway for parades, exhibitions, amusements and other similar purposes. The third class includes the use of highways for laying gas and water mains, conduits and other purposes by those lawfully authorized but which, in the exercise of their rights, occasion a recurring temporary obstruction of the way. It is necessary for the existence of any right on behalf of the public authorities with reference to the control or regulation of public ways that these be legal highways in the full sense of the term which included not only a lawful establishment but also a maintenance by the proper authorities.[679-81]

§ 832. Permanent obstructions; structures and their adjuncts.

The general principle applies that a legally created highway cannot be occupied by buildings [682] or their adjuncts; [683] gates and fences,[684] ditches,[685] or other permanent structures and improvements [686] which interfere with the primary purpose of the way.

[677] See, post, §§ 833 et seq.

[678] See, post, §§ 832 et seq.

[679-81] Blakeslee v. Tyler, 55 Conn. 387, 11 Atl. 291; Seeger v. Mueller, 28 Ill. App. 28; Id., 133 Ill. 86, 24 N. E. 513; Hibbard, Spencer, Bartlett & Co. v. City of Chicago, 173 Ill. 91, 50 N. E. 256, 40 L. R. A. 621; City of Waterloo v. Union Mill Co., 72 Iowa, 437, 34 N. W. 197;

State v. Shinkle, 40 Iowa, 131; State v. McGee, 40 Iowa, 595; Anderson v. Young, 21 N. Y. Supp. 172; Commonwealth v. Royce, 152 Pa. 88, 25 Atl. 162; Dyerle v. State, (Tex. Cr. App.) 68 S. W. 174.

682 First Nat. Bank v. Tyson, 133 Ala. 459, 32 So. 144, 59 L. R. A. 399; Webb v. City of Demopolis, 95 Ala. 116, 21 L. R. A. 62; Lutterloh v. Town of Cedar Keys, 15 Fla. 306. Public authorities have no right to appropriate public highways to any other use than that of travel and for the convenience of the whole public; they cannot lawfully authorize the erection of either public or private buildings upon them. McCormick v. South Park Com'rs, 150 Ill. 516, 37 N. E. 1075; Barrows v. City of Sycamore, 150 Ill. 588, 37 N. E. 1096, 25 L. R. A. 535; Dickerson v. City of Le Roy, 72 Ill. App. 588; John Anisfield Co. v. Grossman & Co., 98 Ill. App. 180; Platt v. Chicago, B. & Q. R. Co., 74 Iowa, 127, 37 N. W. 107. Round house and turn table.

Attorney General v. Vineyard Grove Co., 181 Mass. 507, 64 N. E. 75; Atlantic City v. Snee, 68 N. J. Law, 39, 52 Atl. 372; Van Wyck v. Lent, 33 Hun (N. Y.) 301; Ackerman v. True, 31 Misc. 597, 66 N. Y. Supp. 140; Northern Pac. R. Co. v. Lake, 10 N D. 541, 88 N. W. 461; Commonwealth v. Young Men's Christian Ass'n of Warren, 169 Pa. 24, 32 Atl. 121; Town of Neshkoro v. Nest, 85 Wis. 126. But see Com. v. Noxton, 121 Mass. 42.

683 Caldwell v. Town of Galt, 27 Ont. App. 162; First Nat. Bank v. Tyson, 133 Ala. 459, 32 So. 144, 59 L. R. A. 399. An encroachment of twenty-two inches on a sidewalk by the columns of a bank building is a public nuisance without regard to whether they are erected for utility or ornament. Harn v. Common Council of Dadeville, 100 Ala. 199, 14 So. 9; City Council of Augusta v. Burum, 93 Ga 68, 19 S. E. 820, 26 L. R. A. 340. A permit to erect an awning is a mere license and subject to revocation.

Hibbard v. City of Chicago, 173 Ill. 91, 50 N. E. 256, 40 L. R. A. 621. The authority to erect an awning is a mere license subject to revocation at any time. Hawkins v. Sanders, 45 Mich. 491. A window awning over a sidewalk in front of a store is not a public nuisance per se. Fox v. City of Winona, 23 Minn. 10; State v. Kean, 69 N. H. 122, 45 Atl. 256, 48 L. R. A. 102. Bay window. Simis v. Brookfield, 13 Misc. 569, 34 N. Y. Supp. 695. Awnings. Farrell v. City of New York, 5 N. Y. Supp. 672. Awnings. Hoey v. Gilroy, 14 N. Y. Supp. 159. Awnings. Trenor v. Jackson, 15 Abb. Pr. (N. S. N. Y.) 115. Awnings. Kiernan v. Newton, 20 Abb. N. C. (N. Y.) 398. Storm door. Griffin v. Baust, 26 App. Div. 553, 50 N. Y. Supp. 905; Broadbelt v. Loew, 162 N. Y. 642, 57 N E. 1105; Hoey v. Gilroy, 129 N. Y. 132, 29 N. E. 85; rvg 14 N. Y. Supp. 159; Commonwealth v. Dicken, 145 Pa. 453, 22 Atl. 1043; State v. Cleveland, 3 R. I. 117. But see City of Philadelphia v. Presbyterian Board of Publication, 9 Phila. (Pa.) 499.

684 Holtz v. Hoyt, 34 Ill. App. 488; Farlow v. Town of Camp Point, 186 Ill. 256; Kruger v. Le Blanc, 70 Mich. 76, 37 N. W. 880; Wyman v. Village of St. Johns, 100 Mich. 571, 59 N. W. 241; City of Mt. Clemens v. Mt. Clemens San-

itarium Co., 127 Mich. 115, 86 N. W. 537; Teague v. Attala County Sup'rs, 56 Miss. 29; Gulick v. Groendyke, 38 N. J. Law, 114; People v. Fowler, 63 Hun, 627, 17 N. Y. Supp. 744; Knowles v. Pennsylvania R. Co., 175 Pa. 623, 34 Atl. 974; Kalteyer v. Sullivan, 18 Tex. Civ. App. 488, 46 S. W. 288; Hatfield v. State (Tex. Cr. App.) 67 S. W. 110; French v. Holt, 53 Vt. 364; Wilson v. West & Slade Mill Co., 28 Wash. 312, 68 Pac. 716; Village of Galesville v. Parker, 107 Wis. 363, 83 N. W. 646. But see Baier v. Schermerhorm, 96 Wis. 372, 17 N. W. 600.

[685] City of Lewiston v. Booth, 3 Idaho, 692, 34 Pac. 809; Town of Canoe Creek v. McEniry, 23 Ill. App. 227.

[686] Meyers v. Nelson (Cal.) 44 Pac. 801; Helm v. McClure, 107 Cal. 199; Jackson v. Kiel, 13 Colo. 378, 20 Pac. 504, 6 L. R. A. 254; City of Lewiston v. Booth, 3 Idaho, 692, 34 Pac. 809; Stephani v. Brown, 40 Ill. 428; Gregsten v. City of Chicago, 40 Ill. App. 607; Davis v. McLean County Com'rs, 143 Ill. 9; Hibbard, Spencer, Bartlett & Co. v. City of Chicago, 173 Ill. 91, 50 N. E. 256, 40 L. R. A. 621; Snyder v. City of Pulaski, 176 Ill. 397, 52 N. E. 62, 44 L. R. A. 407; Tell City v. Bielfield, 20 Ind. App. 1, 49 N. E. 1090; Lebanon Light, Heat & Power Co. v. Leap, 139 Ind. 443, 29 L. R. A. 342; Dantzer v. Indianapolis R. Co., 141 Ind. 604, 34 L. R. A. 769; State v. Robinson, 28 Iowa, 514; Emerson v. Babcock, 66 Iowa, 257. Hay scales. Venard v. Cross, 8 Kan. 248; Shinkle v. City of Covington, 83 Ky. 420. Coal yard. Dickey v. Maine Tel. Co., 46 Me. 483; Appleton v. Inhabitants of Nantucket, 121 Mass. 161; Beecher v. People, 38 Mich. 289; Tittabawassee Highway Com'rs v. Sperling, 120 Mich. 493, 79 N. W. 693; Kaje v. Chicago, St. P., M. & O. R. Co., 57 Minn. 422; Moran v. Pullman Palace Car Co., 134 Mo. 641, 33 L. R. A. 755; Beecher v. Newark Street & Water Com'rs, 65 N. J. Law, 307, 47 Atl. 466, affirming 64 N. J. Law, 475, 46 Atl. 166; Eldert v. Long Island Elec. R. Co., 28 App. Div. 451, 51 N. Y. Supp. 186; Murphy v. Leggett, 29 App. Div. 309, 51 N. Y. Supp. 472; People v. Thompson, 98 N. Y. 6; People v. Keating, 168 N. Y. 390, 61 N. E. 637, reversing 62 App. Div. 348, 71 N. Y. Supp. 97. Under Laws 1897, c. 378, §§ 1608–1610, the common council of New York has the power to enact an ordinance providing for and regulating the erection and maintenance of newsstands under street ways of elevated railroad structures.

Bates v. Holbrook, 171 N. Y. 460, 64 N. E. 181. The erection by subcontractors on the subway improvement of large structures for the storage of their tools is a nuisance. Huddleston v. Town of Killbuch Tp. (Pa.) 7 Atl. 210; Com. v. Pittston Ferry Bridge Co., 176 Pa. 394, 35 Atl. 240; City of Wilkes Barre's Appeal, 100 Pa. 313; Robinson v. State (Tex. Cr. App.) 44 S. W. 509. The use of a highway may constitute an obstruction although it is of a portion not used by the traveled way. Davis v. City of Appleton, 109 Wis. 129, 85 N. W. 515. Water tank. But see City of Leavenworth v. Douglass, 59 Kan. 416, 53 Pac. 123; West v. Bancroft, 32 Vt. 367.

§ 833. Wires and poles.

It can safely be said that without legislative permission directly given by the legislature or indirectly through the grant to a municipal corporation of the right, the erection and maintenance of poles and wires, in a legally established highway, for the purpose of conveying electricity for lighting or as a means of communication, is considered a public obstruction and nuisance, materially interfering with the proper use of the highway and subject to removal.[687] The grant, however, of such authority removes their character as an illegal obstruction but does not eliminate the question of whether this use is not an additional burden or servitude for which the abutting owner is entitled to compensation.[688] The courts are at variance upon this latter question. In Indiana, Louisianna, Massachusetts, Minnesota, Missouri, Michigan, Montana and Pennsylvania,[689] it has been held that an easement of a

[687] Dickey v. Maine Tel. Co., 46 Me. 483; Newman v. Village of Avondale, 31 Wkly. Law Bul. 123.

[688] Patton v. City of Chattanooga, 108 Tenn. 197, 65 S. W. 414. See, also, cases cited generally in this and following sections.

[689] Magee v. Overshiner, 150 Ind. 127, 49 N. E. 951, 40 L. R. A. 370; Irwin v. Great Southern Tel. Co., 37 La. Ann 63. The decisions in this state are based upon the fact that the abutting owner has no fee in the streets in front of his property which are considered as common and the entire control vested in the state or some of its agencies.

Pierce v. Drew, 136 Mass. 75. "When land has been taken or granted for highways, it is so taken or granted for the passing and repassing of travelers thereon, whether on foot or horseback, or with carriages and teams for the transportation and conveyance of passengers and property, and for the transmission of intelligence between the points connected thereby. As every such grant has for its object the procurement of an easement for the public, the incidental powers granted must be so construed as most effectually to secure to the public the full enjoyment of such easement. * * * When the land was taken for a highway, that which was taken was not merely the privilege of traveling over it in the then known vehicles, or of using it in the then known methods, for either the conveyance of property or transmission of intelligence. * * * The discovery of the telegraph developed a new and valuable mode of communicating intelligence. Its use is certainly similar to, if not identical with, that public use of transmitting information for which the highway was originally taken, even if the means adopted are quite different from the post boy or the mail coach. It is a newly discovered method of exercising the old public easement, and all appropriate methods must have been deemed to have been paid for when the road was laid out. * * *

highway is for intercommunication and the transmission of intelligence as well as for travel and transportation; that when new modes of travel and new means of communication become necessary, the public has the right to use them and no new burden is imposed unless inconsistent with the old use and that if it remains unimpaired, the abutting owner has no reason to complain. On the other hand, some of the Federal courts and the states of Illinois, Kentucky, New Jersey, New York, Nebraska, Maryland,

We are therefore of opinion that the use of a portion of a highway for the public use of companies organized under the laws of the state for the transmission of intelligence by electricity, and subject to the supervision of the local municipal authorities, which has been permitted by the legislature, is a public use similar to that for which the highway was originally taken, or to which it was originally devoted, and that the owner of the fee is entitled to no further compensation." People v. Eaton, 100 Mich. 208, 24 L. R. A. 721; Cater v. North Western Tel. Exch. Co., 60 Minn. 539, 63 N. W. 111, 28 L. R. A 310; Hershfield v. Rocky Mountain Bell Tel. Co., 12 Mont. 102; Kisby, Elec. Wires, p. 82.

Julia Bldg. Ass'n v. Bell. Tel. Co., 88 Mo. 258. "These streets are required by the public to promote trade and facilitate communication in the daily transactions of business between the citizens of one part of the city with those of another, as well as to accommodate the public at large in these respects. If a citizen living or doing business on one end of Sixth street wishes to communicate with a citizen living and doing business on the other end, or at any intermediate point he is entitled to use the street, either on foot, on horseback, or in a carriage, or other vehicle in bearing his message. The defendants in this case propose to use the street by making the telephone poles and wires the messenger to bear such communications instantaneously and with more dispatch than in any of the above methods, or any other known method of bearing oral communications. Not only would such communications be borne with more dispatch, but, to the extent of the number of communications daily transmitted by it, the street would be relieved of that number of footmen, horsemen or carriages. If a thousand messages were daily transmitted by means of telephone polls, wires and other appliances used in telephoning, the street through these means would serve the same purpose, which would otherwise require its use either by a thousand footmen, horsemen or carriages to effectuate the same purpose. In this view of it the erection of telephone poles and wires for transmission of oral messages, so far from imposing a new and additional servitude would, to the extent of each message transmitted, relieve the street of a servitude or use by a footman, horseman or carriage." Lockhart v. Craig St. R. Co., 139 Pa. 419.

Mississippi, Ohio, Pennsylvania, Virginia, Wisconsin, and Washington,[690] have decided that highways were originally intended primarily for travel and transportation and that though they were designed also for the transmission of intelligence, and the

[690] Pacific Postal Tel. Cable Co. v. Irvine, 49 Fed. 113. The right to additional compensation in this case is made dependent upon the title acquired by the public corporation and the court holds that if an easement only, then the erection of poles and wires will constitute an additional burden, but if the public have acquired a fee, then no such right on the part of the abutting owner exists. The court in its opinion by Ross, J., say: "The papers submitted upon the motion show that the telegraph poles and wires in question were erected by complainant upon land, the fee of which is in the defendant James Irvine, and over which the right of way for a public road had been theretofore granted to the board of supervisors of the county in which the land is situate. It appears that the poles and wires were erected by complainant under a grant from the board of supervisors so to do, but without the consent and against the protest of the defendants. The right of way granted to the supervisors was for a public road, that is to say, a way to be used by the public for ordinary travel. Where the fee of the highway is vested in the public, there can be no valid legal objection to the grant by the public of a right to erect such poles and wires without regard to the adjacent property holders; but where, as here, the fee of the highway remains in the adjacent owner, and only its use for purposes of public travel has been granted, I think it clear that every use of the highway not in the line of such travel is an additional burden, for which the proprietor of the fee is entitled to additional compensation, and which can not be constitutionally taken from him without his consent, except by proceedings regularly instituted and prosecuted according to law."

American Telephone & Tel. Co. v. Jones, 78 Ill. App. 372; Board of Trade Tel. Co. v. Barnett, 107 Ill. 507; Postal Telegraph Cable Co. v. Eaton, 170 Ill. 513, 49 N. E. 365, 39 L. R. A. 722; East Tennessee Tel. Co. v. City of Russellville, 106 Ky. 667, 51 S. W. 308. The construction of a telephone line on the street of a city, held to constitute an additional burden. Chesapeake & P. Tel. Co. v. Mackenzie, 74 Md. 36; Stowers v. Postal Tel. Cable Co., 68 Miss. 559, 3 Am. Electrical Cas. 855, 12 L. R. A. 864. Compensation must be made to abutting owners although the fee of the street is in the public.

Halsey v. Rapid Transit St. R. Co., 47 N. J. Eq. 380. The court as a obiter dicta say: "And this principle exhibits in a very clear light, the reason why it has been held that the placing of telegraph and telephone poles in the street imposes an additional servitude on the land. They are not placed in the street to aid the public in exercising their right of free passage, nor to facilitate the use of the street as a public way, but to aid in the transmission of intelligence.

telephone and telegraph are used for that purpose, yet, this mode of use is so entirely different from the old one and necessitates such a permanent occupation of the soil that it cannot be supposed that the landowner ever contemplated such a use and occupation; that the primary law of the highway is motion and whether vehicles are used or intelligence transmitted, the vehicles must move and the intelligence be transmitted by some moving body which passes along the highway either on or over or perhaps under it, but which cannot permanently appropriate any part of it without giving to the abutting owner the right of compensation for the

Although our public highways have always been used for carrying the mails and for the promotion of other like means of communication, yet the use of them for a like purpose, by means of the telegraph and telephone differs so essentially, in every material respect, from their general and ordinary uses, that the general current of judicial authority has declared that it was not within the public easement."

Blashfield v. Empire State Telephone & Tel. Co., 18 N. Y. Supp. 250. A telephone line in a country highway is an additional burden upon the fee entitling its owners to compensation. People v. Metropolitan Telephone & Tel. Co., 31 Hun (N. Y.) 604.

Eels v. American Telephone & Tel. Co., 143 N. Y. 133, 38 N. E. 202, 25 L. R. A. 640. "We think neither the state nor its corporation can appropriate any portion of the public highway permanently to its own special, continuous and exclusive use by setting up poles therein, although the purpose to which they are to be applied is to string wires thereon and thus to transmit messages for all the public at a reasonable compensation. It may be at once admitted that the purpose is a public one, although for the private gain of a corporation, but the constitution provides that private property shall not be taken for public use without compensation to the owner. Where land is dedicated or taken for a public highway, the question is what are the uses implied in such dedication or taking? Primarily there can be no doubt that the use is for passage over the highway. The title to the fee of the highway generally remains in the adjoining owner, and he retains the ownership of the land, subject only to the public easement. If this easement does not include the right of a telegraph company to permanently appropriate any portion of the highway, however small it may be, to its own special, continuous and exclusive use, then the defendant herein has no defense to the plaintiff's claim. Although the purpose of a public highway is for the passage of the public, it may be conceded that the land forming such highway was not taken for the purpose of enabling the public to pass over it only in the then known vehicles, or for using it in the then known methods for the conveyance of property or tne transmission of intelligence. Still the

actual injury to his property or the right to use the same. The freedom of use and enjoyment of adjoining property where portions of the highway are occupied permanently by telegraph and electric poles and wires has been interfered with and a definite portion of the highway taken contrary to the original understanding and without compensation. In considering the decisions above cited, it must be remembered that the Massachusetts case was decided by a divided court. The Louisiana and Montana decisions were based upon the fact that the fee was vested in the state;

primary law of the highway is motion, and whatever vehicles are used, or whatever method of transmission of intelligence is adopted, the vehicle must move and the intelligence be transmitted by some moving body which must pass along the highway, either on or over, or perhaps under it, but it cannot permanently appropriate any part of it. In the case at bar the fee in the highway at the point in controversy is in the plaintiff, but I do not regard that fact as controlling upon the question of the proper use of the highway. Of course the plaintiff could not recover in this form of action [action of ejectment] unless he owned the fee in the highway at this particular point, but I do not think the proper use of the highway depends upon the question as to who owns the fee thereof. I think that the rights of the public in and to the highway remain the same wherever the fee thereof may be placed. * * * We cannot agree that this permanent appropriation and exclusive possession of a small portion of the highway can properly be regarded as any newly discovered method of exercising the old public easement, for the very reason that this so-called new method is a permanent, continuous and exclusive use and possession of some part of the public highway itself, and, therefore, cannot be simply a new method of exercising such old public easement. It is a totally distinct and different kind of use from any heretofore known. It is not a mere difference in the kind of vehicle, or in their number or capacity, or in the manner, method or means of locomotion. All these might be varied, increased as to number, capacity or form, altered as to means or rapidity of locomotion, or transformed in their nature and character, and still the use of the highway might be substantially the same, a highway for passage and motion of some sort. Here, however, in the use of the highway by the defendant is the fact of permanent and exclusive appropriation and possession, a fact which is, as it seems to us, wholly at war with that of the legitimate public easement in a highway. * * * The argument is pressed upon us that the question to be decided in this case is new and that it ought to be decided with reference to the wants and customs of the advancing civilization which it is alleged is doing so much to render life more comfortable, attractive and beautiful. Courts are frequently addressed with such ar-

and that in the Michigan, Minnesota and Missouri cases there were dissenting opinions. In the Minnesota case two judges dissented in a court of five members. The weight of authority based upon the better reasons, so it seems to the author, is to the effect that the construction of telegraph and telephone lines upon highways, including streets, is not within the original purposes of their dedication or acquisition, and that poles and wires constitute an additional servitude entitling the abutting owner to compensation for the damages that he may have sustained. In the Minnesota

guments, which are quite forcible, and they have in this case been very eloquently, plausibly and aptly advanced. The answer to be made is that, although this particular phase of the question, strictly speaking, may itself be new, yet the principle which governs our decision is as old almost as the common law itself; and in deciding this appeal favorably to the defendant herein, we should be overturning and making nothing of cases which have been regarded as the law for generations past."

Blashfield v. Empire State Telephone & Tel. Co., 147 N. Y. 520, 42 N. E. 2, reversing 71 Hun, 532, 24 N. Y. Supp. 1006; Phillips v. Postal Tel. Cable Co., 130 N. C. 513, 41 S. E. 1022. The authority granted by Act of Congress July 24, 1866, for the construction of telegraph lines in the United States upon the military and post roads of the United States, does not authorize these companies to appropriate private lands for a right of way. Smith v. Central Dist. Printing & Tel. Co., 1 Ohio Cir. Dec. 475, 2 Ohio Cir. R. 259, 2 Am. Electrical Cas. 237; Prentiss v. Cleveland Tel. Co., 32 Wkly. Law Bul. (Ohio) 13. The stringing of electric telephone wires along a street is not a reasonable or proper use of it.

Dailey v. State, 51 Ohio St. 348, 37 N. E. 710, 24 L. R. A. 724. An abutting owner whose title extends to the center of a roadway has a property interest in trees planted on the line of a highway which is subject only to the convenience of public travel, and a telegraph company cannot injure or destroy them in the construction or maintenance of its line, without first compensating the owner. Haverford Elec. Light Co. v. Hart, 1 Pa. Dist. Ct. Rep. 571; Western Union Tel. Co. v. Williams, 86 Va. 696, 8 L. R. A. 429; Krueger v. Wisconsin Tel. Co., 106 Wis. 96, 50 L. R. A. 298. Dillon, Mun. Corp. (4th Ed.) § 698a; Hewitt v. W. U. Tel. Co., 13 Wash. L. R. 466; Elliott, Roads & St. (2d Ed.) §§ 705, 706 and 816 et seq.; Croswell, Law of Electricity, 1895, § 110.

Joyce, Elec. Law, §§ 295–320, inclusive where the subject is fully treated and exhaustive quotations from cases made. Lewis, Em. Dom. (2d Ed.) §§ 131, et seq. and § 226. "The lines of a telegraph or telephone company are on the same footing as the steam railroad. They form no part of the equipment of a public highway, but are entirely foreign to its use. Where the fee of the street is in the abutting owner, he is clearly entitled to compensation for the additional burden placed upon his land. When the

case above cited [691] the arguments are well stated in the majority and the dissenting opinions. In the majority opinion by Justice Mitchell, the court say: "The question, then, is, what is the nature and extent of the public easement in a highway? If there is any one fact established in the history of society and of the law itself, it is that the mode of exercising this easement is expansive, developing and growing as civilization advances. In the most primitive state of society the conception of a highway was merely a footpath; in a slightly more advanced state it included the idea of a way for pack animals; and, next, a way for vehicles drawn by animals,—constituting, respectively, the 'iter,' the 'actus,' and the 'via' of the Romans. And thus the methods of using public highways expanded with the growth of civilization, until today our urban highways are devoted to a variety of uses not known in former times, and never dreamed of by the owners of the soil when the public easement was acquired. Hence it has become settled law that the easement is not limited to the particular methods of use in vogue when the easement was acquired, but includes all new and improved methods, the utility and general convenience of which may afterwards be discovered and developed in aid of the general purpose for which highways are designed. And it is not material that these new and improved methods of use were not contemplated by the owner of the land when the easement was acquired, and are more onerous to him than those then in use. Another proposition, which we believe to be sound, is that the public easement in a highway is not limited to travel or transportation of persons or property in movable vehicles.. This is, doubtless, the principal and most necessary use of highways, and in a less advanced state of society was the only known use, as the etymology of the word 'way' indicates. And the courts, which, as a rule, are exceedingly conservative in following old definitions, have often seemed inclined to adhere to this original conception of

fee is in the public, the abutting owner may recover for any interference with his rights in the street. It is evident that poles and wires may be so placed as not to afford the slightest impediment to the access of light and air or to ingress and egress. In such case there is no taking, because there is no damage." But see Roake v. American Telephone & Tel. Co., 41 N. J. Eq. (14 Stew.) 35; Broome v. New York & N. J. Tel. Co., 42 N. J. Eq. (15 Stew.) 141.

[691] Cater v. North Western Tel. Exch. Co., 60 Minn. 539, 28 L. R. A. 310.

the purpose of a highway, and to exclude every form of use that does not strictly come within it. But it is now universally conceded that urban highways may be used for constructing sewers and laying pipes for the transmission of gas, water, and the like for public use. Some courts put this on the ground that these uses are merely incidental to and in aid of travel on the streets. Other courts put it on the ground that such uses are contemplated when the easement in urban ways is acquired, but not in the case or rural highways. But it seems to us that neither of these reasons is either correct or satisfactory. The uses referred to of urban streets are not in aid of travel, but are themselves independent and primary uses, although all within the general purpose for which highways are designed. Neither can a distinction between urban and rural ways be sustained on the ground that such uses were contemplated when the public easement was acquired in the former but not when the easement was acquired in the latter. As a matter of fact, most of these uses were unknown when the public easement was acquired in many of the streets in the older cities. Indeed, many of what are now urban highways were merely country roads when the public acquired its easement in them, and doubtless many highways that are now merely country roads will in time become urban streets.. When such changes occur, will the abutting owners be entitled to new compensation before the public can build sewers or lay water or gas pipes in these streets? It seems to us that a limitation of the public easement in highways to travel and the transportation of persons and property in movable vehicles is too narrow. In our judgment, public highways, whether urban or rural, are designed as avenues of communication; and, if the original conception of a highway was limited to travel and transportation of property in movable vehicles, it was because these were the only modes of communication then known; that as civilization advances, and new and improved methods of communication and transportation are developed, these are all in aid of and within the general purpose for which highways are designed. Whether it be travel, the transportation of persons and property, or the transmission of intelligence, and whether accomplished by old methods or by new ones, they are all included within the public 'highway easement,' and impose no additional servitude on the land, provided they are not inconsistent with the reasonably safe and practical use of the highway in other and usual and necessary modes, and provided

they do not unreasonably impair the special easements of abutting owners in the street for purposes of access, light, and air. It is impracticable, as well as dangerous, to attempt to lay down, except in this general form, any rule or test of universal application as to what is or what is not a legitimate 'street or highway use.' * * * So far as there is any distinction between rural and urban highways, there would be much more reason for holding such structures an additional servitude in the latter than in the former. It is a matter of common knowledge that telegraph and telephone lines along the side of a country road rarely, if ever, appreciably interfere with either public travel or the easements of the abutting land owners; whereas in the cities, especially on business streets, where the buildings extend out to the line of the street, the numerous wires stretched upon the crossarms frequently materially interfere with access, light, and air, as well as render protection of the buildings more difficult in case of fire." In the dissenting opinion of Chief Justice Start it is said: "If such use of the highway is outside of the scope of the public easement therein, then it is an additional servitude, for which the owner of the soil has never been compensated, and the legislature cannot authorize such use except upon condition that compensation be made to the owner. A highway primarily is simply a public easement or servitude, for travel and passage of persons, animals, and things, carrying with it, as an incident, the right of the public to use the soil for the purpose of the repair and improvement of the way, and, in cities and populous places, the further right to use the street for the more general purposes of sewerage, the distribution of water and light, and the furtherance of public health, safety, and convenience. The owner of the land over which the highway passes retains the fee thereof and all rights of property therein not incompatible with the public easement therein, as here defined. 2 Dillon, Mun. Corp. § 688; Angell & D. Highways, § 301. While the fundamental idea of a highway is that it is for public travel, yet the purposes for which it was acquired are not limited to travel and passage in the then known vehicles and methods, for all new vehicles and methods of travel thereon, which are not inconsistent with the safe and practical use of the highway for travel in the ordinary methods, are included in the public easement. Accordingly, it has been held by nearly all recent authorities that the operation of a street railway for the transportation of persons only, whether the motive power is ani-

mal or mechanical, including electricity, with the necessary poles and wires to communicate the power to the car or vehicle to be moved, is not an additional servitude. Taggart v. Newport St. R. Co., 16 R. I. 668, 19 Atl. 326; Halsey v. Rapid Transit St. R. Co., 47 N. J. Eq. 380, 20 Atl. 859. The authorities, in reference to such street railways, proceed upon the basis that such new use of the street is similar to that for which the street was originally acquired; or, in other words, it is merely a newly discovered method of exercising the old public easement for travel and passage of persons and things along the public street. This principle has been extended by a limited number of adjudged cases, to the erection and use of telephone and telegraph poles and wires in the streets, for the purpose of transmitting intelligence. The analogy, however, between a telephone line and the purposes for which a country highway is acquired is remote, if not fanciful; and it is safe to say that such use of the highway was not within the contemplation of the parties when the damages for the public easement were assessed or the right of passage dedicated. The use of a highway for a telephone line is essentially distinct from its use for travel. The right of the public in the ordinary highway is to pass along upon it, not to remain stationary; and it would be just as reasonable to claim that towers erected in the highway for the purpose of transmitting intelligence by signal lights were not an additional servitude as to make such a claim for telephone poles. In each case there would be an exclusive use and possession of a portion of the highway, in no manner connected with the movement of vehicles or cars of any kind, which cannot be properly regarded as a new method of exercising the old public easement for travel and passage. The adjudged cases upon this subject are conflicting, but the later cases and the weight of authority sustain the doctrine that a telegraph or telephone line along the highway, where the fee thereof is in the abutting owner, is foreign to its use, and an additional servitude, for which such owner is entitled to compensation; and that the legislature cannot authorize the imposition of such servitude without also providing for such compensation. * * * The opposite doctrine is held in the following cases, by a divided court, except in the last case cited, and in that one the fee was in the public: Pierce v. Drew, 136 Mass. 75; Julia Bldg. Ass'n v. Bell Tel. Co., 88 Mo. 258; People v. Eaton, 100 Mich. 208, 59 N. W. 145; Irwin v. Great Southern Tel. Co., 37 La. Ann. 63. In the first two cases the dissenting opinions are so vig-

orous as to largely neutralize the decisions as authorities outside of the jurisdiction of the court announcing them. The latest decision upon this question is that of the New York court of appeals in the case of Eels v. American T. & T. Co., which was in all substantial particulars similar to the one at bar. It ably discusses the question on principle, and reaches the unanimous conclusion that the occupation of a rural highway by a telegraph and telephone company for the erection of its poles is an additional servitude, for which the owner of the fee is entitled to compensation." And Buck, Judge, in his dissenting opinion says: "The erection of telegraph and telephone poles is not merely a new method of exercising old rights, but the addition of a new servitude and essentially a new burden upon the street. Viewed in this light, if the necessities or luxuries of modern life are needed, let those who seek their enjoyment and benefit pay for them, and not secure them at the expense of additional burdens imposed upon private property. It is this compulsory yielding up of private rights and private property to concentrated power and wealth in the hands of the few, under the demands of a so-called 'progressive civilization,' that needs judicial care and its conservative force to see that no new appropriation of lands not embraced in the original dedication or condemnation shall be permitted. If the erection of telephone and telegraph poles in our public streets and highways is simply a new and improved method of the use of the street, I fail to see why any legislative permission was necessary, because the telephone company would in such cases have the same right to the use of the street as any traveler thereon."

§ 834. Conditions imposed for use of highway.

Legislative permission, directly or indirectly given, is necessary for a legal use of a highway or street for wires whether these are strung upon poles or placed in conduits under the surface,[692] and

[692] Western Union Tel. Co. v. City of New York, 38 Fed. 552, 3 L. R. A. 449. A telegraph company acting as a business agency of the Federal government and authorized to maintain its wires along a structure of an elevated railroad in the streets, it being an independent post road of the United States, cannot be deprived of its right by state legislation. Chicago General St. R. Co. v. Ellicott, 88 Fed. 941; Southern Bell Telephone & Tel. Co. v. City of Richmond, 103 Fed. 31 44 C. C. A. 147, affirming 98 Fed. 671; Western Union Tel. Co. v. City of

Toledo, 103 Fed. 746. A right of this character is not generally assignable in part.

Abbott v. City of Duluth, 104 Fed. 833. Under a legislative act giving telegraph and telephone companies full power and right to use highways, a telephone company may use, subject to its provisions and conditions, the streets, avenues and alleys in a city without the grant of a franchise therefor from the municipal authorities whose powers over streets are only those delegated by the legislature and subject to such direct control as the legislature may see fit. The terms "Public roads and highways" as used in the statute includes streets, avenues, and alleys in cities and villages as well as rural highways.

City of Toledo v. Western Union Tel. Co., 107 Fed. 10, 52 L. R. A. 730. The rights granted by act of Congress July 24, 1866, Rev. St. §§ 5263–5268, and act of Congress June 8, 1872, Rev. St. § 3964, are strictly construed and a telegraph company is not authorized to use the streets of a city for the installment of a district telegraph system for the purpose of the collection and delivery of telegraph messages and the maintenance of a messenger system for the purpose of police signals, watchman and fire alarms within the city.

City of Morristown v. East Tennessee Tel. Co., 115 Fed. 304. The power conferred on a city to grant a franchise for the use of its streets, "by ordinance" cannot be exercised by a mere resolution nor can an ordinance containing such a grant be amended in respect to any of its terms or conditions by a resolution. Hewett v. Union Tel. Co., 4 Mackey (D. C.) 424; Western Union Tel. Co. v. Eyser, 2 Colo. 141; Board of Public Works of Denver v. Denver Tel. Co., 28 Colo. 401, 65 Pac. 35; People v. Central Union Tel. Co., 192 Ill. 307, 61 N. E. 428. The grant of a right "to a telephone company, its successors and assigns" for the use of streets is assignable.

Coverdale v. Edwards, 155 Ind. 374, 58 N. E. 495. The grant of a right to use the streets of a city for the purpose of erecting electric poles may, by its language, be revokable at the pleasure of the city council. North Western Tel. Exch. Co. v. City of Minneapolis, 81 Minn. 140, 83 N. W. 527, affirmed on rehearing, 81 Minn. 140, 86 N. W. 69, 53 L. R. A. 175. Any telegraph or telephone company under Gen. St. 1894, § 2641, may erect poles within the urban ways and streets of a city as well as upon the rural highways provided they are so erected as not to interfere with the convenience of travel.

City of Duluth v. Duluth Tel. Co., 84 Minn. 486, 87 N. W. 1127. The establishment of a telephone plant under Gen. St. 1894, § 2641, becomes a vested right which cannot be revoked by the city except under the reasonable exercise of its police power. City of St. Paul v. Freedy, 86 Minn. 350, 90 N. W. 781; City of Plattsburg v. Peoples' Tel. Co., 88 Mo. App. 306. As a condition of the grant, a telephone company may be properly made to pay for its franchise and its worth may be determined by competitive bidding. Roake v. American Tel. & Tel. Co., 41 N. J. Eq. 35. A telephone line may be constructed under a statute

authorizing a telegraph line. New York & N. J. Tel. Co. v. Borough of Bound Brook, 66 N. J. Law, 184, 48 Atl. 1022. A municipality, under N. J. Act, 1900, Public Laws, p. 74, has no discretionary powers in reference to the designation of the telephone route for a through line.

Domestic Tel. Co. v. City of Newark, 49 N. J. Law, 344, 8 Atl. 128. The consent of a municipality to the erection of telegraph poles in public streets can only be given to corporations under act of April 9, 1875. French v. Robb. (N. J.) 51 Atl. 509. A misuse of the rights to place electric light poles in a street is a question alone for the grantee of the power. Duke v. Central N. J. Tel. Co., 53 N. J. Law, 341, 11 L. R. A. 664; Sheehy v. Clausen, 26 Misc. 269, 55 N. Y. Supp. 1000; Barhite v. Home Tel. Co. of Rochester, 50 App. Div. 25, 63 N. Y. Supp. 659. The city of Rochester under its charter as amended by Laws 1894, c. 28, § 8, may control the erection and maintenance of telegraph wires and poles in the streets and other public places of the city.

City of Rochester v. Bell Tel. Co. of Buffalo, 52 App. Div. 6, 64 N. Y. Supp. 804. A telephone company under Laws of N. Y. 1848, c. 265, 1853, c. 471, and 1890, c. 566, has the right to construct and maintain its lines and fixtures under or over public highways and a city has no power to prevent it from using the streets for the erection and maintenance of a telephone line. Under the general police power, however, the municipality may regulate the manner in which these lines shall be constructed and maintained.

Seaboard Tel. & Tel. Co. v. Kearny, 68 App. Div. 283, 74 N. Y. Supp. 15. The fact that a telephone company has permitted its lines to fall into a state of dis-repair owing to financial difficulties is no justification for a city's refusal to permit their lawful restoration. People v. Squire, 107 N. Y. 593, 14 N. E. 820; Auerach v. Cuyahoga Tel. Co., 7 Ohio N. P. 633. Where a municipality has been granted the power to decide whether a telephone company must place its wires in underground conduits or upon poles, its decision will not be interferred with by the courts in the absence of a flagrant abuse or violation of authority.

In re Co-operative Tel. Co., 9 Oh. S. & C. P. Dec, 831. A city cannot demand or receive compensation of a telephone company for the use of its streets except what may be necessary to restore the pavement to its former condition where the company is operating its lines under authority of Rev. St. § 3461. City of Zanesville v. Zanesville Tel. & Tel. Co., 64 Ohio St. 67, 59 N. E. 781, 52 L. R. A. 150, reversing 63 Ohio St. 442, 59 N. E. 109, Ohio Rev. St. § 3461, is unconstitutional as conferring legislative or administrative powers upon a county probate court.

Peoples' Tel. & Tel. Co. v. Berks & D. Turnpike Road, 199 Pa. 411, 49 Atl. 284. A telephone company is a telegraph within the meaning of the general incorporation act of April 29, 1874, § 33, which provides that a telegraph company incorporated under its provisions may construct its lines along any highway.

State v. City of Spokane (Wash.) 63 Pac. 1116. A city has the power

the legislature [693] or one of its subordinate agencies,[694] notably, municipal corporations proper, have, in a grant of the right to telegraph, telephone or electric lighting companies to use highways, including streets, the power to impose such conditions as may seem advisable and necessary for the maintenance of the highway in a safe condition for public use [695] and its use for these pur-

under Ballinger's Ann. Code & St. § 4369, to withhold permission from the telephone company for the use of streets. Roberts v. Wisconsin Tel. Co., 77 Wis. 589. The rights granted by Sanb. & B. Wis. Ann. St. § 1778, include telephone as well as telegraph companies although the former are not specifically mentioned. State v. City of Sheboygan, 111 Wis. 23, 86 N. W. 657. A grant of this character when accepted by the corporation and its terms complied with becomes ordinarily a contract which cannot be arbitrarily repealed or amended and which is under the protection of that provision of the federal constitution prohibiting the passage of laws impairing the obligation of a contract. City of St. Louis v. Western Union Tel. Co., 63 Fed. 68; Sunset Telephone & Tel. Co. v. City of Medford, 115 Fed. 202; Chesapeake & P. Tel. Co. v. City of Baltimore, 89 Md. 689, 43 Atl. 784, 44 Atl. 1033; Northwestern Tel. Exch. Co. v. City of Minneapolis, 81 Minn. 140, 83 N. W. 527, 86 N. W. 69, 53 L. R. A. 175; Broome v. New York & N. J. Tel. Co., 42 N. J. Eq. (15 Stew.) 141; Hudson Tel. Co. v. Jersey City, 49 N. J. Law, 303; Clarksburg Elec. Light Co. v. City of Clarksburg, 47 W. Va. 739, 35 S. E. 994, 50 L. R. A. 142.

[693] See cases cited in two preceding notes.

[694] Abbott v. City of Duluth, 104 Fed. 833. A telephone company occupying the streets of a city under authority from the state cannot be compelled by municipal authorities to remove poles and wires where this action is not based upon any claim that they interfere with the safety of ordinary travel but is taken for the purpose of compelling the company owning the poles and wires to pay for the franchise from the city to maintain the same. Thompson v. Alameda County Sup'rs, 111 Cal. 553, 44 Pac. 230. A telephone franchise must be awarded to the highest bidder and for cash under Statutes 1893, p. 288. See, also, cases cited in three preceding notes.

[695] Chicago General St. R. Co. v. Ellicott, 88 Fed. 941; Michigan Tel. Co. v. City of Charlotte, 93 Fed. 11. "All grants of rights or privileges in streets by a city vested by its charter with the power of supervision and control of its streets are subject to the power and duty of the city to enact such legislation as may be required from time to time in the proper exercise of such supervision and control in the interests of the public; and an ordinance which can fairly be seen to be directed to a legitimate purpose, falling within such power and duty —as one requiring a telephone company which had been granted the right to maintain its line in a cer-

poses in such a manner as to interfere in the least possible degree with the use of the street for ordinary purposes of travel [696] and with the abutting owner's access to his property, or other rights

tain street to remove the same, on the ground that it had become dangerous and inconvenient to persons using the street, but offering another location for the erection of the line, which is a reasonable substitute,—is within the legitimate powers of the city, and cannot be held unconstitutional by a court, as depriving the company of its property without due process of law."

Wilson v. Great Southern Telephone & Tel. Co., 41 La. Ann. 1041; Chesapeake & P. Tel. Co. v. City of Baltimore, 89 Md. 689, 43 Atl. 784, 44 Atl. 1033; Com. v. City of Boston, 97 Mass. 555. The authority given under Gen. St. c. 64, §§ 2, and 3 to erect telegraph poles in a highway under the direction of the municipal authorities is given only to electrical telegraph companies incorporated under the laws of the commonwealth of Massachusetts. State v. Flad, 23 Mo. App. 185; Chalmers v. Paterson, P. & S. Tel. Co., 66 N. J. Law, 41, 48 Atl. 993; City of Philadelphia v. Postal Tel. & Cable Co., 67 Hun, 21, 21 N. Y. Supp. 556; Monongahela City v. Monongahela Elec. Light Co., 3 Pa. Dist. Ct. R. 63. The grant of the right to an electric light company to use the streets of a city is always subject to the rights of the city to make necessary improvements upon the streets.

City of Philadelphia v. Western Union Tel. Co., 11 Phila. (Pa.) 327. All grants of power to private corporations to carry on their business within the limits of a city are made on the implied condition that they shall be subject to such reasonable regulations as the city shall think necessary in pursuance of its chartered powers for the protection and general welfare of its inhabitants. Western Union Tel. Co. v. City of Philadelphia, (Pa.) 12 Atl. 144; Maxwell v. Central Dist. Printing Tel. Co., 51 W. Va. 121, 41 S. E. 125; State v. City of Sheboygan, 111 Wis. 23, 86 N. W. 657. It is also held that a telegraph company in exercising its rights is bound to erect neat and shapely telegraph poles; not broken and unsightly ones. See Forsythe v. Baltimore & O. Tel. Co., 12 Mo. App. 494.

[696] Sheffield v. Central Union Tel. Co., 36 Fed. 164. "The statutes of Ohio provide that the telephone company might occupy for its poles a part of the public highway, but must not do it so as to incommode the public in the use of the highway. In the location of its poles in the highway the defendant was required to exercise reasonable care, so as not to incommode persons having a right to use the road for all purposes of travel. This use means the ordinary and reasonable use of the highway for all purposes for which highways are usually used by the public. It was not required to so locate its posts or poles as to provide against all possible injuries that might be incurred or happen under extraordinary circumstances."

Southern Bell Telephone & Tel. Co. v. City of Richmond, 103 Fed.

to which he may be entitled.[697] A new condition, however, cannot be required when it would be inconsistent with or impair a con-

31, 44 C. C. A. 147, affirming 98 Fed. 671; City of Toledo v. Western Union Tel. Co., 107 Fed. 10, 52 L. R. A. 730. An interstate telephone company is not entitled to erect and maintain its lines upon the streets of a city without securing a permit therefor and without complying with reasonable regulations for their erection and maintenance.

City of St. Paul v. Freedy, 86 Minn. 350, 90 N. W. 781; City of Hannibal v. Missouri & K. Tel. Co., 31 Mo. App. 23. An ordinance providing for the relocation of telephone poles may be void because unreasonable. State v. Murphy, 130 Mo. 10, 31 S. W. 594, 31 L. R. A. 798; Western Union Tel. Co. v. Guernsey & Scudder Elec. Light Co., 46 Mo. App. 120; Lundeen v. Livingston Elec. Light Co., 17 Mont. 32, 41 Pac. 995. A guy wire running from a telephone post to a post above the ground and two feet from the sidewalk is an obstruction to the street. Cincinnati Incline Plane R. Co. v. City & S. Tel. Assn, 26 Ohio Law J. 8, 12 L. R. A. 534, reversing 24 Ohio Law J. 471; Central Pennsylvania Tel. Supply Co. v. Wilkes-Barre & W. S. R. Co., 11 Pa. Co. Ct. R. 417.

[697] Sunset Telephone & Tel. Co. v. City of Medford, 115 Fed. 202. A city cannot, after a telephone company has accepted a grant and established its plant, impose a new condition upon its right to use the streets of a city, namely, that it pay for that use. O'Connor v. Nova Scotia Tel. Co., 22 Can. Sup. Ct. 276; Bradley v. Southern New England Tel. Co., 66 Conn. 559, 34 Atl. 499, 32 L. R. A. 280. Telephone companies are prohibited from injuring trees upon a highway without the consent of the adjoining owner.

Bradley v. Pharr, 45 La. Ann. 426, 19 L. R. A. 647; McDermott v. Warren, B. & S. St. R. Co., 172 Mass. 197, 51 N. E. 972, construing Public St. c. 109, § 4, as amended by St. 1884, c. 306. Gay v. Mutual Union Tel. Co., 12 Mo. App. 485. Where telegraph poles are authorized by statute and ordinance, their erection cannot be complained of by one not suffering special damage. Hershfield v. Rocky Mountain Bell Tel. Co., 12 Mont. 102; Marshall v. City of Bayonne, 59 N. J. Law, 101. In an ordinance authorizing the erection of telephone poles, it is not necessary to require the company to obtain the consent of the abutting owners before erecting poles in front of their respective lots.

Mantell v. Bucyrus Tel. Co., 20 Ohio Circ. R. 345; Hays v. Columbiana Tel. Co., 21 Ohio Circ. R. 480; Russ v. Pennsylvania Tel. Co., 15 Pa. C. Ct. R. 226. The erection of a telephone pole in front of a window can be enjoined at the instance of a property owner although the company has been duly authorized to erect and maintain the poles within the city limits. Memphis Bell Tel. Co. v. Hunt 84 Tenn. (16 Lea) 456; Maxwell v. Central Dist. & Printing Tel. Co., 51 W. Va. 121, 41 S. E. 125. But see Johnson v. Thomson-Houston Elec. Co., 54 Hun, 469, 7 N. Y. Supp. 716.

tract right already granted.[698] Neither can a condition be imposed upon the use of a wire when located wholly upon property and used solely for private purposes.[699]

Where the legislature has granted the power to a municipal corporation, its exercise is usually considered of a discretionary character in respect to the time, extent or the place of the use of streets by corporations transacting the business of the character under consideration.[700] A grant of the right to use streets for telephone poles, though not a franchise, becomes, when the privileges granted are accepted, a binding contract between the parties which cannot be revoked or rescinded except for cause.[701]

(a) A payment of a license fee. One of the conditions ordinarily imposed is the payment of a license fee for the use of the street which may be either a general charge covering the operations of the company within specified limits and for a specified time[702] or one based upon the lineal feet of conduits used or the number of poles erected and used.[703] A charge of this character can be sus-

[698] Sunset Telephone & Tel. Co. v. City of Medford, 115 Fed. 202.

[699] Callum v. District of Columbia, 15 App D. C. 529.

[700] Louisville Home Tel. Co. v. Cumberland Telephone & Tel. Co., 111 Fed. 663. It is within the power of a city to designate on what part of its street a telephone company shall construct its line and the exercise of the power is presumptively valid and cannot be interferred with by the courts unless shown to have been arbitrary and unreasonable.

[701] City of St. Louis v. Western Union Tel. Co., 63 Fed. 68; Sunset Telephone & Tel. Co. v. City of Medford, 115 Fed. 202; People v. Central Union Tel. Co., 192 Ill. 307, 61 N. E. 428; Chesapeake & P. Tel. Co. v. City of Baltimore, 89 Md. 689, 43 Atl. 784; Northwestern Tel. Exch. Co. v. City of Minneapolis, 81 Minn. 140, 83 N W. 527, 53 L. R. A. 175; Brome v. New York & N. J. Tel. Co., 42 N. J. Eq. (15 Stew.) 141; Hudson Tel. Co. v. Jersey City, 49 N. J. Law, 303; Clarksburg Elec. Light Co. v. City of Clarksburg, 47 W. Va. 739, 35 S. W. 994, 50 L. R. A. 142.

[702] In re Chipchase, 56 Kan. 357, 43 Pac. 264; Western Union Tel. Co. v. City of Fremont, 39 Neb. 692, 26 L. R. A. 698; City of Harrisburg v. Pennsylvania Tel. Co., 15 Pa. Co. Ct. R. 518; Western Union Tel. Co. v. Harris (Tenn. Ch. App.) 52 S. W. 748. But see Sunset Telephone & Tel. Co. v. City of Medford, 115 Fed. 202; Hodges v. Western Union Tel. Co., 72 Miss. 910, 18 So. 84, 29 L. R. A. 770; Wisconsin Tel. Co. v. City of Oshkosh, 62 Wis. 32, 21 N. W. 828.

[703] City of St. Louis v. Western Union Tel. Co., 148 U. S. 92, reversing 39 Fed. 59, rehearing denied 149 U. S. 465; Postal Tel. & Cable Co. v. City of Baltimore, 79 Md. 502, 29 Atl. 819, 24 L. R. A. 161;

tained when not unreasonably high and when it operates uniformly and generally. In determining the reasonableness of a charge, the presence of poles and overhead wires as an impediment to the work of a fire department and as increasing liability from fire will be considered determining elements.[704]

(b) Limitation upon charges by company for services rendered. Another condition frequently imposed is the reservation of the right on the part of public authorities to regulate the charges to be made for services rendered by these corporations.[705] Public authorities have, undoubtedly, a right of control and regulation without the inclusion of a condition of this nature but where it is named in the grant there is then no doubt of the existence of the right or the extent of its exercise.[706]

Cheasapeake & P. Tel. Co. v. City of Baltimore, 89 Md. 689, 43 Atl. 784, 44 Atl. 1033; Western Union Tel. Co. v. City of Philadelphia (Pa.) 12 Atl. 144; Borough of New Hope v. Western Union Tel. Co., 16 Pa. Super. Ct. 306; Borough of Taylor v. Postal Tel. & Cable Co., 16 Pa. Super. Ct. 344; City of Chester v. Western Union Tel. Co., 154 Pa. 464, 25 Atl. 1134. But see City of Allentown v. Western Union Tel. Co., 148 Pa. 117.

[704] City of Philadelphia v. Atlantic & P. Tel. Co., 102 Fed. 254, 42 C. C. A. 325; City of Philadelphia v. Postal Tel. Cable Co., 67 Hun, 21, 21 N. Y. Supp. 556.

[705] State of Missouri v. Bell Tel. Co., 23 Fed. 539, but see dissenting opinion. Hockett v. State, 105 Ind. 250, 5 N. E. 178; Central Union Tel. Co. v. Bradbury, 106 Ind. 1, 5 N. E. 721; Central Union Tel. Co. v. State, 118 Ind. 194; Central Union Tel. Co. v. State, 123 Ind. 113; Nebraska Tel. Co. v. State, 55 Neb. 627, 76 N. W. 171, 45 L. R. A. 113. But see City of St. Louis v. Bell Tel. Co., 96 Mo. 623, 2 L. R. A. 278. "We are at a loss to see what this power to regulate the use of the streets has to do with the power to fix telephone charges. The power to regulate the charges for telephone service is neither included in nor incidental to the power to regulate the use of streets, and the ordinance cannot be upheld on any such ground." See, also, Joyce, Elec. Law, c. 23, on the subject of rates and charges.

[706] City of St. Louis v. Bell Tel. Co., 96 Mo. 623, 10 S. W. 197, 2 L. R. A. 278; State v. City of Sheboygan, 111 Wis. 23, 86 N. W. 657.

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